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*Via CSM Dropbox*

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

Re: California Regional Water Quality Control Board, Los Angeles Region
Order No. R4-2010-0108, 11-TC-01
Rebuttal to Comments on Test Claim

Dear Ms. Halsey:

The County of Ventura and Ventura County Watershed Protection District hereby file these Rebuttal Comments with respect to the above-referenced Test Claim. The document being filed includes the rebuttal comments, and Attachments 1 through 21, which are the documents in Support of Claimants' Rebuttal to Comments to the Test Claim.

## I. INTRODUCTION

The test claim filed by County of Ventura (County) and the Ventura County Watershed Protection District (District) (collectively, Claimants) seeks a subvention of funds for six mandates imposed by Order No. R4-2010-0108, a municipal stormwater permit issued by the California Regional Water Quality Control Board Los Angeles Region (Los Angeles Water Board) on July 8, 2010 (2010 Permit). The 2010 Permit replaced the prior municipal stormwater permit, adopted by the Los Angeles Water Board on July 27, 2000 (2000 Permit), which previously regulated Claimants' municipal stormwater discharges.

The Los Angeles Water Board and the State Water Resources Control Board (SWRCB) (hereinafter collectively, "Water Boards") submitted late comments in opposition to Claimants' request for subvention. The Water Boards argue that Claimants' test claim is untimely, the costs imposed by the mandates within the 2010 Permit are mandated by federal law, the challenged requirements do not constitute "new programs or higher levels of service" and are not unique to local government, and that Claimants possess sufficient fee authority to pay for the mandates. The California Department of Finance (Finance) also submitted comments in opposition to Claimants' test claim, and similarly contend that Claimants have sufficient fee authority to pay for the mandates.

As explained in detail below, these arguments are without merit. First, it is abundantly clear, after reviewing and applying the California Supreme Court's holding in *Department of*

*Finance v. Commission on State Mandates* (*County of Los Angeles*), (2016) 1 Cal. 5th 749, as well as the Third District Court of Appeal's decision in *Department of Finance v. Commission on State Mandates* (*County of San Diego*), (Dec. 19, 2017, No. C070357) ___ Cal. App. 5th ___ [2017 Cal. App. LEXIS 1134], that the requirements imposed by the 2010 Permit are not federal mandates compelled by federal law. Additionally, the mandates in the 2010 Permit are undoubtedly programs that require services unique to local government that were not included in Claimants' 2000 Permit, which previously regulated their storm water discharge. Finally, the Claimants lack fee authority to pay for the mandates because Claimants must comply with Proposition 218 in order to impose a tax or fee to pay for the mandates. Accordingly, a subvention of funds for the mandates contained within the 2010 Permit is required under article XIII B, section 6 of the California Constitution.

## II. CLAIMANTS' TEST CLAIM WAS TIMELY FILED

Claimants timely filed their Test Claim on August 26, 2011 because the 2010 Permit, though adopted by the Los Angeles Water Board on July 8, 2010, was not deemed effective by operation of law until 50 days after the adoption date of the permit: August 27, 2010. This 50-day time period between the adoption date and the effective date of a permit is established in a Memorandum of Agreement (MOA) executed by the SWRCB and the United States Environmental Protection Agency (U.S. EPA) that allows the SWRCB to administer the Clean Water Act in California.

Under the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1251 et seq., as amended, the U.S. EPA is empowered to administer the National Pollutant Discharge Elimination System (NPDES) program throughout the country. (33 U.S.C. § 1342(a).) However, U.S. EPA may delegate this authority if a state submits and requests approval of its own permitting program and that program meets the federal requirements. (33 U.S.C. § 1342(b).) In order for a state to administer section 402 of the CWA, pertaining to NPDES permits, it must execute an MOA between the state's program director and the U.S. EPA's Regional Administrator. (40 CFR § 123.24(a).) This MOA outlines the terms upon which the U.S. EPA delegates its statutory authority to administer the NPDES program – including the authority to issue permits – to the state for administration. (See 40 CFR § 123.24(a).) Even after an MOA has been executed and the state program has been approved, the U.S. EPA retains authority to oversee the state program. (33 U.S.C. § 1342(c); 40 CFR § 123.24; see also *Askins v. Ohio Department of Agriculture* (6th Cir. 2016) 809 F.3d 868, 871 ["The U.S. EPA may approve a state to administer a state-NPDES program, but the U.S. EPA retains authority to supervise it and withdraw approval."].)

The 1989 "NPDES Memorandum of Agreement Between the U.S. Environmental Protection Agency and the California State Water Resources Control Board" (1989 MOA) governs the distribution of NPDES program responsibilities between the U.S. EPA, SWRCB, and Regional Water Quality Control Boards (RWQCB), including procedures relating to the EPA's review and comment on "prenotice" draft permits, draft permits, and adopted permits. (AR R0066267; AR R0066279-289.) It also provides that the MOA can be modified only by

mutual consent by the SWRCB and EPA, the parties to the agreement. (AR R0066315.) As a result, the language contained in the 2010 Permit at Finding G.4, related to the permit's effective date, cannot modify or supersede the provisions in the MOA. Nor can this language abrogate U.S. EPA's statutory authority to oversee the CWA and NPDES program. (See 40 CFR § 123.24(a).) This is similar to the situation in which an issued NPDES permit contains provisions that are inconsistent with federal law. In such an instance, the contrary permit provisions are superseded by the federal law. (*Save Our Bays & Beaches v. City & County of Honolulu* (D.Haw 1994) 904 F.Supp. 1098, 1106.)[1] Here, because the MOA is an extension of U.S. EPA's federal authority under the CWA, the MOA has a similar effect on permit provisions that are contrary to the plain meaning of the MOA. Accordingly, the terms of the MOA control the effective date of the 2010 Permit.

The 1989 MOA provides that final permits adopted by a RWQCB become effective either on the date of adoption, 50 days after adoption, or 100 days after adoption, depending upon the nature of the permit and level of public response to a draft permit. When an individual permit has received significant public comment, or when the final permit has changed from the draft permit sent to U.S. EPA for review other than changes requested by U.S. EPA, that permit "shall become effective on the 50th day after the date of adoption," provided that U.S. EPA has not objected to the permit. (AR R0066289.) This 50-day time period is needed to provide U.S. EPA with adequate time to review a permit that has garnered significant public attention and/or has changed during the approval process. (See AR R0066291.)

The 2010 Permit fits both of these criteria, even though only one is necessary to trigger the 50-day time period. First, 21 separate, substantive comments were timely submitted on the 2010 draft permit. (See generally, AR F000556-F000819.) Commenters included environmental interest groups and industry groups, and some of those commenters requested and received party status in this proceeding. For instance, the Building Industry Association of Southern California, Building Industry Legal Defense Foundation, and Construction Industry Coalition on Water Quality (collectively, "BIA") submitted comments on the 2010 Permit that focused on the land development section of the 2010 Permit and its request that the Los Angeles Water Board consider including provisions for bio-infiltration designs for new developments and redevelopment projects, among other possible options for maintaining pre-construction hydrology in developments. (AR F000561-F000562.) A letter submitted by the Oxnard Chamber of Commerce also raised concerns about the 2010 Permit's treatment of Low Impact Development best management practices, which could impact opportunities for development and redevelopment in the City of Oxnard. (AR F000758-F00760.) This is significant public comment. Second, revisions were made to the draft permit issued on May 5, 2010 to address some of these comments. (See AR F000820-F000940.) Thus, the final permit approved by the Los Angeles Water Board on July 8, 2010 had changed from the draft permit sent to U.S. EPA for review on May 5, 2010, and those

[1] The court in *Save Our Bays & Beaches* explained that "[o]n July 1, 1988, the secondary treatment requirements of the [Clean Water] Act became mandatory and binding on all municipal sewage treatment works, including the Kailua and Kaneohe Plants. As of that date, these statutory requirements superseded any inconsistent provisions in the 1985 Kailua and Kaneohe Permits." (*Save Our Bays & Beaches*, *supra*, 904 F.Supp. at p. 1106.)

changes were not to address U.S. EPA comments. (See AR F000943-F000946.) Therefore, the 2010 Permit could not become effective before the U.S. EPA was provided the appropriate time for review as mandated by the MOA – meaning that the permit did not become effective on the date of the Los Angeles Water Board's adoption of the permit, but 50 days after the date of adoption pursuant to the provisions of the 1989 MOA.[2]

The fact that the 2010 Permit is a continuation of Order Number 09-0057 (2009 Permit) does not change this analysis. Initially, the 2009 Permit was appealed to the SWRCB for review by BIA, which challenged the adoption of the 2009 Permit based on late changes to the permit that were not provided to the public for review and comment. After the Los Angeles Water Board agreed to a voluntary remand of the 2009 Permit, it opened the permit up to public comment on a new tentative version of the permit. As mentioned above, during this reconsideration, the tentative 2010 Permit received significant public comment from stakeholders, several of which urged that the Los Angeles Water Board modify the permit from the version adopted in 2009. This created great uncertainty for the Claimants, because they did not know which provisions the Los Angeles Water Board may or may not change, and which comments from the public it would choose to address and incorporate.

For example, the 2010 Permit includes provisions requiring Claimants to update technical manuals with specifications for low-impact developments and provide a list of offsite mitigation programs for developers in Part 4.E.IV.4 and Part 4.E.III.2(c)(3). While these provision are similar to those included in the 2009 Permit, given the significant comments submitted regarding development generally and low-impact development specifically, it was difficult for the Claimants to predict whether these provisions would remain the same following the permit reconsideration process. The Los Angeles Water Board retained total discretion to alter any provision in its reconsideration of the 2009 Permit and ultimate adoption of the 2010 Permit. Therefore, filing a test claim on the 2009 Permit, while the permit was actively being reconsidered by the Los Angeles Water Board, would have been premature because the specific mandates in the permit reasonably could have changed upon reconsideration. Undoubtedly, had Claimants filed a test claim on the 2009 Permit, Water Boards would have argued it was untimely because it was filed in advance of the final 2010 Permit.

The MOA controls the effective date of the 2010 Permit. The 2010 draft permit approved by the Los Angeles Water Board received significant public comment and changed from the draft permit sent to U.S. EPA for review. Therefore, in accordance with the MOA, the 2010 Permit became effective 50 days after the date of adoption – August 27, 2010.

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[2] The Water Boards suggest that Claimants should have filed a Petition for Review of the 2010 Permit with the SWRCB if they disagreed with the effective date as listed on the 2010 Permit. This argument is pointless, as the relevance of the effective date of the permit is limited. While the permit's effective date does trigger the date by which Claimants were required to file this test claim, the effective date is not relevant to Claimants' ability to challenge the permit or the obligations imposed by the permit. A challenge to the permit, such as a petition for review to the SWRCB, must be filed within 30 days of the date of the permit's adoption, not the effective date of the permit. (Wat. Code, § 13320(a).)

Claimants' test claim was filed within 12 months of the effective date of the 2010 Permit on August 26, 2011

## III. THE 2010 PERMIT IMPOSES NEW PROGRAMS AND HIGHER LEVELS OF SERVICE

### A. The "Prior Permit" Is the 2000 Permit

Contrary to the Water Boards' assertion, the 2009 Permit is not the proper "prior" permit to use when determining whether the 2010 Permit contains provisions that are new programs or higher levels of service. This is because the 2010 Permit was adopted as a "reconsideration" of the 2009 Permit, which effectively converted the 2009 Permit into the 2010 Permit. (See AR F001187.) In the hearing adopting the 2010 Permit, Los Angeles Water Board staff, stated that the action item for the board was "a reconsideration of the Ventura County Municipal Separate Storm Sewer System Permit, which was previously adopted by the Board a little over a year ago on May 7th, 2009." (*Ibid.*)

This reconsideration followed the adoption of the 2009 Permit on May 7, 2009 at a hearing where the Los Angeles Water Board modified the 2009 Permit to include certain consensus language related to low-impact development. (AR F001187-F001188.) After the 2009 Permit was adopted, BIA petitioned the SWRCB for review of the 2009 Permit contesting the procedural legality of the Los Angeles Water Board's adoption of the permit with this consensus language, which had not been provided to the public for comment. (AR F001188.) After confusion regarding the proper final version of the 2009 Permit, the contents of the administrative record, and other "procedural irregularities," the SWRCB sent a letter to the Los Angeles Water Board requesting that it agree to a "voluntary remand" of the 2009 Permit to address the issues identified in the BIA's petition. (AR F001357.) Ultimately, "[o]n March 11th, [2010] the Regional Board agreed to *reconsider* the Ventura County M.S.4 permit to address these issues regarding recirculation of the permit among others." (AR F001188, emphasis added.)

Describing the Los Angeles Water Board's action with regard to the 2009 Permit as a reconsideration is critical to the conclusion that the proper prior permit is the 2000 Permit rather than the 2009 Permit. Because the 2010 Permit is a *reconsideration* of the 2009 Permit, it is not an amendment to the 2009 Permit or a completely new permit. (See AR F001187.) Instead, due to the "procedural irregularities" and other issues associated with the adoption of the 2009 Permit, the Los Angeles Water Board, in practice, converted the 2009 Permit into the 2010 Permit. Additionally, as mentioned above, the reconsideration of the 2010 Permit was done wholesale, and was not formally limited by a SWRCB remand following a decision on a petition for review. Accordingly, the 2009 Permit no longer has any significance on its own. Therefore, the 2000 Permit is the appropriate permit against which the 2010 Permit should be compared when determining whether a provision is a new program or a higher level of service.

### B. The 2010 Permit Imposes New Programs

A new program is (1) a program that carries out the provision of services to the public, or a state policy imposing unique requirements on local governments, and (2) a program that the local government was not required to perform previously. (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189.) The six mandated activities listed in Claimants' test claim are new programs and/or they impose a higher level of service because the requirements are imposed uniquely on local governments. Specifically, the 2010 Permit is issued to all of the co-permittees, which include the Claimants, as well as the cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley, and Thousand Oaks. Each of the co-permittees is a local government. The provisions contained within the 2010 Permit that are the subject of this Test Claim are imposed on Claimants and do not apply generally to residents and/or other entities. (See *ibid.*) Furthermore, the six mandates constitute services that Claimants provide to the public generally, in that they relate to the provision of municipal stormwater capture and discharge. (See *Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.)

In fact, the CWA contains specific provisions related to permits issued to municipal storm sewer systems (MS4s), including the requirement that MS4s "effectively prohibit" non-stormwater discharges to the storm sewer system. (33 U.S.C. § 1342(p)(3)(B)(ii).) The CWA also only imposes the maximum-extent-practicable standard upon municipal stormwater dischargers. (33 U.S.C. § 1342(p)(3)(B)(iii).) Thus, MS4 permits, in general, are unique to local governments, and the 2010 Permit specifically imposes its requirements solely on a handful of local governments, including Claimants.

The six mandates are "new" because Claimants were not previously *required* to perform the specific activities in the 2010 Permit. Although Claimants have been operating under an NPDES permit of some sort since 1994, Claimants do not argue that the 2010 Permit as a whole is a new program. Therefore, the Water Boards' claims that the six provisions cannot be considered new programs are misplaced. The Claimants' test claim seeks subvention for costs associated with specific provisions of the 2010 Permit that are new programs or higher levels of service. Some of these provisions *are* new programs in certain instances. For example, even Claimants' prior permit – the 2000 Permit – did not require outreach specific to businesses and hands-on consultations for small businesses to reduce their contributions to stormwater pollution. The 2010 Permit does require these measures and thus creates a new program in which Claimants must provide services directly to the specified businesses in order to comply with the terms of the 2010 Permit. This and other provisions that are new programs are discussed in further detail below in Section V.

### C. The 2010 Permit Imposes a Higher Level of Service

A higher level of service is not defined in article XIII B of the California Constitution. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 50.) However, the phrase has been interpreted to mean that the state mandate requires local governments to increase the

services provided to the public in existing "programs." (*Id.* at p. 56.) Again, a "program" is defined as "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid.*) As discussed before, the mandates contained in the 2010 Permit are unique to local governments – indeed, unique to Claimants – and are not mandates required generally. Although it is true that non-governmental entities that discharge stormwater are required to obtain permits under the CWA, this does not make an MS4 permit, or the specific provisions in the 2010 Permit, a law of general applicability.[3] The provisions at issue in Claimants' test claim are imposed specifically upon Claimants, governmental entities, and are above and beyond the requirements that had been imposed on Claimants in their prior permit, the 2000 Permit. Therefore, the provisions in the 2010 Permit are a "program" pursuant to article XIII B.

In general, the six provisions in the 2010 Permit constitute a higher level of service because the provisions include new, much more specific requirements than were included in the 2000 Permit. Previously, Claimants were allowed the ability to determine the ideal means by which they would implement the provisions of the 2000 Permit. Now, that flexibility is gone in favor of stringent requirements that outline exactly what the Claimants must do to satisfy the 2010 Permit's mandates.

This is analogous to *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, which held that a new order directing school districts to undertake specific actions to address racial segregation in schools was a higher level of service subject to subvention. (*Id.* at p. 173.) In *Long Beach*, the school district had a constitutional duty to take actions to eliminate racial segregation, and there existed multiple options or considerations for the school district to evaluate and select. (*Ibid.*) Case law established that school districts must "take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause" and listed potential steps that might be taken. (*Ibid.*, quoting *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 305.) The challenged executive order required school districts to undertake specific actions, including conducting racial and ethnic surveys every two years and developing a plan to address and prevent segregation with specific components. (*Long Beach*, *supra*, 225 Cal.App.3d at p. 173.) The *Long Beach* court held that requiring these specific actions, when the school district had before only been required to consider suggested options, was a higher level of service. (*Ibid.*)

The argument that a program is not a higher level of service because it is more specific goes against the precedent set in *Long Beach*. The 2010 Permit lists numerous specific steps that Claimants must undertake, where the 2000 Permit gave Claimants options, or less specific end goals. Previously, Claimants could determine for themselves the option or means by which they could achieve the 2000 Permit's requirements. The lack of flexibility in the 2010 Permit means that its requirements constitute a higher level of service. A more detailed

[3] The District is not seeking subvention for costs associated with implementing the requirements of an MS4 permit under the CWA generally. Rather, the District is seeking subvention for the costs associated with the six discrete new programs or higher levels of service required in the 2010 Permit as listed in its test claim.

explanation of how this lack of flexibility constitutes a higher level of service will be discussed below in Section V of these rebuttal comments.

## IV. THE STATE HAS FAILED TO ESTABLISH THAT ANY OF THE EXCEPTIONS TO SUBVENTION APPLY

### A. The Water Boards Have Failed to Establish That the Requirements of the 2010 Permit Are Mandated by Federal Law

The *County of Los Angeles* and *County of San Diego* decisions control the Commission's consideration of the federal mandate issue in this proceeding. Under this authority, in order for a permit condition to be a federal mandate for purposes of article XIII B, section 6, the federal law or regulation relied upon must " 'expressly' or 'explicitly require the condition imposed in the permit.' " (*County of Los Angeles*, *supra,* 1 Cal. 5th at pp. 770-771; *County of San Diego*, *supra*, 2017 Cal. App. LEXIS 1134, at p. *34.)

Contrary to the Water Boards' assertion, the Supreme Court's holding in *County of Los Angeles* was not limited to "a narrow issue," nor was its "primary focus" the construction of "maximum extent practicable." Rather, in *County of Los Angeles* the Supreme Court announced the test to be utilized in future state mandate determinations involving the "federal mandate" exception to reimbursement. (*County of Los Angeles*, *supra*, 1 Cal. 5th at p. 765.)

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

Applying this test to the permit conditions at issue, the Supreme Court reviewed the federal authorities relied upon by the Los Angeles Regional Board. (*Id.* at pp. 767-772.) The Court found that the authorities did not "expressly" or "explicitly" require the specific conditions imposed in the permit. (*Id.* at pp. 770-772.) Additionally, the court concluded that the CWA's requirement that the permit reduce pollution impacts to the "maximum extent practicable" was not a federal mandate, but rather vested the Los Angeles Regional Board with discretion to choose which conditions to impose in order to meet this standard. (*Id.* at pp. 767-768; *County of San Diego*, *supra*, 2017 Cal. App. LEXIS 1134, at p. *18.) Since the conditions imposed in the County of Los Angeles permit were not expressly required by the CWA or the regulations relied upon by the Los Angeles Regional Board, the conditions were state mandates, not federal mandates. (*Id.* at pp. 770-772.)

In *County of San Diego*, the Third District Court of Appeal applied the ruling and analysis of *County of Los Angeles* to the NPDES permit issued by the Regional Water Quality Control Board, San Diego Region (San Diego Regional Board) to the County of San Diego and its co-permittees. In its decision, the court of appeal noted "[a]lthough the high court

reviewed conditions different from those before us, it established the law that we must apply to resolve this appeal." (*County of San Diego, supra,* 2017 Cal. App. LEXIS 1134 at p. *17.) The court went on to explain its task in light of the Supreme Court's "test for determining whether a requirement imposed on a permit under a cooperative federal-state program is a federal mandate," stating:

> We must determine first whether the CWA, its regulations and guidelines, and any other evidence of federal mandate such as similar permits issued by the EPA, required each condition. If they did, we conclude the requirement is a federal mandate and not entitled to subvention under section 6. Second, if the condition was not "expressly required" by federal law but was instead imposed pursuant to the State's discretion, we conclude that the requirement is not federally mandated and subvention is required. The State has the burden to establish the requirements were imposed by federal law. (*Id.* at pp. 27-28.)

As a result of the clear direction provided by the courts, the Commission's task here is simple and straightforward. The Commission must review the federal authority cited by the Water Boards which they claim mandates each of the permit conditions at issue. If the federal authority cited does not "expressly" or "explicitly" require the permit condition, the condition is not federally mandated and subvention is required. Here, as set forth in detail in Section V below, the state has failed establish that the requirements in the 2010 Permit are imposed by federal law. The 2010 Permit requirements are therefore not federally mandated and subvention is required.

### B. The Los Angeles Water Board's Determination That the Permit Provisions Were Required by Federal Law Is Not Entitled to Deference

The Water Boards assert that their determination that the permit conditions are federally mandated is entitled to deference under the Supreme Court's opinion in *County of Los Angeles*. However, the Water Boards misconstrue and misapply the holding of *County of Los Angeles*. In *County of Los Angeles*, the Supreme Court explained that in order for such a determination to be entitled to deference, the regional board must find that the conditions are the *only* means by which the "maximum extent practicable" standard can be implemented. In the absence of such a finding, no deference is due.

Here, the Water Boards made no such finding. Rather, as the Water Boards' comments explain, "the Los Angeles Water Board made findings in connection with the specific challenged provisions in Part 4 of the Permit that such provisions were *necessary* to implement the MEP standard." (Water Boards' Comments at p. 22, emphasis added.) However, a finding that the permit conditions are "necessary" to implement the MEP is not the same as finding that the permit conditions "are the only means by which the MEP standard could be implemented." As the court in *County of San Diego* explained, use of the word "necessary" is not equivalent to finding that the permit requirement was the *only* means

of meeting the federal standard. "It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law." (*County of San Diego, supra,* 2017 Cal. App. LEXIS 1134 at pp. *32-33.)

Use of the word "necessary" also does not distinguish the 2010 Permit from the permit at issue in *County of Los Angeles*. "By law, a regional board cannot issue an NPDES permit to MS4's without finding that it has imposed conditions 'necessary to carry out the provisions of [the Clean Water Act]." (*Id.* at pp. 32-33.) Further, as explained above, in order to be a federal mandate, the condition imposed by the permit must be "expressly" or "explicitly" required by the CWA or another federal law or regulation. Just as the CWA's requirement that the permits reduce pollution impacts to the MEP is not a federal mandate for purposes of article XIII B, section 6, neither is the Act's requirement that permits include "a requirement to effectively prohibit non-stormwater discharges into the storm sewers." (33 U.S.C. §1342(p)(3)(B)(iii).) Rather, in both instances the CWA vests the regional boards with discretion to determine the appropriate conditions to impose in order to meet these standards. In neither instance does the CWA expressly or explicitly dictate the conditions that must be included in the permits. Therefore, the federal mandate exception to the subvention requirement does not apply here.

The Water Board's reliance on 2010 Permit Finding E.7 is also unavailing. First, the finding ignores the Commission's exclusive jurisdiction to adjudicate reimbursement claims, (Gov. Code, § 17552; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333; *County of Los Angeles, supra*, 1 Cal.5th at p. 759.) Second, the finding does not appear to be based on any of the specific requirements included in the 2010 Permit. Finding E.7 contains no reference to evidence in the record to support the finding, but instead appears to include boilerplate language that has been included in several other permits issued by regional boards throughout the State. (See e.g. Finding E.6 of Order No. R9-2010-0016, Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the County of Riverside, the Incorporated Cities of Riverside County, and the Riverside County Flood Control and Water Conservation District within the San Diego Region.[4]) As such, 2010 Permit Finding E.7 is not the type of determination identified by the court in *County of Los Angeles*, which is entitled to deference. Therefore, the Los Angeles Water Board's determination that the 2010 Permit requirements are required by federal law is not entitled to deference.

### C. U.S. EPA's Inclusion of Similar Requirements in Other Permits Is Not Determinative of the Federal Mandates Issue

The Water Boards argue that "the inclusion of equivalent or substantially similar provision by U.S. EPA in other permits demonstrates that the Los Angeles Water Board effectively administered federal requirements concerning permit requirements." (Water Boards' Comments, at p. 24.) However, a similar argument was made to the Supreme Court in *County of Los Angeles* and was rejected. (*County of Los Angeles, supra,* 1 Cal. 5th at p. 768.)

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[4] Included as Attachment No. 21 in Documentation in Support of Rebuttal Comments.

> ...[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, and the Commission should have deferred to the board's determination of what conditions federal law required.
>
> 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. (*Ibid.*, emphasis in original.)

To be a federal mandate, a federal law or regulation must expressly or explicitly require the condition imposed. (*Id.* at pp. 770-771.) Here, as explained in detail in Section V below, the authorities relied upon by the Water Boards do not expressly or explicitly require the conditions imposed in the 2010 Permit. Therefore, the 2010 Permit conditions cannot be federal mandates.

### D. Claimants' "True Choice" and Exhaustion of Administrative Remedies

The Water Boards argue that the 2010 Permit's "Best Management Practice Substitution" provision afforded Claimants the opportunity to substitute BMPs where a BMP identified in the permit may be impracticable. The Water Boards contend that Claimants had a "true choice" to seek substitute BMPs, and by failing to avail themselves of this "remedy" Claimants failed to exhaust their administrative remedies.

First, the Water Boards' reference to the Claimants' "true choice" appears to refer to the Supreme Court's holding in *County of Los Angeles* regarding the federal mandate issue.

In *County of Los Angeles*, the Supreme Court held:

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

(*County of Los Angeles*, *supra*, 1 Cal. 5th at p. 766, emphasis added).

However, the Water Boards' reference to this phrase is taken out of context and has no discernible application to the argument being made. The "true choice" referred to in *County of Los Angeles* refers to the choice that the regional board has in imposing particular permit

requirements. Where the state exercises a "true choice," the requirement cannot be a federal mandate. Here, although the 2010 Permit does provide that the Claimants *may* propose alternate BMPs, the regional board still retains the discretion – i.e. the "true choice" – to approve or reject the permittee's proposal.

Second, Claimants were under no duty to exhaust any administrative remedies prior to filing the Test Claim. Under the doctrine of exhaustion of administrative remedies, "the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73, citations omitted.) Here, the Test Claim is the administrative remedy Claimants must exhaust prior to seeking relief from the courts for the mandates imposed by the 2010 Permit.

Claimants were under no obligation to avail themselves of the substitute BMP "remedy" prior to filing a test claim with the Commission. Importantly, Claimants' test claim does not challenge the Los Angeles Water Boards' authority to impose the mandates of the 2010 Permit. Claimants instead are seeking the Commission's determination of whether the 2010 Permit's requirements are reimbursable state mandates. As the Supreme Court explained in *County of Los Angeles*, "[t]he question here was not whether the RWQCB had authority to impose the challenged permit requirements. It did. The narrow question here was who will pay for them." (*County of Los Angeles*, *supra,* 1 Cal.5th at p. 769.) The same question is being asked here, and only the Commission can make this determination. (Gov. Code, §§ 17552, 17556(c); *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333.)

### E. The 2010 Permit's Requirements Are Unique to Local Government

As noted previously, the requirements listed in the Claimants' test claim are unique to local government, and therefore subject to subvention as a "program" under article XIII B. The Water Boards claim that because both public and private dischargers are required to obtain NPDES permits, the requirements contained within the 2010 Permit are not unique to local governments. (Water Boards' Comments, pp. 25-26.) However, the Commission has already held that "the issue is not whether NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim . . . constitutes a program because this permit is the only one over which the Commission has jurisdiction." (*In re Test Claim on: Los Angeles Regional Water Quality Control Board Order No. 01-182,* Case Nos. 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, adopted July 31, 2009, at p. 49.) The Commission further held that because the requirements in the permit applied exclusively to a local agency, the activities constituted a program. (*Ibid.*)

The 2010 Permit is exactly the same – it is an individual permit issued only to local agencies. Therefore, the requirements included in the permit are unique to local government and subject to subvention.

### F. Claimants Lack Fee Authority Sufficient to Pay for the Costs of Complying With the 2010 Permit

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." (Gov. Code, § 17556(d).) However, as with the federal mandates exception to reimbursement discussed above, the Water Boards and Finance bear the burden of demonstrating that this exception applies. As the Supreme Court explained in *County of Los Angeles*, "the State must explain why" the Claimants can assess fees, charges, or assessments sufficient to pay for the mandated program, rather than forcing Claimants to prove the opposite. (*County of Los Angeles, supra,* 1 Cal. 5th at p. 769.)

Neither the Water Boards nor Finance have met this burden. Rather, in support of their position that this exception applies, both merely state their "belief" that Claimants possess fee authority "undiminished by Proposition 218." The Water Boards and Finance generally contend that the fact that Claimants have to seek voter approval pursuant to Proposition 218 to levy an assessment, fee or tax does not mean that they do not have authority to do so within the meaning of Government Code section 17556(d). Neither of these contentions, however, is sufficient to support the application of the "fee authority exception" in this instance.

Courts have confirmed that the express intent of the voters in approving Proposition 218 was to eliminate local governments' authority to impose assessments, fees, and charges, and to replace that authority with the power only to propose a new or increased exaction.

> In 1996, California voters adopted Proposition 218, known as the Right to Vote on Taxes Act, which added articles XIII C and XIII D to the California Constitution. [] The principal purpose of Proposition 218 was to close a loophole in Proposition 13, which limited the ability of local governments to impose taxes by similarly limiting their ability to impose assessments, fees, and charges.

(*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App. 4th 892, 910, citations omitted.)

Thus, the "principle purpose" of Proposition 218 was to deprive local governments of their former unilateral and discretionary authority to impose assessments, fees, and charges. Today, as a result, Claimants may propose new taxes, assessments or fees, but lack the authority to levy or impose them. While the Water Boards and Finance refer to Claimants' "authority" to impose an ad valorem tax, assessment, fee or charge to pay for the costs of complying with the 2010 Permit, they ignore the fact that this "authority" is contingent on compliance with the notice, public hearing, majority protest and/or voter approval requirements of Proposition 218. Moreover, they disregard the decisive role the electorate plays in determining whether the proposed exaction is imposed and collected.

The Water Boards and Finance contend that even though Proposition 218 requires Claimants to submit a fee to the voters for approval, this does not mean that Claimants lack authority to assess a fee. However, this contention lacks merit and has already been considered and rejected by the Commission. In its Statement of Decision regarding *In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2001-00001*, Case No. 07-TC-09, adopted March 26, 2010 (*San Diego County Test Claim*) the Commission held that "... local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities that would condition the fee or assessment on voter or property-owner approval under Proposition 218 (Article XIII D)." (*San Diego County Test Claim*, at p. 107.) With regard to Government Code section 17556(d), the Commission found:

> The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." ... Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.
>
> Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."

(*San Diego County Test Claim*, *supra,* at p. 106, emphasis in original, citations omitted.)

In reaching this decision, the Commission also rejected the Water Boards' contention made here that *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, was applicable. In *Connell*, the court held that economic impracticability was not a bar to levying charges or fees within the meaning of section 17556. (*Id.* at p. 401.) With respect to *Connell*, 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 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional

> one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."

(*San Diego County Test Claim*, *supra,* at p. 107, emphasis added.)

Nevertheless, relying on *Clovis Unified School District v. Chiang*, (2010) 188 Cal.App.4th 794 (*Clovis*), the Water Boards and Finance contend that Claimants have the ability to impose property-related fees under their police power and that this alone meets the requirements of Government Code section 17556(d). However, *Clovis* is not applicable here. In *Clovis*, the community college districts were specifically authorized to collect health fees from students to pay for "health supervision and services." (*Clovis*, *supra*, 188 Cal.App.4th at p. 810, fn. 7.) Despite this statutory authorization, the community college districts voluntarily chose not to impose the health fees. Under these circumstances, the court held that "Claimants can choose not to require these fees, but not at the state's expense." (*Id.* at p. 812.)

Here, Claimants have not been authorized to collect assessments, fees or taxes for the purpose of paying for the costs of complying with the 2010 Permit. Claimants in fact lack such authority, as it resides solely with the electorate pursuant to Proposition 218. As a result, this is not a situation where Claimants have been granted the authority to collect fees and taxes but have simply chosen not to do so. As explained above, and as the Commission has previously acknowledged, Claimants have no such authority due to the legal and constitutional hurdle imposed by Proposition 218. Furthermore, if this argument was accepted, article XIII B, section 6 could essentially be written out of the Constitution because a local government seeking subvention could always submit a tax or fee to the voters. If this is all that is required to establish the applicability of the fee authority exception, a local government would never be able to obtain subvention. Such a result would be contrary to the people's intent in adopting the Constitution's subvention requirement.

The Water Boards and Finance have not met their burden of establishing that Claimants have the authority to levy service charges, fees or assessments sufficient to pay for the mandated programs within the 2010 Permit. They have not identified any fee authority independent of Proposition 218 that Claimants can utilize to pay for the mandates of the 2010 Permit. The Water Boards and Finance have therefore failed to establish the applicability of the fee authority exception. As a result, Government Code section 17556(d) does not apply.

## V. REBUTTAL TO SPECIFIC PERMIT REQUIREMENTS

### A. Public Outreach: Public Education and Business Support

The 2010 Permit includes public outreach requirements that are above and beyond the requirements in the Claimants' prior permit. These requirements include: distributing stormwater pollution prevention materials to specified entities; developing an ethnic communities strategy; providing materials to 50 percent of all K-12 students every two years

and/or developing a youth outreach plan; developing and implementing a behavioral change assessment strategy; coordinating and developing a pollutant-specific outreach program; conducting corporate research; and implementing a business assistance program. None of these requirements are mandated by federal law, and neither were these requirements part of Claimants' prior 2000 Permit. (See AR F004054-F004055.) Accordingly, they constitute a new program or higher level of service for which Claimants have borne and will continue to bear the costs of implementation.

1. Public Outreach and Education

Specifically, the 2010 Permit now requires Claimants to distribute stormwater pollution prevention education materials to automotive parts stores, home improvement centers, hardware stores, lumber yards, pet shops, and feed stores. (Part 4.C.2(c)(1)(C), 2010 Permit, p. 42.) Claimants must also create a detailed strategy to enhance education of ethnic communities "through culturally effective methods." (*Ibid.*) It further requires Claimants to provide schools with educational materials related to stormwater pollution, or Claimants can pay an equivalent amount of funds to the State's Environmental Education Account. Claimants must also develop a behavioral change assessment strategy to determine whether the programs described above have been effective in changing public behavior.

a. 2010 Permit Is a Higher Level of Service – Public Education

These requirements constitute a much higher level of service than was required by the 2000 Permit. For instance, the 2000 Permit merely required that Claimants "conduct educational activities within its jurisdiction and participate in countywide events," distribute outreach materials to the general public and to schoolchildren at counters and events, as deemed appropriate, and ensure that at least 2.1 million impressions of advertisements about stormwater quality are made per year across numerous media platforms. (AR F004054.) Under the prior permit, Claimants were given options and discretion regarding how they would meet the public outreach and education requirements. This discretion has been removed in the 2010 Permit in favor of rigid requirements that prescribe precisely the actions that Claimants must take to educate the public. As explained in *Long Beach*, specific requirements that replace prior discretion or options available to the local government are a higher level of service. The fact that Claimants, in certain instances, previously performed activities similar to the requirements in the 2010 Permit does not preclude the requirements from being considered a higher level of service. (See Gov. Code, § 17565 ["If a local agency . . ., at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency . . . for those costs incurred after the operative date of the mandate."].) As *Long Beach* instructs, because the menu of options that were previously available to the Claimants under the 2000 Permit has been limited to discrete actions that Claimants must take with regard to public outreach and education, these requirements are a higher level of service.

For instance, the fact that Claimants previously elected to provide outreach materials in Spanish and English does not make the requirement that Claimants educate ethnic

communities "through culturally effective methods" the same level of service as was required by the 2000 Permit. The Claimants had options and the ability to determine how best to meet their prior public education requirement, and no provisions in the 2000 Permit spoke directly to minority communities. Claimants could have changed course at any time to another option that would also satisfy its prior requirements. Under the 2010 Permit, however, Claimants are now required to perform outreach targeted at ethnic communities, and the 2010 Permit does not limit this requirement to the Spanish-speaking population in Ventura County. Thus, Claimants are now required to develop a strategy to provide outreach to other ethnic communities, including those that speak languages other than Spanish. It must also create a program to ensure that the means of outreach to these ethnic communities is "culturally effective."

b. 2010 Permit Requirements Are not Federally Mandated – Public Education

Additionally, none of these public outreach requirements are mandated by federal law, as the Water Boards contend. (Water Boards' Comments, pp. 29-35.) Federal law in 40 C.F.R. section 122.26(d)(2)(iv)(A) provides that permits should include programs to reduce pollutants from residential areas, including through educational activities. However, this language gives the state the discretion to decide which specific implementing requirement the permit will ultimately include. In *County of Los Angeles*, the California Supreme Court held that "if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated." (*County of Los Angeles*, *supra*, 1 Cal.5th at p. 765.) Here, the state, through the Los Angeles Water Board, had complete discretion regarding how to develop the program in the 2010 Permit that would satisfy the provisions in 40 C.F.R. section 122.26(d)(2)(iv)(A).

The federal regulation contains broad, general language that essentially grants authority to the state to develop the precise way that a permittee will implement a program to reduce stormwater pollution discharges from residential areas. By including very specific requirements in the 2010 Permit, the Los Angeles Water Board developed its own mandates and imposed them on Claimants. Therefore, the 2010 Permit's provisions are not federally mandated.

2. Pollutant-Specific Outreach and Business-Related Outreach and Assistance

In addition to the public education components described above, the 2010 Permit also requires Claimants to develop outreach programs focusing on specific pollutants such as metals, bacteria, nutrients, and urban pesticides. The 2010 Permit further requires Claimants to work to develop a corporate outreach program to educate corporate franchise operators regarding stormwater best management practices and regulation, specifically targeting retail gasoline outlets (RGOs) (both franchisors and franchisees), retail automotive parts stores, home improvement centers, and restaurants. The 2010 Permit additionally requires Claimants to implement a program to provide technical information to small businesses to facilitate their

reduction of discharges of pollutants to stormwater, and the program must include onsite, telephone, or email consultation with the businesses regarding the businesses' responsibilities related to reducing discharge of pollutants and available guidance documents, as well as the distribution of education materials to auto repair shop operators, car wash facilities, mobile carpet cleaning services, commercial pesticide applicator services, and restaurants.

a. 2010 Permit Contains Higher Levels of Service and New Programs – Business and Pollutant-Specific Requirements

The 2000 Permit contained no provisions requiring Claimants to undertake programs targeted at specific pollutants in stormwater, aside from a general statement that additional target businesses may be identified for inspection based on source identification for Pollutants of Concern. (See AR F004055.) With regard to businesses, Claimants were required to inspect only automotive service facilities and food service facilities once every two years to explain regulations and inspect for illicit discharges. (AR F004055.) The 2000 Permit contained no provisions related to small business assistance.

Because Claimants were not previously required to provide the services of small business assistance and pollutant-specific education, these programs are new programs pursuant to article XIII B. Further, the enlarged corporate and industrial outreach program is a higher level of service because Claimants were previously required only to inspect and consult with certain businesses, particularly automotive service facilities and food service facilities. The 2010 Permit expands the universe of corporate entities that the Claimants must serve to include RGOs – including franchisors and franchisees – retail automotive parts store franchisers, home improvement centers franchisers, and restaurant franchisers. It also imposes duties on Claimants beyond inspecting these businesses, including outreach to educate operators of these businesses about best management practices. (AR F001399-1400.) The small business assistance program is also new, because the 2000 Permit did not contemplate outreach and assistance specific to small businesses. It also goes beyond the prior limitation of business outreach only to automotive services and food services, to now include car washing, mobile carpet cleaning, and pest control services. Thus, these requirements in the 2010 Permit are new programs or higher levels of service and are a reimbursable state mandate.

b. 2010 Permit Requirements Are not Federally Mandated – Business and Pollutant-Specific Requirements

These business-focused and pollutant-specific requirements are also not mandated by federal law. First, the U.S. EPA MS4 Permit Improvement Guide and Stormwater Menu of BMPs for the Minimum Control Measure are not federal regulations or federal law. (AR F004445 ["This Guide does not 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."].) These guides are just that – guidance documents that the U.S. EPA produces as a resource for permit writers. (AR F004444-F004445.) Therefore, the contents of these documents do not constitute federal mandates, but

options that the state might select and impose upon permittees. Thus, in addition to not being federal law, these guidance documents demonstrate the discretion given to the Water Boards with regard to development of MS4 permit requirements.

Second, federal regulations, 40 C.F.R. section 122.26(d)(2)(iv), contain generalized goals for permits to achieve and for the items that should be addressed in permit applications – namely that the discharge of pollutants to storm water be reduced to the "maximum extent practicable." The provisions in 40 C.F.R. section 122.26(d)(2)(iv) identify the program elements that the U.S. EPA found achieve the standards established in CWA section 402(p). (See 55 Fed.Reg. 47990.) As explained in *County of Los Angeles*, when the CWA gives the state broad discretion to impose a particular requirement on a local government, and the state then elects to impose that requirement, the requirement is a state mandate. (*County of Los Angeles*, *supra*, 1 Cal.5th at pp. 767-768; see also *County of San Diego*, *supra*, 2017 Cal. App. LEXIS 1134, at p. *21 ["The 'maximum extent practicable' standard by its nature is discretionary and does not by itself impose a federal mandate for purposes of section 6."].) Since the Los Angeles Water Board chose to impose the particular business-related and pollutant-specific requirements on Claimants in the 2010 Permit, the measures are not mandated by federal law and are therefore subject to subvention by the state.

3. The Above-Mentioned Provisions Are Reimbursable State Mandates

None of the 2010 Permit's new requirements related to public outreach and education described above are mandated by federal law, and neither are they the same level of service that was required by the 2000 Permit. The heightened level of service and new programs will present, and have presented, substantial costs to Claimants. Claimants' test claim lists well over $285,000 in actual and reimbursable costs incurred by Claimants in meeting these higher levels of service and new programs. The Water Boards contend that these costs are de minimis because Claimants voluntarily undertook somewhat similar programs prior to the adoption of the 2010 Permit. However, as mentioned above, Claimants could at any time have ceased one of these programs in favor of another option that would fulfill prior permit requirements. Under the 2010 Permit, Claimants are required to continue with these programs and increase the level of outreach and educational activities pursuant to the specifications in Parts 4.B and 4.C. Ongoing program development and outreach have associated costs that are not de minimis, as demonstrated by the Claimants' accounting.

**B. Reporting Program and Program Effectiveness Evaluation**

The 2010 Permit also includes a requirement that the Claimants develop an electronic reporting program and form for annual reports by July 8, 2011. (2010 Permit, Part 4.I.1.) It further requires Claimants to assess, evaluate, and synthesize the results of the monitoring program and the effectiveness of best management practices (BMPs) implementation. (2010 Permit, Part 3.E.1(e).)

The Water Boards argue that these requirements are not unique to local governments because allegedly similar terms are included in the MS4 permit issued to the California

Department of Transportation (DOT). That permit, issued in 2012 by the SWRCB, required assessment of program effectiveness in achieving permit requirements and objectives; assessment of program effectiveness in protecting and restoring water quality; identification of quantifiable effectiveness measures for each BMP and linking implementation with water quality improvements; and identification of how DOT will propose revisions to optimize BMP effectiveness. This does not prove that the 2010 Permit's reporting requirements are generally applicable.

First, the permits were issued by two different entities several years apart from one another, and each permit applies only to the specified permittee(s). In fact, DOT's permit was adopted in 2012, two years after Claimants' 2010 Permit. This shows that the provisions as included in the 2010 Permit were specific to Claimants and were not intended as a law – or requirement – of general applicability. For this reason alone, the Water Boards' argument that the 2010 Permit's provisions are not unique to local governments should fail. Further, these requirements are not similar enough to the requirements imposed on Claimants to allow the state to argue that the program is one of general applicability. DOT is only required to identify effectiveness measurements, but is not required to actually assess the BMPs' effectiveness. And none of the provisions in DOT's permit require DOT to generate an electronic reporting program and corresponding form. Therefore, the provisions are not identical, and the 2010 Permit's provisions are unique to Claimants, a local government.

1. 2010 Permit Contains Higher Levels of Service and New Programs

Parts 3.E.1(e) and 4.I.1 of the 2010 Permit constitute new programs or higher levels of service as compared to prior permit requirements. This is because although the 2000 Permit included the requirement that Claimants gather information and assess the effectiveness of the implementation of permit requirements on stormwater quality, this requirement did not go so far as to require that Claimants create a program effectiveness assessment for BMPs. (See AR F004052.) Instead, the 2000 Permit's Monitoring and Reporting Program provided that Claimants should assess the effectiveness of the Claimants' efforts to reduce storm water pollution, and "*to the extent data collected in monitoring requirements included herein allows*, the discharger shall include an analysis of trends, . . . [and] BMP effectiveness. . . ." (ARF004079, emphasis added.) Thus, where Claimants had been required to analyze the effectiveness of BMPs prior to the 2010 Permit, this was limited by the fact that Claimants only needed to do so if the data collected permitted such analysis. Now, Claimants are required to do this analysis, which means that the monitoring program must gather sufficient data to allow meaningful analysis. Thus, this requirement is more stringent and requires more effort on Claimants' part, therefore making the requirement a higher level of service.

Additionally, Claimants were not required to generate an electronic reporting program and corresponding form in the 2000 Permit. (See AR F004052.) The 2000 Permit only required annual reporting from Claimants to be submitted to the Los Angeles Water Board. (AR F004052.) This is therefore a new program, wherein the state is imposing tasks related to generating reporting forms and frameworks onto a local government when the state had previously created forms for this purpose. Alternatively, it is a higher level of service because

Claimants must now create the program, as well as the forms by which it reports annual results to the Los Angeles Water Board, *and* report the necessary information, when before it was only required to report required information, not to generate the program itself.

The fact that Claimants proposed some language related to assessing the effectiveness of the Ventura County Storm Water Management Plan (SWMP) is irrelevant to the question of whether the requirement is a state mandate. Ultimately, the state has the discretion to make any proposed practices and procedures part of permit conditions. (*County of Los Angeles*, *supra*, 1 Cal.5th at pp. 771-772.) This discretion makes the permit requirement a state mandate. Further, if Claimants were voluntarily undertaking given activities, those activities become state mandates when the activities are made requirements of the permit. (See Gov. Code, § 17565.)

2. 2010 Permit Requirements Are not Federally Mandated

Federal law requires only that permittees submit annual reports that cover various topics. (40 C.F.R. § 122.26(a)(1)(v).) Those topics include the status of stormwater management program implementation; proposed changes to management programs; revisions to controls assessments and fiscal analysis; a summary of monitoring data gathered during the year; annual expenditures and budget; a summary of the nature and number of enforcement actions, inspections, and public education programs; and identification of water quality improvements or degradation. (40 C.F.R. § 122.42(c).) Federal law is focused on the permittee's compliance with the permit overall, not with the effectiveness of any individual BMP, as the 2010 Permit requires. Additionally, none of the federal regulations contemplate the permit issuer requiring the permittee to generate an electronic reporting program and form. Thus, the 2010 Permit's requirement that Claimants create and maintain an electronic reporting program and annual report form is a requirement that is freely imposed upon Claimants by the Los Angeles Water Board. Pursuant to *County of Los Angeles*, when a state has the discretion to impose a particular mandate on a local government, that requirement is a state mandate and not a federal mandate. (*County of Los Angeles*, *supra*, 1 Cal.5th at p. 765.)

3. The 2010 Permit Provisions Are Reimbursable State Mandates

None of the 2010 Permit's new requirements related to the annual reporting program and program effectiveness assessments are mandated by federal law. They are also not the same level of service that was required by the 2000 Permit. The heightened level of service and new programs will present, and have presented, substantial costs to Claimants. Claimants' test claim lists nearly $70,000 in actual and reimbursable costs incurred by Claimants in meeting these higher levels of service and new programs. The Water Boards contend that these costs are de minimis because Claimants had developed the required forms prior to the adoption of the 2010 Permit, and Claimants proposed this particular provision. The California Supreme Court held that although MS4s may propose or describe practices and procedures in permit applications, "the issuing agency has discretion whether to make those practices conditions of the permit." (*County of Los Angeles*, *supra*, 1 Cal.5th at pp. 771-772 [citing 40 C.F.R. § 122.26(d)(2)(iv)].) Therefore, because the Los Angeles Water Board had

discretion regarding whether to impose the reporting requirements as a permit condition, the provision is a state mandate. Additionally, ongoing reporting program development, annual reporting pursuant to the new program, and maintenance of electronic reporting have associated costs that are not de minimis, as demonstrated by Claimants' accounting.

The Water Boards appear to argue that because Claimants did not comment during the permit reconsideration about the cost impacts of the reporting program, Claimants are unable to seek reimbursement for this cost. This argument, which is analogous to an exhaustion of administrative remedies argument, is inapplicable here. Claimants' test claim does not challenge the 2010 Permit itself or the Los Angeles Water Board's authority to impose the reporting program requirements. Instead, Claimants seek subvention for funds expended due to the higher level of service/new program imposed on Claimants related to the electronic reporting and program effectiveness assessments. (See *County of Los Angeles*, *supra*, 1 Cal.5th at p. 769 ["The question here was not whether the [Los Angeles] Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them."].)

**C. Special Studies**

The 2010 Permit requires Claimants to undertake three special studies: (1) a hydromodification control study; (2) an update to the technical guidance manual to include new informational requirements for hydromodification criteria, best management practice performance criteria, and low-impact development principles; and (3) an identification of eligible offsite mitigation projects and corresponding schedule for completing the projects.

Part 4.E.III.3(a)(1) requires Claimants to either conduct their own hydromodification control study, or to participate in the Southern California Storm Water Monitoring Coalition's Hydromodification Control Study (HCS). The purpose of the study is to "develop tools to predict and mitigate the adverse impacts of hydromodification, and to comply with hydromodification control criteria." (2010 Permit, Attachment F, Sect. F.) Even if Claimants participate in the HCS, they will have to pay their share of costs for the project and will still have to conduct their own regional studies of local rivers and streams. (See *id.* and Part 4.E.III.3(a)(1)(E).)

Part 4.E.IV.4 requires Claimants to update their Ventura County Technical Guidance Manual for Stormwater Quality Control Measures (Technical Manual) to include hydromodification control criteria; expected BMP pollutant removal performance; selected BMPs appropriate for stormwater pollutants of concern; data on local effectiveness of implemented BMPs; BMP maintenance and cost considerations; principles to facilitate integrated water resources planning and management (considering water conservation, groundwater recharge, recreation, and redevelopment); and low-impact development principles and specifications.

Part 4.E.III.2(c)(3) provides that Claimants must identify a list of eligible public and private offsite mitigation projects available for developers to fund. This list must be provided

to the project applicant. Additionally, Claimants must create a schedule for the completion of offsite mitigation projects, including milestone dates for identifying, funding, designing, and constructing the project. (2010 Permit, Part 4.E.III.2(c)(4).) Public mitigation projects are subject to additional annual reporting related to the total funds raised to date and a description of the pending projects.

1. 2010 Permit Contains Higher Levels of Service and New Programs

The Water Boards admit that the hydromodification control study and offsite mitigation project listing study appear for the first time in the 2010 Permit. The argument that the hydromodification study serves the same purpose as a different requirement in the 2000 Permit does not preclude it from being a new program or higher level of service. Simply put, Claimants were not previously required either to conduct their own hydromodification control studies or to participate in a regional HCS. The 2000 Permit required Claimants to protect receiving water from erosion and sediment loss through controlling stormwater runoff rates. (AR F004056.) However, Claimants are now required to do much more than that: they must conduct a study – or participate in one – that will classify regional streams, develop a predictive relationship between changes in watershed impervious cover and streambed alterations, and develop a model that will predict stream bed/bank enlargement and evaluate effective mitigation for those impacts. Because Claimants have not been required to undertake or participate in such a study, this requirement is a new program or higher level of service when compared with the provisions in the 2000 Permit.

Unlike the other studies, the Water Boards claim that the 2010 Permit's requirements to update the Technical Manual are not new programs or a higher level of service because the 2000 Permit required Claimants to create the Technical Manual in the first instance. The 2000 Permit did note that the Technical Manual may need to be updated from time to time; however, the highly specific areas of update included in the 2010 Permit make the update a higher level of service. (See AR F004053-F004054.) Under the 2000 Permit, Claimants were free to determine how and where to update their Technical Manual, as well as to determine whether such updates were necessary. The 2010 Permit imposes the state's determinations of what areas of the Technical Manual must be updated upon Claimants. Again, as *Long Beach* instructs, when the state limits the permittees' available options for compliance to discrete requirements, those requirements are state mandates. (*Long Beach*, *supra*, 225 Cal.App.3d at p. 173.)

The offsite mitigation list and scheduling requirements are a new program or higher level of service because, as the Water Boards admit, Claimants were not required to perform those services under the 2000 Permit. Attachment A to the 2000 Permit required that Claimants ensure that developers contribute funds to stormwater mitigation funds that benefit the regional community. (AR F004104-F004105.) Now, Claimants must provide a higher level of service to developers related to offsite mitigation projects. Claimants must maintain a list of approved projects, provide that list to developers, and create a schedule for each project, complete with milestones. (2010 Permit, Part 4.E.III.2(c)(3)-(4).) This is a higher level of service, requiring Claimants to do more related to offsite mitigation projects than they

had been required to do under the 2000 Permit. The general language in the 2000 Permit gave Claimants options to choose from in determining how to "ensure" that developers contribute to mitigation funds. These options have largely been removed in favor of a single means of assisting developers to find offsite mitigation projects, which is a higher level of service. (See *Long Beach*, *supra*, 225 Cal.App.3d at p. 173.)

2. 2010 Permit Requirements Are not Federally Mandated

Federal law does not mandate that the District perform the three special studies mentioned above. Federal regulations provide that permittees must develop programs to develop, implement, and enforce controls to reduce discharges of pollutants from municipal storm sewer systems, including areas of new development. (40 C.F.R. § 122.26(d)(2)(iv)(A)(2).) The CWA provides that the permitting authority may require permittees to provide reports and other information to determine compliance with standards of performance. (33 U.S.C. § 1318(a)(A).) However, neither of these federal laws require that a local government participate in or undertake the three special studies contained in the 2010 Permit. Instead, the state, through the Los Angeles Water Board, used its discretion to formulate the special studies and then imposed them upon Claimants. A requirement developed by the state remains a state mandate even though the state has the authority from federal law to impose such a requirement. (See *County of Los Angeles*, *supra*, 1 Cal.5th at p. 769.) This is because the state freely chose to impose the particular requirement on the local government. (*Id.* at p. 765.)

Again, U.S. EPA's guidance documents, including the MS4 Permit Improvement Guide and Stormwater Menu of BMPs for the Minimum Measure: Post Construction Stormwater Management in New Development, are not federal law. These documents provide options or helpful reasoning to permit writers, but do not constitute binding requirements. (AR F004444-F004445 ["This Guide does not 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."]; see also AR E007326 [noting that the Model Post-Construction Stormwater Runoff Control Ordinance is "intended to be a tool for communities"].) Since the guidance documents are not federal law, they cannot support the Water Boards' arguments that the special studies are federal mandates.

3. The 2010 Permit Provisions Are Reimbursable State Mandates

The provisions requiring Claimants to undertake three special studies are not federally mandated, and constitute new programs or higher levels of service. Claimants have incurred significant costs – $412,421.36 total – in meeting these new mandates. These costs are not de minimis and are therefore subject to state subvention.

Again, the Water Boards' argument that Claimants proposed the study provisions does not change the foregoing analysis. This is because the Los Angeles Water Board retained the discretion to select proposed practices and procedures. (*County of Los Angeles*, *supra*, 1 Cal.5th at pp. 771-772, citing 40 C.F.R. § 122.26(d)(2)(iv).) When the Los Angeles Water

Board exercised that discretion to include the Claimants' proposal as a permit condition, it became a reimbursable state mandate.

### D. Watershed Initiative Participation

The 2010 Permit requires Claimants to participate in regional monitoring coalition groups, regional bioassessments, and a regional monitoring survey. (2010 Permit, Part 4.B.1-2.) These activities are focused on watershed management and planning, and require Claimants' participation in the Southern California Stormwater Monitoring Coalition (SMC). The participation in regional bioassessments requires six probabilistic sites and one integrator site for the Ventura River, three probabilistic sites and one integrator site for the Santa Clara River, and six probabilistic sites and one integrator site for the Calleguas Creek watersheds. Additionally, Claimants must perform bioassessments at one fixed urban site in each of the three major watersheds. (2010 Permit, Part 4.B.2(a)(1).)

#### 1. 2010 Permit Contains Higher Levels of Service and New Programs

The 2000 Permit did not require Claimants' participation in the SMC regional monitoring group, Claimants' participation in a regional bioassessment, or Claimants' participation in a regional monitoring survey (the Southern California Bight Project Regional Monitoring Survey). While the 2000 Permit did require that Claimants participate in watershed management planning meetings for three groups – the Santa Clara River Enhancement and Management Plan, the Calleguas Creek Watershed Management Plan, and the Steelhead Restoration and Recovery Plan – the scope of these groups is limited only to watersheds within the Claimants' service areas. (AR F004084.) The SMC and other programs are region-wide groups; that is, the groups' monitoring and bioassessments cover Southern California as a region and not just watersheds within Claimants' service areas. Additionally, the 2000 Permit only required participation in water quality meetings of local monitoring groups and in the Southern California Coastal Water Research Project (SCCWRP). It did not require Claimants to actively participate in intensive local bioassessments that are part of a larger regional project, or to participate in the Southern California Bight Project. Because Claimants were not previously required to provide these regional monitoring services, the requirements for participation in regional watershed initiatives is a higher level of service or new program.

That Claimants had voluntarily been part of the SMC and the Southern California Bight Project does not mean that the new requirement to participate in the coalition is not a state mandate. (See Gov. Code, § 17565 ["If a local agency . . ., at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency . . . for those costs incurred after the operative date of the mandate."].) This is because Claimants' participation ceases to be optional and voluntary and becomes a condition of Claimants' permit. Therefore, the watershed initiative participation requirements are reimbursable state mandates.

2. 2010 Permit Requirements Are not Federally Mandated

The Water Boards claim that participation in regional watershed initiatives is required by federal law, which provides that storm water management programs may be implemented through intergovernmental coordination. (40 C.F.R. § 122.26(d)(2)(iv).) However, federal regulations specifically state that the management program's planning process involves intergovernmental coordination "where necessary." (*Ibid.*) The language in the federal law thus gives the state discretion to determine when intergovernmental coordination is necessary or appropriate, and to determine the form of such coordination. Because the state can freely determine whether and what kind of intergovernmental coordination is necessary, this is a state mandate and not a federal mandate. (See *County of Los Angeles*, *supra*, 1 Cal.5th at p. 765.)

Similarly, the CWA provides that the permitting authority *may require* permittees to provide reports and other information in order to determine compliance with standards of performance. (33 U.S.C. § 1318(a)(A).) This does not require permittees to participate in regional watershed initiatives, but instead gives the state, through the Los Angeles Water Board, discretion to require permittees to provide specific reports or information. A requirement developed by the state remains a state mandate even though the state has the discretion granted by federal law to impose such a requirement. (See *County of Los Angeles*, *supra*, 1 Cal.5th at p. 769.) This is because the state freely chose to impose the particular requirement on the local government. (*Id.* at p. 765.)

The U.S. EPA's MS4 Permit Improvement Guide provides options or helpful reasoning to permit writers, but it does not constitute binding federal authority. (AR F004444-F004445 ["This Guide does not 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."].) Since the guide is not federal law, it cannot support the Water Boards' argument that participation in watershed initiatives is a federal mandate.

3. The 2010 Permit Provisions Are Reimbursable State Mandates

The provisions requiring Claimants to participate in regional monitoring coalition groups, regional bioassessments, and regional monitoring surveys are not federally mandated, and constitute new programs or higher levels of service. In total, Claimants have incurred $562,128.19 in costs associated with their participation in regional watershed initiatives. These costs are not de minimis and are therefore state mandates subject to subvention.

The Water Boards argue that because the Los Angeles Water Board accommodated a request from Claimants to substitute part of the regional bioassessment requirements for newly agreed-upon SMC regional programs, the state is not required to reimburse Claimants for the costs they've incurred in complying with the regional watershed initiative requirements in the 2010 Permit. This argument is based on the Los Angeles Water Board's accommodation of Claimant's request in 2015 related to the level of effort required of Claimants to support the SMC Regional Bioassessment Program. (Los Angeles Water Board,

letter to Gerhardt Hubner, Deputy Director, Ventura County Watershed Protection District, re Response to Request to Confirm Level of Effort Prescribed in Order No. R4- 2010-0108, Attachment F, section 1.1.a.1.a.i, in Accordance with New Five-Year Study Design for SMC Regional Bioassessment Program (June 4, 2015).) Contrary to the Water Boards' representation of this accommodation as a decrease in the level of effort required of Claimants in regard to regional monitoring participation generally, this letter confirms that the accommodation reflects a change in the SMC Regional Bioassessment Program that made the additional support that Claimants needed to provide with regard to Ventura County watersheds no longer necessary.[5] This followed the completion of the 2009-2013 five-year study for the SMC Regional Bioassessment Program, and reflects the extent of the SMC Regional Bioassessment Program in its 2015-2020 version of the study. However, this accommodation does not retract or retroactively remove the additional local monitoring support Claimants were required to provide through the 2010 Permit based upon the 2009-2013 study; it only clarifies that the additional support is no longer needed going forward under the SMC's 2015-2020 study plan. The provisions requiring Claimants' participation in the SMC remain in force, as do the other special study provisions.

Furthermore, the Claimants are under no obligation to seek modifications of the requirements included in the 2010 Permit before seeking reimbursement from the state through a Test Claim, as explained above.

### E. Vehicle Wash Areas

The 2010 Permit continues prior vehicle and equipment washing requirements for all public agency vehicle and equipment wash areas, but eliminates the prior exemption for fire fighting vehicles. This expanded definition requires the County, as a Permittee, to retrofit 30 fire stations to comply with requirements to eliminate discharges of wash waters from vehicle and equipment washing by: (1) self-containing and hauling wash waters for disposal; (2) equipping the area with a clarifier; (3) equipping the area with an alternative pretreatment device; or (3) plumbing the area to the sanitary sewer. (2010 Permit, Part 4.G.I.3(a).)

#### 1. 2010 Permit Contains Higher Levels of Service and New Programs

The 2000 Permit contained an express exemption from the vehicle and equipment wash area discharge requirements for firefighting vehicles. (AR F004059-F004060 ["Co-permittees shall require that all vehicle/equipment wash areas must be self-contained, or covered, or equipped with a clarifier, or other pretreatment facility, and properly connected to

[5] "Ventura County Watershed Protection District's participation in the Regional Program was required to provide a level of effort that would fully support the Regional Program to prevent any data gaps in Ventura County. Understanding that the original Regional Program five-year study design (2009-2013) has been completed, and the Regional Program has been modified for 2015-2020, the specific level of effort described per watershed Attachment F, Section 1, of the Ventura County MS4 Permit, no longer reflects the current SMC Regional Program." (Los Angeles Water Board, letter to Gerhardt Hubner, Deputy Director, Ventura County Watershed Protection District, re Response to Request to Confirm Level of Effort Prescribed in Order No. R4- 2010-0108, Attachment F, section 1.1.a.1.a.i, in Accordance with New Five-Year Study Design for SMC Regional Bioassessment Program (June 4, 2015).)

a sanitary sewer. This provision does not apply to fire fighting vehicles."].) Now, firefighting vehicles are subject to the same requirements regarding the discharge of wash waters as any other public agency, therefore requiring Claimants to incur costs to ensure that fire stations can meet this new requirement. Accordingly, this is a new program or higher level of service, because Claimants were not previously required to provide wash water catchment or pretreatment services to fire stations.

The Water Boards claim that because the prior permit required Claimants to "effectively prohibit non-stormwater discharges" into the storm sewer system, including "discharges or flows from emergency fire fighting activities," this is neither a new program nor a higher level of service. (AR F004047-F004048.) However, the prohibition relied upon by the Water Boards refers to *emergency* fire fighting *activities*. Washing fire engines and trucks at a fire station is not an emergency situation, neither is it generally considered a fire fighting activity. The reasonable reading of the prior permit requirement is that it applies to discharges from activities directly related to fighting an active fire, and not to discharges associated with routine maintenance of fire fighting vehicles. The discharge prohibition in the 2000 Permit also included discharges related to "individual residential car washing," which also cannot be reasonably interpreted to include washing publicly-owned vehicles at a publicly-owned location. Because the 2000 Permit expressly exempted fire fighting vehicles from the vehicle washing requirements and the 2010 Permit does not, this is a new program or higher level of service.

2. 2010 Permit Requirements Are not Federally Mandated

The Water Boards argue that the CWA's requirement that MS4 permittees effectively prohibit non-stormwater discharges to MS4 systems creates a federal mandate that fire fighting vehicles be regulated in the same way as other public agency vehicles. (See 33 U.S.C. § 1342(p)(3)(B)(ii) [stating that permits for MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers"].) Federal regulations further describe the categories in which the state, as the issuer of the MS4 permit, will address certain non-stormwater discharges to the storm sewer system. Specifically, regulations state that:

> [T]he following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, *individual residential car washing*, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water

> (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States.)

(40 C.F.R. § 122.26(d)(2)(iv)(B)(1), emphasis added.) Washing fire fighting vehicles, which are not passenger vehicles owned by individual residents, is not listed in the foregoing categories. As explained previously, "fire fighting" refers to activities taken by fire fighters during the fighting of an active fire, not to the routine washing of vehicles. Even if washing fire fighting vehicles were contemplated by the above-quoted regulation, the language of the regulation gives the state discretion to develop the means to deal with the mentioned non-stormwater discharges.

Indeed, the Water Boards themselves state that the Los Angeles Water Board *decided* not to retain the exemption for fire fighting vehicles related to vehicle and equipment washing areas. The fact that the Los Angeles Water Board was at one time able to exempt a category of public agency vehicles and then change its mind to remove that exemption demonstrates that it had a "true choice" under the CWA to determine whether or not it will provide exemptions in the permits it issues. This true choice means that the Los Angeles Water Board's decision to remove the former exemption is a requirement mandated by the state and not by federal law. (*County of Los Angeles*, *supra*, 1 Cal.5th at p. 765.) Therefore, the costs associated with retrofitting fire stations with appropriate wash area catchment or pretreatment facilities is reimbursable by the state.

The Water Boards note that Claimants did not comment on this provision during the Los Angeles Water Board's consideration of the 2010 Permit, and appear to imply that it is the Claimants' burden to show that fire fighting vehicles should remain exempted. First, whether Claimants commented on the provision is irrelevant to the matter at hand because Claimants are not challenging the 2010 Permit or the Los Angeles Water Board's authority to impose the provision. Instead, Claimants seek subvention for funds expended due to the higher level of service or new program imposed on Claimants related to public agency vehicle and equipment wash areas. (See *County of Los Angeles*, *supra*, 1 Cal.5th at p. 769 ["The narrow question here was who will pay for [the challenged requirements]."].) Second, it is the state's burden to show that a federal law expressly or explicitly required the condition at issue. (*Ibid.* ["[T]he State must explain why federal law mandated these requirements, rather than forcing the Operators to prove the opposite."].) It was not and is not incumbent upon Claimants to comment on and provide evidence to indicate that the fire fighting vehicles should be exempted in order for Claimants to be eligible to seek state subvention for this new program or higher level of service.

Claimants are not required to mitigate costs in order to receive reimbursement from the state for state mandated activities. (See Cal. Const., art XIII B, § 6.) Thus, the Water Boards' argument that it could be less expensive for fire departments to wash their vehicles at commercial truck washes or for the County to build their own facilities for public agency fleets is irrelevant to this Test Claim. Additionally, this argument is based upon the Water Boards' unsupported conjecture that paying to wash each fire fighting vehicle at a commercial

truck wash or building new facilities is less expensive than retrofitting fire stations. This argument should be wholly disregarded by the Commission.

Finally, the U.S. EPA's MS4 Permit Improvement Guide is not binding federal law, but instead provides options or helpful reasoning to permit writers. (AR F004444-F004445 ["This Guide does not 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."].) Since the guide is not federal law, it cannot support the Water Boards' argument that federal law expressly requires the removal of the vehicle wash requirement exemption related to fire fighting vehicles.

3. The 2010 Permit Provisions Are Reimbursable State Mandates

The 2010 Permit's removal of the exemption for fire fighting vehicles from the public agency vehicle wash area requirements was not mandated by federal law and is a new program or higher level of service. It is also unique to local governments, contrary to arguments by the Water Boards.

The Water Boards argue that the removal of the fire fighting exemption is not unique to local governments because similar terms are included in the SWRCB's general permits for storm water discharges associated with industrial activities and construction activities, as well as the SWRCB's permit for storm water discharges issued to DOT. None of these permits contains an exemption for fire fighting vehicles within their vehicle washing requirements. However, these permits generally do not cover (and the permittees themselves do not manage or operate) public fire fighting facilities in the first place. In this sense, the 2000 Permit, with its fire fighting vehicle exemption, is actually more similar in practice to the two general permits and the DOT permit, than the 2010 Permit. Now, without the exemption, the County must provide a higher level of service or new program to address washing fire fighting vehicles at 30 fire stations. This is unique to local governments, which are the providers of public fire protection services in urban areas. Because the removal of the exemption creates a new program or higher level of service that is unique to local governments, the new permit condition is a reimbursable state mandate.

**F. Illicit Connections/Discharge**

The 2010 Permit also expanded requirements related to the illicit connections and illicit discharges. Specifically, Claimants must screen for illicit connections by creating a map of all pipes 18 inches and greater in diameter, including their locations and lengths, and the location of all channels within the Claimants' permitted area. (2010 Permit, Part 4.H.I.3(a).)

1. 2010 Permit Contains Higher Levels of Service and New Programs

While the 2000 Permit contained some requirements related to investigating illicit connections and discharges, these conditions did not require the Claimants to prepare a

detailed map of pipes and channels within the permitted areas. The Water Boards admit that the 2000 Permit did not include this requirement. (Water Boards' Comments, p. 76.) Because Claimants were not previously required to create a map, this is a new program or higher level of service.

The Water Boards maintain that the mapping requirement is not a new program or higher level of service because the same provision was included in the permit adopted by the Los Angeles Water Board in 2009. This argument ignores the fact that the 2010 Permit is a reconsideration of the 2009 Permit – not an amendment to the 2009 Permit or a completely new permit. (AR F001187.) Because the 2009 Permit was essentially converted into the 2010 Permit, the 2000 Permit is the appropriate permit against which the 2010 Permit should be compared. Because the 2000 Permit did not include the mapping requirement, the condition is a new program or higher level of service.

2. 2010 Permit Requirements Are Not Federally Mandated

Federal law does require some mapping, but not to the level of detail specified in the 2010 Permit. Title 40 of the Code of Federal Regulations, § 122.26(d)(1)(iii)(B) provides that MS4 operators must submit a map of their storm sewer system (with their permit application) that shows the locations of outfalls and major storm water structural controls, and that describes the locations of specified land uses. Federal regulations also state that applications for permits must characterize discharges, including screening for illicit discharges and connections. (40 C.F.R. § 122.26(d)(1)(iv)(D). None of these federal regulations expressly require the amount of detail regarding the pipes within the MS4 system that the 2010 Permit condition mandates.

The fact that the CWA provides that the Administrator of the EPA "shall prescribe conditions for [NPDES] permits to assure compliance . . . including conditions on data and information collection, reporting, and such other requirements as he deems appropriate" does not make the mapping requirement a federal mandate. (33 U.S.C. § 1342(a)(2).) Instead, this provision gives the state, as the administrator of the CWA's NPDES program in California, the discretion to impose those requirements it deems appropriate. The Los Angeles Water Board's exercise of its discretion to impose this very detailed mapping requirement upon the co-permittees makes the requirement a state mandate. (*County of Los Angeles*, *supra*, 1 Cal.5th at p. 765.)

Again, the U.S. EPA's MS4 Permit Improvement Guide is not binding federal law, but instead provides options or helpful reasoning to permit writers. (AR F004444-F004445 ["This Guide does not 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."].) Since the guide is not federal law, it cannot support the Water Boards' argument that federal law expressly requires the highly specific mapping requirements in the 2010 Permit.

Similarly, the existence of *one* U.S. EPA-issued MS4 permit that includes similar language does not indicate that the Los Angeles Water Board was compelled by federal law to include the mapping requirement in Claimants' 2010 Permit, particularly when federal law expressly gives the state discretion to determine which conditions are necessary or appropriate. While the Supreme Court considered the Permit's conditions related to trash receptacles that the U.S. EPA had issued in other states in *County of Los Angeles*, this was not the sole basis for the Court's determination that the trash receptacle requirement was not federally mandated. Ultimately, the Supreme Court stated that federal laws requiring permittees to propose conditions did not make those conditions federal mandates because the state retained the discretion to decide whether those proposed conditions would be incorporated into the final permit. (*County of Los Angeles*, *supra*, 1 Cal.5th at pp. 771-772.)

3. The 2010 Permit Provisions Are Reimbursable State Mandates

The storm sewer mapping requirements included in the 2010 Permit are not federally mandated and are new programs or higher levels of service. Contrary to the Water Boards' argument that the provisions are not unique to local government, the specific, granular mapping requirements are imposed solely on Claimants through their MS4 permit. This permit, and all of its conditions, are imposed only upon Claimants. The permit does not apply generally to all storm water dischargers. Additionally, although the general permits for industrial and construction dischargers and the DOT permit may include similar mapping requirements, those requirements do not expressly require the level of detail with regard to the size and length of pipes used in the storm sewer system. Therefore, these provisions are unique to local government, and are reimbursable state mandates.

## VI. CONCLUSION

For the foregoing reasons, each of the six mandates at issue in Claimants' test claim are state mandates for which Claimants are entitled to reimbursement. The Commission should therefore 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: January 2, 2018

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**Documentation in Support of Claimants Rebuttal to Comments on Test Claim**

| Attachment No. | Document Title |
|---|---|
| | *Federal Statues and Regulations* |
| 1 | 33 U.S.C. § 1342 |
| 2 | 40 C.F.R. § 35.2005 |
| 3 | 40 C.F.R. § 122.26 |
| 4 | 40 C.F.R. § 122.42 |
| 5 | 40 C.F.R. § 123.24 |
| 6 | 55 Fed. Reg. 47990 |
| | *State Consitutional Provisions, Statutes, and Regulations* |
| 7 | Gov. Code, § 17552 |
| 8 | Gov. Code, § 17556 |
| 9 | Gov. Code, § 17565 |
| | *Federal Cases* |
| 10 | *Askins v. Ohio Department of Agriculture* (6th Cir. 2016) 809 F.3d 868 |
| 11 | *Save Our Bays & Beaches v. City & County of Honolulu* (D. Haw 1994) 904 F.Supp. 1098 |
| | *State Cases* |
| 12 | *County of Contra Costa v. State of California* (1986) 177 Cal.App. 3d 62 |
| 13 | *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 |
| 14 | *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155 |
| 15 | *Kinlaw v. State of California* (1991) 54 Cal.3d 326 |
| 16 | *Department of Finance v. Commission on State Mandates* (*County of Los Angeles* ) (2016) 1 Cal.5th 749 |
| 17 | *Department of Finance v. Commission on State Mandates* (*County of San Diego* ) (Dec. 19, 2017, No. C070357) ___ Cal. App. 5th ___ [2017 Cal.App. LEXIS 1134] |
| 18 | *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892 |
| | *State Administrative Decisions* |
| 19 | In re Test Claim on: Los Angeles Regional Water Quality Control Board Order No. 01-182 |
| 20 | In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2001-00001 |
| | *State Permits* |
| 21 | California Regional Water Quality Control Board San Diego Region Order No. R9-2010-0016 Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the County of Riverside, the Incorporated Cities of Riverside County, and the Riverside County Flood Control and Water Conservation District within the San Diego Region |

# ATTACHMENT NO. 1

# 33 USCS § 1342

Current through PL's 115-94, approved 12/18/17, with a gap of 115-91



## § 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.)*

# ATTACHMENT NO. 2

# 40 CFR 35.2005





## § 35.2005 Definitions.

**(a)**Words and terms not defined below shall have the meaning given to them in 2 CFR part 200, subpart A--Acronyms and Definitions.

**(b)**As used in this subpart, the following words and terms mean:

**(1)**Act. The Clean Water Act *(33 U.S.C. 1251* et seq., as amended).

**(2)**Ad valorem tax. A tax based upon the value of real property.

**(3)**Allowance. An amount based on a percentage of the project's allowable building cost, computed in accordance with appendix B.

**(4)**Alternative technology. Proven wastewater treatment processes and techniques which provide for the reclaiming and reuse of water, productively recycle wastewater constitutuents or otherwise eliminate the discharge of pollutants, or recover energy. Specifically, alternative technolgy includes land application of effluent and sludge; aquifer recharge; aquaculture; direct reuse (non-potable); horticulture; revegetation of disturbed land; containment ponds; sludge composting and drying prior to land application; self-sustaining incineration; and methane recovery.

**(5)**Alternative to conventional treatment works for a small community. For purposes of §§ 35.2020 and 35.2032, alternative technology used by treatment works in small communities include alternative technologies defined in paragraph (b)(4), as well as, individual and onsite systems; small diameter gravity, pressure or vacuum sewers conveying treated or partially treated wastewater. These systems can also include small diameter gravity sewers carrying raw wastewater to cluster systems.

**(6)**Architectural or engineering services. Consultation, investigations, reports, or services for design-type projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the grantee is located.

**(7)**Best Practicable Waste Treatment Technology (BPWTT). The cost-effective technology that can treat wastewater, combined sewer overflows and nonexcessive infiltration and inflow in publicly owned or individual wastewater treatment works, to meet the applicable provisions of:

**(i)**40 CFR part 133--secondary treatment of wastewater;

**(ii)**40 CFR part 125, subpart G--marine discharge waivers;

**(iii)***40 CFR 122.44(d)*--more stringent water quality standards and State standards; or

**(iv)***41 FR 6190* (February 11, 1976)--Alternative Waste Management Techniques for Best Practicable Waste Treatment (treatment and discharge, land application techniques and utilization practices, and reuse).

**(8)**Building. The erection, acquisition, alteration, remodeling, improvement or extension of treatment works.

**(9)**Building completion. The date when all but minor components of a project have been built, all equipment is operational and the project is capable of functioning as designed.

**(10)**Collector sewer. The common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive wastewaters directly from facilities which convey wastewater from individual systems, or from private property, and which include service "Y" connections designed for connection with those facilities including:

**(i)**Crossover sewers connecting more than one property on one side of a major street, road, or highway to a lateral sewer on the other side when more cost effective than parallel sewers; and

**(ii)**Except as provided in paragraph (b)(10)(iii) of this section, pumping units and pressurized lines serving individual structures or groups of structures when such units are cost effective and are owned and maintained by the grantee.

**(iii)**This definition excludes other facilities which convey wastewater from individual structures, from private property to the public lateral sewer, or its equivalent and also excludes facilities associated with alternatives to conventional treatment works in small communities.

**(11)**Combined sewer. A sewer that is designed as a sanitary sewer and a storm sewer.

**(12)**Complete waste treatment system. A complete waste treatment system consists of all the treatment works necessary to meet the requirements of title III of the Act, involving: (i) The transport of wastewater from individual homes or buildings to a plant or facility where treatment of the wastewater is accomplished; (ii) the treatment of the wastewater to remove pollutants; and (iii) the ultimate disposal, including recycling or reuse, of the treated wastewater and residues which result from the treatment process.

**(13)**Construction. Any one or more of the following: Preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, field testing of innovative or alternative wastewater treatment processes and techniques (excluding operation and maintenance) meeting guidelines promulgated under section 304(d)(3) of the Act, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items.

**(14)**Conventional technology. Wastewater treatment processes and techniques involving the treatment of wastewater at a centralized treatment plant by means of biological or physical/chemical unit processes followed by direct point source discharge to surface waters.

**(15)**Enforceable requirements of the Act. Those conditions or limitations of section 402 or 404 permits which, if violated, could result in the issuance of a compliance order or initiation of a civil or criminal action under section 309 of the Act or applicable State laws. If a permit has not been issued, the term shall include any requirement which, in the Regional Administrator's judgment, would be included in the permit when issued. Where no permit applies, the term shall include any requirement which the Regional Administrator determines is necessary for the best practicable waste treatment technology to meet applicable criteria.

**(16)**Excessive infiltration/inflow. The quantities of infiltration/inflow which can be economically eliminated from a sewer system as determined in a cost-effectiveness analysis that compares the costs for correcting the infiltration/inflow conditions to the total costs for transportation and treatment of the infiltration/inflow. (See §§ 35.2005(b) (28) and (29) and 35.2120.)

**(17)**Field testing. Practical and generally small-scale testing of innovative or alternative technologies directed to verifying performance and/or refining design parameters not sufficiently tested to resolve technical uncertainties which prevent the funding of a promising improvement in innovative or alternative treatment technology.

**(18)**Individual systems. Privately owned alternative wastewater treatment works (including dual waterless/gray water systems) serving one or more principal residences, or small commercial establishments. Normally these are onsite systems with localized treatment and disposal of wastewater, but may be systems utilizing small diameter gravity, pressure or vacuum sewers conveying treated or partially treated wastewater. These systems can also include small diameter gravity sewers carrying raw wastewater to cluster systems.

**(19)**Industrial user. Any nongovernmental, nonresidential user of a publicly owned treatment works which is identified in the Standard Industrial Classification Manual, 1972, Office of Management and Budget, as amended and supplemented, under one of the following divisions:

**Division A.**Agriculture, Forestry, and Fishing

**Division B.**Mining

**Division D.**Manufacturing

**Division E.**Transportation, Communications, Electric, Gas, and Sanitary Services

**Division I.**Services

**(20)**Infiltration. Water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow.

**(21)**Inflow. Water other than wastewater that enters a sewer system (including sewer service connections) from sources such as, but not limited to, roof leaders, cellar drains, yard drains, area drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

**(22)**Initiation of operation. The date specified by the grantee on which use of the project begins for the purpose for which it was planned, designed, and built.

**(23)**Innovative technology. Developed wastewater treatment processes and techniques which have not been fully proven under the circumstances of their contemplated use and which represent a significant advancement over the state of the art in terms of significant reduction in life cycle cost or significant environmental benefits through the reclaiming and reuse of water, otherwise eliminating the discharge of pollutants, utilizing recycling techniques such as land treatment, more efficient use of energy and resources, improved or new methods of waste treatment management for combined municipal and industrial systems, or the confined disposal of pollutants so that they will not migrate to cause water or other environmental pollution.

**(24)**Interceptor sewer. A sewer which is designed for one or more of the following purposes:

**(i)**To intercept wastewater from a final point in a collector sewer and convey such wastes directly to a treatment facility or another interceptor.

**(ii)**To replace an existing wastewater treatment facility and transport the wastes to an adjoining collector sewer or interceptor sewer for conveyance to a treatment plant.

**(iii)**To transport wastewater from one or more municipal collector sewers to another municipality or to a regional plant for treatment.

**(iv)**To intercept an existing major discharge of raw or inadequately treated wastewater for transport directly to another interceptor or to a treatment plant.

**(25)**Interstate agency. An agency of two or more States established under an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of water pollution.

**(26)**Marine bays and estuaries. Semi-enclosed coastal waters which have a free connection to the territorial sea.

**(27)**Municipality. A city, town, borough, county, parish, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created under State law, or an Indian tribe or an

authorized Indian tribal organization, having jurisdiction over disposal of sewage, industrial wastes, or other waste, or a designated and approved management agency under section 208 of the Act.

**(i)**This definition includes a special district created under State law such as a water district, sewer district, sanitary district, utility district, drainage district or similar entity or an integrated waste management facility, as defined in section 201(e) of the Act, which has as one of its principal responsibilities the treatment, transport, or disposal of domestic wastewater in a particular geographic area.

**(ii)**This definition excludes the following:

**(A)**Any revenue producing entity which has as its principal responsibility an activity other than providing wastewater treatment services to the general public, such as an airport, turnpike, port facility or other municipal utility.

**(B)**Any special district (such as school district or a park district) which has the responsibility to provide wastewater treatment services in support of its principal activity at specific facilities, unless the special district has the responsibility under State law to provide wastewater treatment services to the community surrounding the special district's facility and no other municipality, with concurrent jurisdiction to serve the community, serves or intends to serve the special district's facility or the surrounding community.

**(28)**Nonexcessive infiltration. The quantity of flow which is less than 120 gallons per capita per day (domestic base flow and infiltration) or the quantity of infiltration which cannot be economically and effectively eliminated from a sewer system as determined in a cost-effectiveness analysis. (See §§ 35.2005(b)(16) and 35.2120.)

**(29)**Nonexcessive inflow. The maximum total flow rate during storm events which does not result in chronic operational problems related to hydraulic overloading of the treatment works or which does not result in a total flow of more than 275 gallons per capita per day (domestic base flow plus infiltration plus inflow). Chronic operational problems may include surcharging, backups, bypasses, and overflows. (See §§ 35.2005(b)(16) and 35.2120).

**(30)**Operation and Maintenance. Activities required to assure the dependable and economical function of treatment works.

**(i)**Maintenance: Preservation of functional integrity and efficiency of equipment and structures. This includes preventive maintenance, corrective maintenance and replacement of equipment (See § 35.2005(b)(36)) as needed.)

**(ii)**Operation: Control of the unit processes and equipment which make up the treatment works. This includes financial and personnel management; records, laboratory control, process control, safety and emergency operation planning.

**(31)**Principal residence. For the purposes of § 35.2034, the habitation of a family or household for at least 51 percent of the year. Second homes, vacation or recreation residences are not included in this definition.

**(32)**Project. The activities or tasks the Regional Administrator identifies in the grant agreement for which the grantee may expend, obligate or commit funds.

**(33)**Project performance standards. The performance and operations requirements applicable to a project including the enforceable requirements of the Act and the specifications, including the quantity of excessive infiltration and inflow proposed to be eliminated, which the project is planned and designed to meet.

**(34)**Priority water quality areas. For the purposes of § 35.2015, specific stream segments or bodies of water, as determined by the State, where municipal discharges have resulted in the impairment of a designated use or significant public health risks, and where the reduction of pollution from such discharges will substantially restore surface or groundwater uses.

**(35)**Project schedule. A timetable specifying the dates of key project events including public notices of proposed procurement actions, subagreement awards, issuance of notice to proceed with building, key milestones in the building schedule, completion of building, initiation of operation and certification of the project.

**(36)**Replacement. Obtaining and installing equipment, accessories, or appurtenances which are necessary during the design or useful life, whichever is longer, of the treatment works to maintain the capacity and performance for which such works were designed and constructed.

**(37)**Sanitary sewer. A conduit intended to carry liquid and water-carried wastes from residences, commercial buildings, industrial plants and institutions together with minor quantities of ground, storm and surface waters that are not admitted intentionally.

**(38)**Services. A contractor's labor, time or efforts which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawings, specifications). This term does not include employment agreements or collective bargaining agreements.

**(39)**Small commercial establishments. For purposes of § 35.2034 private establishments such as restaurants, hotels, stores, filling stations, or recreational facilities and private, nonprofit entities such as churches, schools, hospitals, or charitable organizations with dry weather wastewater flows less than 25,000 gallons per day.

**(40)**Small Community. For purposes of §§ 35.2020(b) and 35.2032, any municipality with a population of 3,500 or less or highly dispersed sections of larger municipalities, as determined by the Regional Administrator.

**(41)**State. A State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Marianas. For the purposes of applying for a grant under section 201(g)(1) of the act, a State (including its agencies) is subject to the limitations on revenue producing entities and special districts contained in § 35.2005(b)(27)(ii).

**(42)**State agency. The State agency designated by the Governor having responsibility for administration of the construction grants program under section 205(g) of the Act.

**(43)**Step 1. Facilities planning.

**(44)**Step 2. Preparation of design drawings and specifications.

**(45)**Step 3. Building of a treatment works and related services and supplies.

(46) Step 2+3. Design and building of a treatment works and building related services and supplies.

**(47)**Step 7. Design/building of treatment works wherein a grantee awards a single contract for designing and building certain treatment works.

**(48)**Storm sewer. A sewer designed to carry only storm waters, surface run-off, street wash waters, and drainage.

**(49)**Treatment works. Any devices and systems for the storage, treatment, recycling, and reclamation of municipal sewage, domestic sewage, or liquid industrial wastes used to implement section 201 of the Act, or necessary to recycle or reuse water at the most economical cost over the design life of the works. These include intercepting sewers, outfall sewers, sewage collection systems, individual systems, pumping, power, and other equipment and their appurtenances; extensions, improvement, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including acquisition of the land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment (including land for composting sludge, temporary storage of such compost and land used for the storage of treated wastewater in land treatment systems before land application); or any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste or industrial waste, including waste in combined storm water and sanitary sewer systems.

**(50)**Treatment works phase or segment. A treatment works phase or segment may be any substantial portion of a facility and its interceptors described in a facilities plan under § 35.2030, which can be identified as a subagreement or discrete subitem. Multiple subagreements under a project shall not be considered to be segments or phases. Completion of building of a treatment works phase or segment may, but need not in and of itself, result in an operable treatment works.

**(51)**Useful life. The period during which a treatment works operates. (Not "design life" which is the period during which a treatment works is planned and designed to be operated.)

**(52)**User charge. A charge levied on users of a treatment works, or that portion of the ad valorem taxes paid by a user, for the user's proportionate share of the cost of operation and maintenance (including replacement) of such works under sections 204(b)(1)(A) and 201(h)(2) of the Act and this subpart.

**(53)**Value engineering. A specialized cost control technique which uses a systematic and creative approach to identify and to focus on unnecessarily high cost in a project in order to arrive at a cost saving without sacrificing the reliability or efficiency of the project.

## Statutory Authority

**AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:**

Secs. 101(e), 109(b), 201 through 205, 207, 208(d), 210 through 212, 215 through 219, 304(d)(3), 313, 501, 502, 511 and 516(b) of the Clean Water Act, as amended, *33 U.S.C. 1251* et seq.

## History

*[49 FR 6234,* Feb. 17, 1984, as amended at *50 FR 45894,* Nov. 4, 1985; *55 FR 27095,* June 29, 1990; *79 FR 75871,* Dec. 19, 2014]

Annotations

## Notes

**[EFFECTIVE DATE NOTE:**

*79 FR 75871,* Dec. 19, 2014, revised paragraph (a), effective Dec. 26, 2014.]

## Case Notes

**LexisNexis® Notes**

*City of Lorain v. Administrator, United States EPA, 1993 U.S. Dist. LEXIS 21197* (ND Ohio Aug. 19, 1993).

***Overview:*** *A city seeking a an innovative and alternative technologies grant for a wastewater treatment plant had the burden of proving to the EPA that its technology was "innovative." The EPA's decision denying the grant was not arbitrary and capricious.*

- The Clean Water Act allows the Environmental Protection Agency (EPA) to award additional funding for the use of innovative technology. *33 U.S.C.S. § 1282*(a)(2). The EPA defines innovative technology as developed wastewater treatment processes and techniques which have not been fully proven under the circumstances of their contemplated use and which represent a significant advancement over the state of the art in terms of significant reduction in life cycle costs or significant environmental benefits. *40 C.F.R. § 35.2005(b)*23. The technologies which are considered to be within the "window of acceptable risk" are those technologies which have progressed beyond the laboratory and

have been successfully tested or demonstrated in field tests or pilot plant programs, but which are not yet fully developed. *Go To Headnote*

## Research References & Practice Aids

**NOTES APPLICABLE TO ENTIRE CHAPTER:**

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325,* Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: *71 FR 25504,* May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: *74 FR 66496,* Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: *75 FR 49556,* Aug. 13, 2010; *77 FR 42181,* July 18, 2012.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Decision, see: *81 FR 43492,* July 5, 2016.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Final report, see: *82 FR 51160,* Nov. 1, 2017.]

**NOTES APPLICABLE TO ENTIRE PART:**

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 35 Notice of Availability of Class Deviation, see: *70 FR 29627,* May 24, 2005.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 35 Final Guidance, see: *70 FR 61039,* Oct. 20, 2005; *76 FR 709,* Jan. 6, 2011.]



End of Document

# ATTACHMENT NO. 3

# *40 CFR 122.26*

This document is current through the December 13, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through December 4, 2017.



## § 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

**(a)** Permit requirement. (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

**(i)** A discharge with respect to which a permit has been issued prior to February 4, 1987;

**(ii)** A discharge associated with industrial activity (see § 122.26(a)(4));

**(iii)** A discharge from a large municipal separate storm sewer system;

**(iv)** A discharge from a medium municipal separate storm sewer system;

**(v)** A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

**(A)** The location of the discharge with respect to waters of the United States as defined at *40 CFR 122.2*.

**(B)** The size of the discharge;

**(C)** The quantity and nature of the pollutants discharged to waters of the United States; and

**(D)** Other relevant factors.

**(2)** The Director may not require a permit for discharges of storm water runoff from the following:

**(i)** Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

**(ii)**All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

Note to paragraph (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

**(3) Large and medium municipal separate storm sewer systems.**

**(i)**Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

**(ii)**The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

**(iii)**The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

**(A)**Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

**(B)**Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

**(C)**A regional authority may be responsible for submitting a permit application under the following guidelines:

**(1)**The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

**(2)**The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

**(3)**Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

**(iv)**One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

**(v)**Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.

**(vi)**Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

**(4)**Discharges through large and medium municipal separate storm sewer systems. In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

**(5)**Other municipal separate storm sewers. The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

**(6)**Non-municipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

**(i)**All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

**(ii)**Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

**(iii)**Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

**(7)**Combined sewer systems. Conveyances that discharge storm water runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of § 122.21 and are not subject to the provisions of this section.

**(8)**Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

**(9)**

**(i)**On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

**(A)**The discharge is from a small MS4 required to be regulated pursuant to § 122.32;

**(B)**The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

**(C)**The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

**(D)**The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

**(ii)**Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

**(iii)**Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

**(b) Definitions.**

**(1)**Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

**(2)**Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

**(3)**Incorporated place means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

**(4)**Large municipal separate storm sewer system means all municipal separate storm sewers that are either:

**(i)**Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

**(ii)**Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

**(iii)**Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

**(A)**Physical interconnections between the municipal separate storm sewers;

**(B)**The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

**(C)**The quantity and nature of pollutants discharged to waters of the United States;

**(D)**The nature of the receiving waters; and

**(E)**Other relevant factors; or

**(iv)**The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4)(i), (ii), (iii) of this section.

**(5)**Major municipal separate storm sewer outfall (or "major outfall") means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

**(6)**Major outfall means a major municipal separate storm sewer outfall.

**(7)**Medium municipal separate storm sewer system means all municipal separate storm sewers that are either:

**(i)**Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or

**(ii)**Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

**(iii)**Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

**(A)**Physical interconnections between the municipal separate storm sewers;

**(B)**The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

**(C)**The quantity and nature of pollutants discharged to waters of the United States;

**(D)**The nature of the receiving waters; or

**(E)**Other relevant factors; or

**(iv)**The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7)(i), (ii), (iii) of this section.

**(8)**Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

**(i)**Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

**(ii)**Designed or used for collecting or conveying storm water;

**(iii)**Which is not a combined sewer; and

**(iv)**Which is not part of a Publicly Owned Treatment Works (POTW) as defined at *40 CFR 122.2*.

**(9)**Outfall means a point source as defined by *40 CFR 122.2* at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

**(10)**Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

**(11)**Runoff coefficient means the fraction of total rainfall that will appear at a conveyance as runoff.

**(12)**Significant materials includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

**(13)**Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

**(14)**Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

**(i)**Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

**(ii)**Facilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities defined in *40 CFR 122.27(b)(2)*-(3) and Industry Groups 242 through 249; 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373; (not included are all other types of silviculture facilities);

**(iii)**Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under *40 CFR 434.11(1)* because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

**(iv)**Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

**(v)**Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

**(vi)**Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

**(vii)**Steam electric power generating facilities, including coal handling sites;

**(viii)**Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity;

**(ix)**Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

**(x)**Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

**(xi)**Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25;

**(15)**Storm water discharge associated with small construction activity means the discharge of storm water from:

**(i)**Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

**(A)**The value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation (RUSLE), pages 21-64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with *5 U.S.C. 552*(a) and 1 CFR part 51. Copies may be obtained at EPA's Water Docket, 1200 Pennsylvania Avenue NW, Washington, DC 20460. For information on the availability of this material at National Archives and Records Administration, call 202-741-6030, or go to: *http://www.archives.gov/federal]register/code]of]federal]regula* tions/ibr]locations.html. An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

**(B)**Storm water controls are not needed based on a "total maximum daily load" (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not

require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

**(C)**As of December 21, 2020 all certifications submitted in compliance with paragraphs (b)(15)(i)(A) and (B) of this section must be submitted electronically by the owner or operator to the Director or initial recipient, as defined in *40 CFR 127.2(b)*, in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, owners or operators may be required to report electronically if specified by a particular permit or if required to do so by state law.

**(ii)**Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

**EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE**

**OF "STORM WATER DISCHARGES ASSICIATED WITH SMALL**

**CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM**

| | |
|---|---|
| Automatic Designation: Required Nationwide Coverage | . Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres.<br>. Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).) |
| Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator. | . Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).) |
| Potential Waiver: Waiver from Requirements as Determined by the NPDES | Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur |

**EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE**

**OF "STORM WATER DISCHARGES ASSICIATED WITH SMALL**

**CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM**

| | |
|---|---|
| Permitting Authority. | within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see § 122.26(b)(15)(i).) |

**(16)**Small municipal separate storm sewer system means all separate storm sewers that are:

**(i)**Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

**(ii)**Not defined as "large" or "medium" municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

**(iii)**This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

**(17)**Small MS4 means a small municipal separate storm sewer system.

**(18)**Municipal separate storm sewer system means all separate storm sewers that are defined as "large" or "medium" or "small" municipal separate storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

**(19)**MS4 means a municipal separate storm sewer system.

**(20)**Uncontrolled sanitary landfill means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runon or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

**(c)**Application requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity -- (1) Individual application. Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit, or any discharge of storm water which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph.

**(i)**Except as provided in § 122.26(c)(1)(ii)-(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

**(A)**A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are

applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under *40 CFR 262.34*); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

**(B)**An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

**(C)**A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

**(D)**Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

**(E)**Quantitative data based on samples collected during storm events and collected in accordance with § 122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

**(1)**Any pollutant limited in an effluent guideline to which the facility is subject;

**(2)**Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

**(3)**Oil and grease, pH, BOD5, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

**(4)**Any information on the discharge required under § 122.21(g)(7) (vi) and (vii);

**(5)**Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

**(6)**The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

**(F)**Operators of a discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

**(G)**Operators of new sources or new discharges (as defined in § 122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

**(ii)**An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of § 122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

**(A)**The location (including a map) and the nature of the construction activity;

**(B)**The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

**(C)**Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

**(D)**Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

**(E)**An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

**(F)**The name of the receiving water.

**(iii)**The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

**(A)**Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to *40 CFR 117.21* or *40 CFR 302.6* at anytime since November 16, 1987; or

**(B)**Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to *40 CFR 110.6* at any time since November 16, 1987; or

**(C)**Contributes to a violation of a water quality standard.

**(iv)**The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

**(v)**Applicants shall provide such other information the Director may reasonably require under § 122.21(g)(13) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

**(2)**[Reserved]

**(d)**Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

**(1)**Part 1. Part 1 of the application shall consist of;

**(i)**General information. The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

**(ii)**Legal authority. A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

**(iii)**Source identification. (A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

**(B)**A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

**(1)**The location of known municipal storm sewer system outfalls discharging to waters of the United States;

**(2)**A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

**(3)**The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

**(4)**The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

**(5)**The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

**(6)**The identification of publicly owned parks, recreational areas, and other open lands.

**(iv)**Discharge characterization. (A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.

**(B)**Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

**(C)**A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving such discharges have been:

**(1)**Assessed and reported in section 305(b) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

**(2)**Listed under section 304(l)(1)(A)(i), section 304(l)(1)(A)(ii), or section 304(l)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

**(3)**Listed in State Nonpoint Source Assessments required by section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);

**(4)**Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those

publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

**(5)**Areas of concern of the Great Lakes identified by the International Joint Commission;

**(6)**Designated estuaries under the National Estuary Program under section 320 of the CWA;

**(7)**Recognized by the applicant as highly valued or sensitive waters;

**(8)**Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

**(9)**Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

**(D)**Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

**(1)**A grid system consisting of perpendicular north-south and east-west lines spaced 1/4 mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

**(2)**All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;

**(3)**Field screening points should be located downstream of any sources of suspected illegal or illicit activity;

**(4)**Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

**(5)**Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

**(6)**For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created, and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

**(7)**Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no

more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced 1/4 mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

**(E)**Characterization plan. Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (see paragraph (d)(1)(iv)(C) of this section) to the extent practicable.

**(v)**Management programs. (A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

**(B)**A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

**(vi)**Fiscal resources. (A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

**(2)**Part 2. Part 2 of the application shall consist of:

**(i)**Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

**(A)**Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

**(B)**Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

**(C)**Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

**(D)**Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

**(E)**Require compliance with conditions in ordinances, permits, contracts or orders; and

**(F)**Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

**(ii)**Source identification. The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal

products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

**(iii)**Characterization data. When "quantitative data" for a pollutant are required under paragraph (d)(2)(iii)(A)(3) of this section, the applicant must collect a sample of effluent in accordance with § 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

**(A)**Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

**(1)**For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at § 122.21(g)(7) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

**(2)**A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

**(3)**For samples collected and described under paragraphs (d)(2)(iii) (A)(1) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)

Total dissolved solids (TDS)

COD

BOD[5]

Oil and grease

Fecal coliform

Fecal streptococcus

pH

Total Kjeldahl nitrogen

Nitrate plus nitrite

Dissolved phosphorus

Total ammonia plus organic nitrogen

Total phosphorus

**(4)**Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

**(B)**Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD[sub]5, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates

shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

**(C)**A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(1) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

**(D)**A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

**(iv)**Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

**(A)**A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

**(1)**A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

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

**(3)**A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

**(4)**A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

**(5)**A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

**(6)**A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and

fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

**(B)**A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

**(1)**A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at *40 CFR 35.2005(20)*) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

**(2)**A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

**(3)**A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

**(4)**A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

**(5)**A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

**(6)**A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

**(7)**A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

**(C)**A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

**(1)**Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

**(2)**Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: Any pollutants limited

in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7) (vi) and (vii).

**(D)**A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

**(1)**A description of procedures for site planning which incorporate consideration of potential water quality impacts;

**(2)**A description of requirements for nonstructural and structural best management practices;

**(3)**A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

**(4)**A description of appropriate educational and training measures for construction site operators.

**(v)**Assessment of controls. Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

**(vi)**Fiscal analysis. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

**(vii)**Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

**(viii)**Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

**(e)**Application deadlines. Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

**(1) Storm water discharges associated with industrial activity.**

**(i)**Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

**(ii)**For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

**(2)**For any group application submitted in accordance with paragraph (c)(2) of this section:

**(i)**Part 1. (A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

**(B)**Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

**(C)**For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

**(ii)**Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

**(iii)**Part 2. (A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submittted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

**(B)**Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

**(C)**For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

**(iv)**Rejected facilities. (A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

**(B)**Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than 180 days after the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

**(v)**A facility listed under paragraph (b)(14) (i)-(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18, 1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

**(3)**For any discharge from a large municipal separate storm sewer system;

**(i)**Part 1 of the application shall be submitted to the Director by November 18, 1991;

**(ii)**Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

**(iii)**Part 2 of the application shall be submitted to the Director by November 16, 1992.

**(4)**For any discharge from a medium municipal separate storm sewer system;

**(i)**Part 1 of the application shall be submitted to the Director by May 18, 1992.

**(ii)**Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

**(iii)**Part 2 of the application shall be submitted to the Director by May 17, 1993.

**(5)**A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter), for:

**(i)**A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

**(ii)**A storm water discharge subject to paragraph (c)(1)(v) of this section.

**(6)**Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of *40 CFR 122.21* and *40 CFR 122.26(c)* (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

**(7)**The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

**(i)**

**(A)**Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

**(B)**For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

**(ii)**The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by November 16, 1992, one year after receipt of a complete permit application;

**(iii)**The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

**(8)**For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

**(9)**For any discharge from a regulated small MS4, the permit application made under § 122.33 must be submitted to the Director by:

**(i)**March 10, 2003 if designated under § 122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under § 123.35(d)(3) (see § 122.33(c)(1)); or

**(ii)**Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under § 122.32(a)(2) (see § 122.33(c)(2)).

**(f) Petitions.**

**(1)**Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

**(2)**Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

**(3)**The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by *40 CFR 35.2005(b)(11)* that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the

length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

**(4)**Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

**(5)**The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

**(g)**Conditional exclusion for "no exposure" of industrial activities and materials to storm water. Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

**(1)**Qualification. To qualify for this exclusion, the operator of the discharge must:

**(i)**Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

**(ii)**Complete and sign (according to § 122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

**(iii)**Submit the signed certification to the NPDES permitting authority once every five years. As of December 21, 2020 all certifications submitted in compliance with this section must be submitted electronically by the owner or operator to the Director or initial recipient, as defined in *40 CFR 127.2(b)*, in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, owners or operators may be required to report electronically if specified by a particular permit or if required to do so by state law.

**(iv)**Allow the Director to inspect the facility to determine compliance with the "no exposure" conditions;

**(v)**Allow the Director to make any "no exposure" inspection reports available to the public upon request; and

**(vi)**For facilities that discharge through an MS4, upon request, submit a copy of the certification of "no exposure" to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

**(2)**Industrial materials and activities not requiring storm resistant shelter. To qualify for this exclusion, storm resistant shelter is not required for:

**(i)**Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak ("Sealed" means banded or otherwise secured and without operational taps or valves);

**(ii)**Adequately maintained vehicles used in material handling; and

**(iii)**Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

**(3) Limitations.**

**(i)**Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

**(ii)**This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be "no exposure" discharges, individual permit requirements should be adjusted accordingly.

**(iii)**If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for un-permitted discharge. Any conditionally exempt discharger who anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

**(iv)**Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

**(4)**Certification. The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

**(i)**The legal name, address and phone number of the discharger (see § 122.21(b));

**(ii)**The facility name and address, the county name and the latitude and longitude where the facility is located;

**(iii)**The certification must indicate that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:

**(A)**Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed to storm water;

**(B)**Materials or residuals on the ground or in storm water inlets from spills/leaks;

**(C)**Materials or products from past industrial activity;

**(D)**Material handling equipment (except adequately maintained vehicles);

**(E)**Materials or products during loading/unloading or transporting activities;

**(F)**Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

**(G)**Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;

**(H)**Materials or products handled/stored on roads or railways owned or maintained by the discharger;

**(I)**Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);

**(J)**Application or disposal of process wastewater (unless otherwise permitted); and

**(K)**Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

**(iv)**All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of § 122.22: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source

discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

## Statutory Authority

The Clean Water Act, *33 U.S.C. 1251* et seq.

## History

*[55 FR 48063*, Nov. 16, 1990, as amended at *56 FR 12100,* Mar. 21, 1991; *56 FR 56554,* Nov. 5, 1991; *57 FR 11412,* Apr. 2, 1992; *57 FR 60447,* Dec. 18, 1992; *60 FR 40235,* Aug. 7, 1995; *64 FR 68722, 68838,* Dec. 8, 1999; *65 FR 30886, 30907,* May 15, 2000; *68 FR 11325, 11329,* Mar. 10, 2003; *70 FR 11560, 11563,* Mar. 9, 2005; *71 FR 33628, 33639,* June 12, 2006; *77 FR 72970, 72974,* Dec. 7, 2012; *80 FR 64064, 64096,* Oct. 22, 2015]

Annotations

## Notes

**[EFFECTIVE DATE NOTE:**

*77 FR 72970, 72974,* Dec. 7, 2012, revised paragraph (b)(14)(ii), effective Jan. 7, 2013; *80 FR 64064, 64096,* Oct. 22, 2015, revised paragraphs (b)(15)(i)(A) and (g)(1)(iii) and added paragraph (b)(15)(i)(C), effective Dec. 21, 2015.]

## Case Notes

**LexisNexis® Notes**

Constitutional Law : Congressional Duties & Powers : Reserved Powers
Energy & Utilities Law : Mining Industry : Coal : General Overview
Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation
Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : General Overview
Energy & Utilities Law : Oil, Gas & Mineral Interests : General Overview
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**Constitutional Law : Congressional Duties & Powers : Reserved Powers**

*Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497* (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- While it is possible to read the provision in *40 C.F.R. § 122.26(d)(2)(iv)(D)(1)* as requiring the regulation of site planning activities by third party construction professionals, a better reading of the provision is that it requires the municipal separate storm sewer systems operator to consider water quality impacts in planning municipal separate storm sewer system connections at construction sites. Therefore, the provision poses no Tenth Amendment problem. *Go To Headnote*

**Energy & Utilities Law : Mining Industry : Coal : General Overview**

*American Mining Congress v. United States EPA, 965 F.2d 759, 1992 U.S. App. LEXIS 11656* (9th Cir May 27, 1992).

***Overview:*** *Petitioners failed to show that a rule adopted by the Environmental Protection Agency to regulate storm water discharges to prevent pollutants was retroactive or improperly applied to certain inactive mining operations.*

- The Environmental Protection Agency's storm water rule, *40 C.F.R. 122.26(b)(14)(iii)*, exempts from the definition of "associated with industrial activity" non-coal mines reclaimed under federal or state laws similar to the Surface Mining Control and Rehabilitation Act, *30 U.S.C.S. §§ 1201*-1328. Because sites reclaimed under older laws might continue to discharge contaminated storm water, the EPA limits the exemption to mines released from reclamation requirements on or after the rule's effective date. *55 Fed. Reg. 48,033. Go To Headnote*

**Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation**

*American Mining Congress v. United States EPA, 965 F.2d 759, 1992 U.S. App. LEXIS 11656* (9th Cir May 27, 1992).

***Overview:*** *Petitioners failed to show that a rule adopted by the Environmental Protection Agency to regulate storm water discharges to prevent pollutants was retroactive or improperly applied to certain inactive mining operations.*

- The Environmental Protection Agency's (EPA) storm water rule excludes from the definition of "associated with industrial activity" those discharges from inactive mines that have been reclaimed under the Surface Mining Control and Rehabilitation Act, *30 US.C.S. § 1201*-1328, or equivalent federal or state laws for non-coal mines. *40 C.F.R. § 122.26(b)(14)(iii)*. *Go To Headnote*

**Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : General Overview**

*American Mining Congress v. United States EPA, 965 F.2d 759, 1992 U.S. App. LEXIS 11656* (9th Cir May 27, 1992).

***Overview:*** *Petitioners failed to show that a rule adopted by the Environmental Protection Agency to regulate storm water discharges to prevent pollutants was retroactive or improperly applied to certain inactive mining operations.*

- The national pollutant discharge elimination system (NPDES) permit program of the Clean Water Act, (Act), *33 U.S.C.S. §§ 1311*(a), 1342(a), regulates point source discharges of pollutants from inactive mines regardless of whether the Environmental Protection Agency (EPA) classifies such discharges as associated with industrial activity under *33 U.S.C.S. § 1342*(p)(2)(B). Nothing in the language or legislative history of the abandoned mine lands program or the Surface Mining Control and Rehabilitation Act, *30 U.S.C.S. § 1201*-1238, indicates a Congressional intent to exempt inactive mines from the NPDES permit requirement. There is no evidence that the EPA's storm water rule, *40 C.F.R. § 122.26(b)(14)(iii)*, duplicates, varies, or frustrates the goals or administration of SMCRA. The rule is fully consistent with the EPA's obligation to cooperate with the Secretary of the Interior in carrying out the provisions of SMCRA. *30 U.S.C.S. § 1292*(b). *Go To Headnote*
- The Environmental Protection Agency's (EPA) storm water rule excludes from the definition of "associated with industrial activity" those discharges from inactive mines that have been reclaimed under the Surface Mining Control and Rehabilitation Act, *30 US.C.S. § 1201*-1328, or equivalent federal or state laws for non-coal mines. *40 C.F.R. § 122.26(b)(14)(iii)*. *Go To Headnote*

- The Environmental Protection Agency's storm water rule, *40 C.F.R. 122.26(b)(14)(iii)*, exempts from the definition of "associated with industrial activity" non-coal mines reclaimed under federal or state laws similar to the Surface Mining Control and Rehabilitation Act, *30 U.S.C.S. §§ 1201*-1328. Because sites reclaimed under older laws might continue to discharge contaminated storm water, the EPA limits the exemption to mines released from reclamation requirements on or after the rule's effective date. *55 Fed. Reg. 48,033.* *Go To Headnote*

**Energy & Utilities Law : Oil, Gas & Mineral Interests : General Overview**

*American Mining Congress v. United States EPA, 965 F.2d 759, 1992 U.S. App. LEXIS 11656* (9th Cir May 27, 1992).

***Overview:*** *Petitioners failed to show that a rule adopted by the Environmental Protection Agency to regulate storm water discharges to prevent pollutants was retroactive or improperly applied to certain inactive mining operations.*

- The Environmental Protection Agency's storm water rule, *40 C.F.R. § 122.26(b)(14)(iii)*, requires only that owners or operators apply for permits for future discharges from inactive mines. Although the rule may reduce the financial attractiveness of mine ownership, it does not impose liability for past conduct. *Go To Headnote*

**Energy & Utilities Law : Utility Companies : General Overview**

*Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497* (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- Reducing the discharge of pollutants from a municipal separate storm sewer systems that receives discharges from areas of new development according to *40 C.F.R. § 122.26(d)(2)(iv)(A)* may be accomplished without any regulation of developers; an municipal separate storm sewer systems operator could reduce pollutant discharges by constructing artificial wetlands or implementing other structural treatment controls. A municipal separate storm sewer systems could prevent illicit discharges as required by *40 C.F.R. § 122.26(d)(2)(iv)(B)* simply by sealing off points of entry where illicit discharges are detected. Moreover, this option allows a municipal separate storm sewer system simply to request a discharger to seek its own National Pollutant Discharge Elimination System permitting arrangement, relieving the municipal separate storm sewer system of any direct regulation of problem dischargers. A municipal separate storm sewer system may similarly monitor and control pollutants from landfills and hazardous waste facilities in satisfaction of *40 C.F.R. § 122.26(d)(2)(iv)(C)* without directly regulating third parties. Finally, a municipal separate storm sewer system may maintain structural and non-structural best management practices regarding construction sites in satisfaction of *40 C.F.R. § 122.26(d)(2)(iv)(D)* without regulating third parties. *Go To Headnote*

**Environmental Law : Hazardous Wastes & Toxic Substances : Resource Conservation & Recovery Act : General Overview**

*Buchholz v. Dayton Int'l Airport, 1995 U.S. Dist. LEXIS 9490* (SD Ohio June 26, 1995).

***Overview:*** *The court granted a preliminary injunction in a citizens' suit against the city airport, whose stormwater detention basin received chemicals from the deicing of aircraft, violating the Clean Water Act and the Resource Conservation and Recovery Act.*

- The term "stormwater discharge associated with industrial activity" includes transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171, which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance, including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication, equipment cleaning operations, airport deicing operations or which are otherwise identified under 40 C.F.R. §§ (b)(14)(i)-(vii) or (ix)-(xi) are associated with industrial activity, pursuant to *40 C.F.R. § 122.26(b)(14)*(viii). *Go To Headnote*

**Environmental Law : Hazardous Wastes & Toxic Substances : Resource Conservation & Recovery Act :**

*Jones v. E.R. Snell Contr., Inc., 333 F. Supp. 2d 1344, 2004 U.S. Dist. LEXIS 11062* (ND Ga Jan. 30, 2004).

***Overview:*** *A county was granted summary judgment because landowner failed to prove county was a "discharger" under Clean Water Act; claims were not covered by the RCRA; and a state law claimed was barred by the landowner's failure to provide ante-litem notice.*

- Solid waste, as defined by the Resource Conservation and Recovery Act, does not include solid or dissolved materials in industrial discharges which are point sources subject to permits under *33 U.S.C.S. § 1342.* *42 U.S.C.S. § 6903*(27). An industrial activity which would give rise to an industrial discharge includes construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. *40 C.F.R. § 122.26(b)(14)(x)*. *Go To Headnote*

**Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances**

*Buchholz v. Dayton Int'l Airport, 1995 U.S. Dist. LEXIS 9490* (SD Ohio June 26, 1995).

***Overview:*** *The court granted a preliminary injunction in a citizens' suit against the city airport, whose stormwater detention basin received chemicals from the deicing of aircraft, violating the Clean Water Act and the Resource Conservation and Recovery Act.*

- The term "stormwater discharge associated with industrial activity" includes transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171, which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance, including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication, equipment cleaning operations, airport deicing operations or which are otherwise identified under 40 C.F.R. §§ (b)(14)(i)-(vii) or (ix)-(xi) are associated with industrial activity, pursuant to *40 C.F.R. § 122.26(b)(14)*(viii). *Go To Headnote*

**Environmental Law : Natural Resources & Public Lands : Wetlands Management**

*N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., Llc, 278 F. Supp. 2d 654, 2003 U.S. Dist. LEXIS 13674* (ED NC July 25, 2003).

***Overview:*** *Plaintiffs had standing to bring Clean Water Act action against tract owners who had conducted ditching activities where there was an injury in fact, fairly traceable to the ditching activities, and the relief sought would redress their injuries.*

- Under the Clean Water Act (CWA), a permit is required for stormwater discharges associated with industrial activity. *33 U.S.C.S. § 1342*(p)(3)(A). It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary. Environmental Protection Agency (EPA) regulations related to the National Pollutant Discharge Elimination System (NPDES) program define "industrial activity" to include construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. *40 C.F.R. § 122.26(b)(14)(x)*. *Go To Headnote*

**Environmental Law : Solid Wastes : Permits : General Overview**

*Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 2002 U.S. App. LEXIS 18844* (9th Cir Sept. 16, 2002).

***Overview:*** *Dairy operators were penalized for repeated violations of Clean Water Act and failure to obtain discharge permits; citizen-plaintiff's notice of suit was timely and proper.*

- Concentrated animal feeding operations (CAFO) are animal feeding operations where animals are stabled or confined for a total of 45 days or more in any 12 month period in an area where neither crops, vegetation or crop residue is sustained. *40 C.F.R. § 122.23(a)(3)*. A CAFO is subject to effluent guidelines, *40 C.F.R. § 412.12(a)*, and is considered to be engaged in industrial activities. *40 C.F.R. § 122.26(b)(14)(i)*, (v). Therefore, it must obtain an individual permit for storm water discharges. *33 U.S.C.S. § 1342*(p)(2)(B); Wash. Admin. Code §§ 173.220.020, 173.220.040. *Go To Headnote*

**Environmental Law : Solid Wastes : Resource Recovery & Recycling**

*Jones v. E.R. Snell Contr., Inc., 333 F. Supp. 2d 1344, 2004 U.S. Dist. LEXIS 11062* (ND Ga Jan. 30, 2004).

***Overview:*** *A county was granted summary judgment because landowner failed to prove county was a "discharger" under Clean Water Act; claims were not covered by the RCRA; and a state law claimed was barred by the landowner's failure to provide ante-litem notice.*

- Solid waste, as defined by the Resource Conservation and Recovery Act, does not include solid or dissolved materials in industrial discharges which are point sources subject to permits under *33 U.S.C.S. § 1342*. *42 U.S.C.S. § 6903*(27). An industrial activity which would give rise to an industrial discharge includes construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. *40 C.F.R. § 122.26(b)(14)(x)*. *Go To Headnote*

**Environmental Law : Water Quality : General Overview**

*Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497* (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- Operators of small municipal separate storm sewer system may opt to avoid the requirements of *33 U.S.C.S. § 1342*(p), Phase II, individual and general permits under an alternative permit option. *40 C.F.R. §§ 122.33(b)(2)(ii)*, *122.26(d)*. This alternative permit allows operators of small municipal separate storm sewer systems to seek individualized permission to discharge based on the permitting program established by the Phase I Rule for large and medium-sized municipal separate storm sewer systems. This option requires the permit seeker to propose management programs that address substantive concerns similar to those raised in the six minimum control measures designed to protect water quality addressing illicit discharges, but does not require the permit seeker to regulate the actions of third parties upstream from the point of discharge to federal waters. *Go To Headnote*

*Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497* (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- *40 C.F.R. § 122.26(d)(2)(iv)(B)(6)*requires permit seekers to propose programs to counter illicit discharges, including a description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : General Overview**

*Nrdc v. County of L.A., 725 F.3d 1194, 2013 U.S. App. LEXIS 16416* (9th Cir Aug. 8, 2013), writ of certiorari denied by *134 S. Ct. 2135, 188 L. Ed. 2d 1124, 2014 U.S. LEXIS 3212, 82 U.S.L.W. 3650 (U.S. 2014).*

***Overview:*** *Pollution exceedances detected at monitoring stations of the county and the county flood control district were sufficient to establish the county defendants' liability as a matter of law for violations of the terms of their National Pollutant Discharge Elimination System permit issued pursuant to the Clean Water Act.*

- Federal regulations define a municipal separate storm sewer system as: 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 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; (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. *40 C.F.R. § 122.26(b)(8)*. Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, a municipal separate storm sewer system conveys only untreated stormwater. *40 C.F.R. § 122.26(a)(7)*, (b)(8). *Go To Headnote*

• An "outfall" is defined as a point source at the point where a municipal separate storm sewer discharges to waters of the United States. *40 C.F.R. § 122.26(b)(9)*. *Go To Headnote*

*Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 2013 U.S. App. LEXIS 6692* (9th Cir Apr. 3, 2013).

***Overview:*** *Resource Conservation and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.S. §§ 6901-6992k, claim failed because wood preservative that escaped from the utility poles through normal wear and tear was not solid waste, as it was applied to utility poles to preserve them and was being used for its intended purpose, not discarded.*

• The Standard Industrial Classification (SIC) Codes for communication and electrical services are 4813 and 4911, respectively. U.S. Dep't of Labor, Occupational Safety & Health Admin., SIC Division Structure, available at *http://www.osha.gov/pls/imis/sic=hr4* manual.html (last visited March 27, 2013). These SIC Codes do not appear to be included or implicated in *40 C.F.R. § 122.26(b)(14)*. In contrast, the SIC codes for facilities that preserve wood (2491) and for construction of power lines (1623) involving greater than five acres are covered by § 122.26(b)(14)(ii) and (x). *Go To Headnote*

*Northwest Envtl. Def. Ctr. v. Brown, 640 F.3d 1063, 2011 U.S. App. LEXIS 10052* (9th Cir May 17, 2011), reversed by, remanded by *133 S. Ct. 1326, 185 L. Ed. 2d 447, 2013 U.S. LEXIS 2373, 81 U.S.L.W. 4190, 24 Fla. L. Weekly Fed. S 110, 76 Env't Rep. Cas. (BNA) 1001, 43 Envtl. L. Rep. 20062 (U.S. 2013).*

***Overview:*** *Stormwater runoff from logging roads into ditches, culverts, and channels being discharged into forest streams and rivers was a point source stormwater discharge associated with industrial activity under 33 U.S.C.S. § 1342(p) and 33 U.S.C.S. § 1362(14) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., for which a permit was required.*

• For purposes of § 402(p) *(33 U.S.C.S. § 1342*(p)) of the Clean Water Act, *33 U.S.C.S. § 1251* et seq., the definition of a "facility engaging in industrial activity" is very broad. The applicable Phase I rule provides that many industrial facilities beyond traditional industrial plants are considered to be engaging in "industrial activity," including mines, landfills, junkyards, and construction sites. *40 C.F.R. § 122.26(b)(14)(iii)*, (v), (x). *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : Discharges**

*S.F. Baykeeper v. Levin Enters., 2013 U.S. Dist. LEXIS 178501* (ND Cal Dec. 18, 2013).

***Overview:*** *Terminal operators were awarded summary adjudication in part in action by an advocacy group for violation of Clean Water Act because group's notice letter was inadequate under 40 C.F.R. § 135.3; there was no mention of the word "commingling" or idea that discharges from activities covered by permit mixed with discharges from activities not covered.*

• Most discharges composed entirely of storm water are exempt from the Clean Water Act's (CWA's) permitting requirements, but permits are required for discharges associated with "industrial activity." *33 U.S.C.S. § 1342*(p)(1) and (2). The Environmental Protection Agency's (EPA's) implementing regulations at *40 C.F.R. § 122.26* require National Pollutant Discharge Elimination System (NPDES) permit authorization for facilities engaged in industrial activity to discharge to United States waters. There are 11 categories of facilities engaged in industrial activity, grouped according to Standard Industrial Classification (SIC) codes. *40 C.F.R. § 122.26(b)(14)*. Marine transportation facilities are SIC code 4491; industrial activities at transportation facilities are defined as the portions of the facility involved in vehicle maintenance, equipment cleaning, or airport deicing operations. *Go To Headnote*

*Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 2013 U.S. App. LEXIS 6692* (9th Cir Apr. 3, 2013).

***Overview:*** *Resource Conservation and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.S. §§ 6901-6992k, claim failed because wood preservative that escaped from the utility poles through normal wear and tear was not solid waste, as it was applied to utility poles to preserve them and was being used for its intended purpose, not discarded.*

- The Environmental Protection Agency (EPA) includes steam electric power generating facilities in the definition of industrial activity, but rejects including major electrical powerline corridors in the regulation. *40 C.F.R. § 122.26(b)(14)(vii)*; National Pollutant Discharge Elimination System Application Regulations for Storm Water Discharges, *53 Fed. Reg. 49,416, 49,432* (proposed Dec. 7, 1988). The EPA prefers that storm water discharges from major powerline corridors not be classified as storm water discharges associated with industrial activity, but rather be part of the class of discharges for which storm water permits are required under Phase II. 55 Fed. Reg. at 48,015 (final rule adopting that approach). If the EPA has rejected including major powerline corridors in the definition of industrial activity, it is reasonable to conclude that EPA did not intend to include individual residential and commercial wooden utility poles in that definition, either. *Go To Headnote*

*Northwest Envtl. Def. Ctr. v. Brown, 640 F.3d 1063, 2011 U.S. App. LEXIS 10052* (9th Cir May 17, 2011), reversed by, remanded by *133 S. Ct. 1326, 185 L. Ed. 2d 447, 2013 U.S. LEXIS 2373, 81 U.S.L.W. 4190, 24 Fla. L. Weekly Fed. S 110, 76 Env't Rep. Cas. (BNA) 1001, 43 Envtl. L. Rep. 20062 (U.S. 2013).*

***Overview:*** *Stormwater runoff from logging roads into ditches, culverts, and channels being discharged into forest streams and rivers was a point source stormwater discharge associated with industrial activity under 33 U.S.C.S. § 1342(p) and 33 U.S.C.S. § 1362(14) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., for which a permit was required.*

- The 1987 amendments to the Clean Water Act (CWA), *33 U.S.C.S. § 1251* et seq., do not exempt from the National Pollutant Discharge Elimination System (NPDES) permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers. This collected runoff constitutes a point source discharge of stormwater associated with industrial activity under the terms of § 502(14), *(33 U.S.C.S. § 1362*(14)) of the CWA, *33 U.S.C.S. § 1251* et seq., and § 402(p) *(33 U.S.C.S. § 1342*(p)) of the CWA. Such a discharge requires an NPDES permit. If logging activity is industrial in nature, the EPA is not free to create exemptions from permitting requirements for such activity. The reference to the Silvicultural Rule in *40 C.F.R. § 122.26(b)(14)* does not, indeed cannot, exempt such discharges from EPA's Phase I regulations requiring permits for discharges associated with industrial activity. *Go To Headnote*

*Hughey v. Jms Dev. Corp., 1993 U.S. Dist. LEXIS 20428* (ND Ga Mar. 29, 1993).

***Overview:*** *A developer was required to have a permit before discharging storm water, and prior acquisition of the permit was not grounds to amend the court's order; and there was a genuine issue of material fact as to property owner's standing.*

- Until October 31, 1992, § 402(p) of the Clean Water Act, *33 U.S.C.S. § 1342*(p), prohibited the Environmental Protection Agency, or states to which issue National Pollutant Discharge Elimination System (NPDES) permitting authority had been delegated, from requiring NPDES permits prior to October 1, 1992 for storm-water discharges. § 402(p)(1). The section, however, excepted from this moratorium discharges associated with industrial activity. § 402(p)(2)(B). Federal regulations define storm water discharge associated with industrial activity as construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale. *40 C.F.R. § 122.26(b)(14)(x)*. *Go To Headnote*

*American Mining Congress v. United States EPA, 965 F.2d 759, 1992 U.S. App. LEXIS 11656* (9th Cir May 27, 1992).

***Overview:*** *Petitioners failed to show that a rule adopted by the Environmental Protection Agency to regulate storm water discharges to prevent pollutants was retroactive or improperly applied to certain inactive mining operations.*

- The Environmental Protection Agency (EPA) may require a permit for a discharge associated with industrial activity. Congress did not stipulate that the activity must occur concurrently with the discharge of storm water. The EPA has determined that discharges from areas of past industrial activity at a variety of facilities, including mines, may be associated with that industrial activity. *40 C.F.R. § 122.26(b)(14)(iii)*. The definition of discharge associated with industrial activity includes discharges from areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. This conclusion is consistent with the language of the Clean Water Act, *33 U.S.C.S. § 1342*(p)(2)(B). *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : Navigable Waters**

*Nrdc v. County of L.A., 636 F.3d 1235, 2011 U.S. App. LEXIS 4647* (9th Cir Mar. 10, 2011), reprinted as amended at *673 F.3d 880, 2011 U.S. App. LEXIS 14443 (9th Cir. Cal. 2011),* opinion withdrawn by, opinion replaced by *2011 U.S. App. LEXIS 26281* (9th Cir. Cal. July 13, 2011).

***Overview:*** *In a Clean Water Act case, 33 U.S.C.S. § 1251 et seq., environmental groups showed that, after stormwater with standards-exceeding pollutants passed through pollution monitoring stations in municipal separate storm sewer systems owned and operated by flood control district it was discharged into two rivers, so judgment for district was reversed.*

- The Environmental Protection Agency has interpreted "waters of the United States" to include intrastate lakes, rivers, streams (including intermittent streams) the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce and tributaries of those waters. *40 C.F.R. § 122.2(c)*, (e). At least some outfalls for the municipal separate storm sewer systems were downstream from the mass-emissions stations. Under *40 C.F.R. § 122.26(9)*, outfall means a point source at the point where a municipal separate storm sewer discharges to waters of the United States. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : Point Sources**

*Nrdc, Inc. v. County of Los Angeles, 673 F.3d 880, 2011 U.S. App. LEXIS 14443* (9th Cir July 13, 2011), reversed by, remanded by *133 S. Ct. 710, 184 L. Ed. 2d 547, 2013 U.S. LEXIS 597, 23 Fla. L. Weekly Fed. S 547, 75 Env't Rep. Cas. (BNA) 1641, 43 Envtl. L. Rep. 20004 (U.S. 2013).*

***Overview:*** *County flood control district was liable under the CWA for discharges of polluted stormwater into two watershed rivers based on detection of pollutants at mass-emissions monitoring stations that were located within a municipal separate storm sewer system (ms4). However, liability for discharges into two other rivers was not established.*

- Under federal regulations, a municipal separate storm sewer system is 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 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 (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. *40 C.F.R. § 122.26(b)(8)*. *Go To Headnote*

Na Mamo O "aha'ino v. *Galiher, 28 F. Supp. 2d 1258, 1998 U.S. Dist. LEXIS 18924* (D Haw Nov. 25, 1998).

***Overview:*** *No National Pollutant Discharge Elimination System permit was required where construction activities on farm land did not fall within the parameters of the regulation and were not carried out pursuant to a larger common plan of development.*

- 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. *33 U.S.C.S. § 1362*(14). Construction, as described in *40 C.F.R. § 122.26(b)(14)(x)*, is a point source activity. Non-point source pollution is not specifically defined in the Clean Water Act, but is described by the Ninth Circuit as any source of water pollution or pollutants not associated with a discrete conveyance. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Overview**

*S.F. Baykeeper v. Levin Enters., 2013 U.S. Dist. LEXIS 178501* (ND Cal Dec. 18, 2013).

***Overview:*** *Terminal operators were awarded summary adjudication in part in action by an advocacy group for violation of Clean Water Act because group's notice letter was inadequate under 40 C.F.R. § 135.3; there was no mention of the word "commingling" or idea that discharges from activities covered by permit mixed with discharges from activities not covered.*

- The Clean Water Act's (CWA's) regulations allow for the Environmental Protection Agency's (EPA's) Director or the administrator of an approved National Pollutant Discharge Elimination System (NPDES) program to require permit coverage for a discharge that contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. *40 C.F.R. § 122.26(a)(1)(v)*. California has nine Regional Water Quality Control Boards. Cal. Water Code. §§ 13100, 13225. The Regional Boards have appointed board members, an executive officer, and staff. Cal Water Code. §§ 13201, 13220. *Go To Headnote*

*Nrdc v. County of L.A., 725 F.3d 1194, 2013 U.S. App. LEXIS 16416* (9th Cir Aug. 8, 2013), writ of certiorari denied by *134 S. Ct. 2135, 188 L. Ed. 2d 1124, 2014 U.S. LEXIS 3212, 82 U.S.L.W. 3650 (U.S. 2014).*

***Overview:*** *Pollution exceedances detected at monitoring stations of the county and the county flood control district were sufficient to establish the county defendants' liability as a matter of law for violations of the terms of their National Pollutant Discharge Elimination System permit issued pursuant to the Clean Water Act.*

- Congress amended the Clean Water Act in 1987 to grant the Environmental Protection Agency (EPA) the express authority to create a separate permitting program for municipal separate storm sewer. *33 U.S.C.S. § 1342*(p)(2), (3). In enacting these amendments, Congress recognized that for large urban areas, municipal separate storm sewer permitting cannot be accomplished on a source-by-source basis. The amendments therefore give the EPA, or a state like California to which the EPA has delegated permitting authority, broad discretion to issue permits on a system-wide or jurisdiction-wide basis, *40 C.F.R. § 122.26(a)(1)(v)*, rather than requiring cities and counties to obtain separate permits for millions of individual stormwater discharge points. This increased flexibility is crucial in easing the burden of issuing stormwater permits for both permitting authorities and permittees. *Go To Headnote*

- Environmental Protection Agency (EPA) regulations make clear that while municipal separate storm sewer NPDES permits need not require monitoring of each stormwater source at the precise point of discharge, they may instead establish a monitoring scheme sufficient to yield data which are representative of the monitored activity. *40 C.F.R. § 122.48(b)*. In fact, EPA regulations require permittees to propose a monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations) and explain why the chosen location is representative. *40 C.F.R. § 122.26(d)(2)(iii)(D)*. *Go To Headnote*

*Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 2013 U.S. App. LEXIS 6692* (9th Cir Apr. 3, 2013).

***Overview:*** *Resource Conservation and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.S. §§ 6901-6992k, claim failed because wood preservative that escaped from the utility poles through normal wear and tear was not solid waste, as it was applied to utility poles to preserve them and was being used for its intended purpose, not discarded.*

- *40 C.F.R. § 122.26(b)(14)(iii)*, (vii) identifies steam power plants and certain oil and gas transmission facilities as associated with industrial activity. However, power plants are plainly industrial plants, § 122.26(b)(14), while power grids are not, especially given EPA's decision to exempt major electrical powerline corridors from stormwater regulation, § 122.26(b)(14)(vii). If EPA exempts high voltage transmission lines and associated towers from National Pollutant Discharge Elimination System permits, it makes even less sense to require them for neighborhood utility poles. As for likening facilities that transmit electricity to those that convey natural gas, § 122.26(b)(14) suggests that it is the substance being transported-petroleum products-that gives rise to the regulation. Section 122.26(b)(14)(iii) covers only oil and gas transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations. The same contamination concerns do not apply to electricity transmission. *Go To Headnote*

*Northwest Envtl. Def. Ctr. v. Brown, 640 F.3d 1063, 2011 U.S. App. LEXIS 10052* (9th Cir May 17, 2011), reversed by, remanded by *133 S. Ct. 1326, 185 L. Ed. 2d 447, 2013 U.S. LEXIS 2373, 81 U.S.L.W. 4190, 24 Fla. L. Weekly Fed. S 110, 76 Env't Rep. Cas. (BNA) 1001, 43 Envtl. L. Rep. 20062 (U.S. 2013).*

***Overview:*** *Stormwater runoff from logging roads into ditches, culverts, and channels being discharged into forest streams and rivers was a point source stormwater discharge associated with industrial activity under 33 U.S.C.S. § 1342(p) and 33 U.S.C.S. § 1362(14) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., for which a permit was required.*

- For purposes of § 402(p) *(33 U.S.C.S. § 1342*(p)) of the Clean Water Act, *33 U.S.C.S. § 1251* et seq., the definition of a "facility engaging in industrial activity" is very broad. The applicable Phase I rule provides that many industrial facilities beyond traditional industrial plants are considered to be engaging in "industrial activity," including mines, landfills, junkyards, and construction sites. *40 C.F.R. § 122.26(b)(14)(iii)*, (v), (x). *Go To Headnote*

*Nrdc v. County of L.A., 636 F.3d 1235, 2011 U.S. App. LEXIS 4647* (9th Cir Mar. 10, 2011), reprinted as amended at *673 F.3d 880, 2011 U.S. App. LEXIS 14443 (9th Cir. Cal. 2011),* opinion withdrawn by, opinion replaced by *2011 U.S. App. LEXIS 26281* (9th Cir. Cal. July 13, 2011).

***Overview:*** *In a Clean Water Act case, 33 U.S.C.S. § 1251 et seq., environmental groups showed that, after stormwater with standards-exceeding pollutants passed through pollution monitoring stations in municipal separate storm sewer systems owned and operated by flood control district it was discharged into two rivers, so judgment for district was reversed.*

- Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, municipal separate storm sewer systems contain and convey only untreated stormwater. *40 C.F.R. § 122.26(a)(7)*, (b)(8). *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations**

*Md. Dep't of the Env't v. Riverkeeper, 2016 Md. LEXIS 97* (Md Mar. 11, 2016).

***Overview:*** *Maryland Department of the Environment's decision to issue several stormwater discharge permits to counties in Maryland was supported by substantial evidence, was not arbitrary and capricious, and was legally correct; permits also satisfied federal monitoring requirements and did not violate public participation mandates in 33 U.S.C.S. § 1251(e).*

- Pursuant to *40 C.F.R. § 122.26(d)(2)(iii)(D)*, applicants for large municipal separate storm sewer systems must submit a proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), and, among other things, why the location is representative. *Go To Headnote*

- Reapplications should focus on maintenance and improvement of municipal separate storm sewer system storm water management programs that were required in the initial applications. The permitting authority can make changes to the municipal separate storm sewer system monitoring program during the reapplication period, but such changes must be appropriate and useful. In other words, when a permittee reapplies for a discharge permit, and if the permitting authority reissues the permit, it is the permitting authority's responsibility to ensure that the reissued permit contains programs that are adequate in light of the initial application requirements in *40 C.F.R. § 122.26(d)*. *Go To Headnote*

*Northwest Envtl. Def. Ctr. v. Grabhorn, Inc., 2009 U.S. Dist. LEXIS 101359* (D Or Oct. 30, 2009).

***Overview:*** *CWA covered discharges to navigable surface waters via hydrologically connected groundwater, but as to environmental groups' claim that landfill operator violated 33 U.S.C.S. § 1311(a) in relation to discharges into as opposed to from man-made pond, groups failed to establish that pond constituted "waters of United States" under 33 U.S.C.S. § 1362.*

- The Oregon Department of Environmental Quality (DEQ) typically regulates discharges of storm water associated with industrial activities through general National Pollution Discharge Elimination System (NPDES) permits. The DEQ

regulates industrial storm water discharges in most Oregon watersheds, including the Tualatin watershed, through the 1200-Z NPDES Permit. The 1200-Z NPDES Permit covers only discharges of storm water. Federal regulations define storm water as storm water runoff, snow melt runoff, and surface runoff and drainage. *40 C.F.R. § 122.26(b)(13)*. The DEQ further defines storm water as water from precipitation or snow melt that collects on or runs off outdoor surfaces such as buildings, roads, paved surfaces and unpaved land surfaces. Or. Admin. R. 340-044-0005(41). Although landfills, land application sites and open dumps can be covered under the 1200-Z NPDES Permit, the general permit is explicitly unavailable to landfills that discharge contaminated storm water, as defined by *40 C.F.R. § 445.2*, to waters of the United States. Federal regulations define "contaminated storm water" as storm water which comes in direct contact with landfill wastes, the waste handling and treatment areas, or landfill wastewater. *40 C.F.R. § 445.2(b)*. *Go To Headnote*

*Waterkeepers N. Cal. v. Ag Indus. Mfg., 375 F.3d 913, 2004 U.S. App. LEXIS 14657* (9th Cir July 16, 2004).

***Overview:*** *An advocate's notice to a manufacturer of intent-to-sue regarding alleged water pollution was adequate to confer jurisdiction. The letter put the manufacturer on notice of the alleged violations and gave it an opportunity to correct the problem.*

- The Clean Water Act, *33 U.S.C.S. § 1251* et seq., prohibits the discharge of pollutants into United States waters except as authorized by the statute. *33 U.S.C.S. § 1311.* The Act is administered largely through the National Pollution Discharge Elimination System (NPDES) permit program. *33 U.S.C.S. § 1342.* In 1987, the Act was amended to establish a framework for regulating storm water discharges through the NPDES system. *33 U.S.C.S. § 1342*(p). The discharge of pollutants without an NPDES permit, or in violation of a permit, is illegal. Much of the responsibility for administering the NPDES permitting system has been delegated to the states. *33 U.S.C.S. § 1342*(b). States may issue individual permits to industrial dischargers or may cover many dischargers under the terms of one general permit. *40 C.F.R. § 122.26(c)*. California has issued a general permit to cover industrial dischargers. Cal. Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES Gen. Permit No. CAS000001. In order to be covered under California's General Permit, individual dischargers must file a notice of intent with the state. Cal. Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES Gen. Permit No. CAS000001 at 1-2 p. 3. *Go To Headnote*

*River Ravine Rescue, Inc. v. City of S. St. Paul, 2004 U.S. Dist. LEXIS 12988* (D Minn July 9, 2004).

***Overview:*** *Environmental group's claim that defendant city discharged pollutants without a permit in violation of the Clean Water Act was dismissed on summary judgment, where the city had subsequently obtained a permit and the claim was mooted.*

- The Clean Water Act prohibits the discharge of any pollutant from a point source into navigable waters unless the discharge complies with the terms of a National Pollutant Discharge Elimination System (NPDES) permit. *33 U.S.C.S. §§ 1311*(a), 1342. NPDES permits establish discharge conditions aimed at maintaining the chemical, physical, and biological integrity of the Nation's waters. NPDES permits are required for storm water discharges from construction activity that disturbs at least five acres of total land area. NPDES permits are also required for storm water discharges from construction activity that disturbs less than five acres of total land area if the activity is part of a common plan of development that disturbs at least five acres. *40 C.F.R. § 122.26(a)(1)(ii)*, (b)(14)(x). *Go To Headnote*

*City of Abilene v. United States EPA, 325 F.3d 657, 2003 U.S. App. LEXIS 6305* (5th Cir Apr. 2, 2003).

***Overview:*** *EPA municipal permits under the Clean Water Act were upheld. The conditions of the permits were authorized under EPA's broad statutory discretion. Tenth Amendment was not violated; cities voluntarily chose the permits, as opposed to an alternative.*

- Because storm water inevitably contains pollutants such as sand or cellar dirt, *33 U.S.C.S. § 1362*(6), a National Pollutant Discharge Elimination System permit is required for the discharge of certain types of storm water into the waters of the United States. Permits for municipal and industrial storm water discharges are governed by *33 U.S.C.S. § 1342*(p) and *40 C.F.R. § 122.26*. While permits for discharges of storm water associated with industrial activity must impose

effluent limitations, 33 U.S.C.S. § 1342(p) authorizes the United States Environmental Protection Agency to issue permits for discharges from municipal separate storm sewer systems (MS4s) that effectively prohibit the introduction of non-storm water into the MS4 and establish management practices and other methods to reduce the discharge of pollutants to the maximum extent practicable. 33 U.S.C.S. § 1342(p)(3). This more flexible type of permit is referred to as a "management permit." Go To Headnote

Miss. River Revival, Inc. v. City of Minneapolis, 145 F. Supp. 2d 1062, 2001 U.S. Dist. LEXIS 6164 (D Minn May 2, 2001).

***Overview:*** *Plaintiffs claims were dismissed as moot where no relief that remained available under the federal statute would deter defendants from discharging storm water without a permit, which was the violation plaintiffs had alleged.*

- Storm water discharges are subject to the National Pollution Discharge Elimination System (NPDES) permitting requirements of the Clean Water Act, 33 U.S.C.S. § 1251 et seq. 33 U.S.C.S. § 1342(p). The Clean Water Act, 33 U.S.C.S. § 1251 et seq., strictly prohibits such discharges unless the discharger is in compliance with the NPDES requirements. 33 U.S.C.S. § 1311(a). The Minnesota Pollution Control Agency is required by law to take action on completed NPDES permit applications within one year. 40 C.F.R. § 122.26(e)(7)(ii). Go To Headnote

Na Mamo O "aha'ino v. Galiher, 28 F. Supp. 2d 1258, 1998 U.S. Dist. LEXIS 18924 (D Haw Nov. 25, 1998).

***Overview:*** *No National Pollutant Discharge Elimination System permit was required where construction activities on farm land did not fall within the parameters of the regulation and were not carried out pursuant to a larger common plan of development.*

- Section 301(a) of the Clean Water Act (act) prohibits the discharge of any pollutant into the nation's waters, except when specifically authorized under the act. 33 U.S.C.S. § 1311(a). Section 402(a) authorizes the issuance of National Pollution Discharge Elimination System (NPDES) permits to particular entities, allowing discharge of limited amounts of pollutants into surface waters. 33 U.S.C.S. § 1342(a). NPDES permits are required for storm water discharges from construction activity including clearing, grading, and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale. 40 C.F.R. § 122.26(b)(14)(x). Go To Headnote

American Mining Congress v. United States EPA, 965 F.2d 759, 1992 U.S. App. LEXIS 11656 (9th Cir May 27, 1992).

***Overview:*** *Petitioners failed to show that a rule adopted by the Environmental Protection Agency to regulate storm water discharges to prevent pollutants was retroactive or improperly applied to certain inactive mining operations.*

- The national pollutant discharge elimination system (NPDES) permit program of the Clean Water Act, (Act), 33 U.S.C.S. §§ 1311(a), 1342(a), regulates point source discharges of pollutants from inactive mines regardless of whether the Environmental Protection Agency (EPA) classifies such discharges as associated with industrial activity under 33 U.S.C.S. § 1342(p)(2)(B). Nothing in the language or legislative history of the abandoned mine lands program or the Surface Mining Control and Rehabilitation Act, 30 U.S.C.S. § 1201-1238, indicates a Congressional intent to exempt inactive mines from the NPDES permit requirement. There is no evidence that the EPA's storm water rule, 40 C.F.R. § 122.26(b)(14)(iii), duplicates, varies, or frustrates the goals or administration of SMCRA. The rule is fully consistent with the EPA's obligation to cooperate with the Secretary of the Interior in carrying out the provisions of SMCRA. 30 U.S.C.S. § 1292(b). Go To Headnote

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Permits**

Sherrill v. Mayor & City Council, 31 F. Supp. 3d 750, 2014 U.S. Dist. LEXIS 96512 (D Md July 16, 2014).

***Overview:*** *Pursuant to 42 U.S.C.S. § 6905(a), parties who were required to comply with state sediment control and stormwater management regulations could not be subjected to further inconsistent regulations. As to past owners and operators of the site, the complaint lacked sufficient factual allegations to state a claim under 42 U.S.C.S. § 6972(a)(1)(A), (B).*

- The Federal Water Pollution Control Act, 33 U.S.C.S. § 1251 et seq.??" commonly known as the Clean Water Act??"regulates the discharge of pollutants from point sources into the navigable waters of the United States. Permits are required for stormwater discharges associated with industrial activity. 40 C.F.R. § 122.26(a)(1)(ii). Federal law requires an analogous or more stringent regulatory requirement in those states authorized to administer their own permitting programs. 40 C.F.R. § 123.25(a)(9). Maryland has obtained such approval and, rather than requiring individual permits for each construction site, has opted to issue a general permit which covers new and existing storm water discharges that are composed in whole or in part of discharges associated with construction activity. Md. Code Regs. 26.08.04.09A(4). The Maryland permitting regulations state that permittees shall comply with requirements to obtain approval for (a) erosion and sediment control plans required under Md. Code Ann., Envir. tit. 4, subtit. 1; and (b) storm water management plans required under Md. Code Ann., Envir. tit. 4, subtit. 2. Md. Code Regs. 26.08.04.09A(5). Go To Headnote

Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 2013 U.S. App. LEXIS 6692 (9th Cir Apr. 3, 2013).

***Overview:*** *Resource Conservation and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.S. §§ 6901-6992k, claim failed because wood preservative that escaped from the utility poles through normal wear and tear was not solid waste, as it was applied to utility poles to preserve them and was being used for its intended purpose, not discarded.*

- The 1987 amendments to the Clean Water Act, 33 U.S.C.S. §§ 1251-1387, and its regulations establish a two-phase approach. In Phase I, EPA requires NPDES permits for the most significant stormwater discharges: those from a prior permitted source or large municipality; those that contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States; and those associated with industrial activity. 33 U.S.C.S. § 1342(p)(2). In Phase II, EPA requires NPDES permits for stormwater discharges from smaller municipal storm systems and construction sites that disturb between one and five acres. 40 C.F.R. § 122.26(a)(9)(i)(A)-(B). EPA retained authority to regulate other stormwater discharges on a local or regional, as-needed basis. 40 C.F.R. § 122.26(a)(9)(i)(C)-(D). Go To Headnote

- Among other things, the Environmental Protection Agency (EPA) reasonably can conclude that 40 C.F.R. § 122.26(b)(14) extends only to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities, not to temporary logging roads that lack a closer connection to traditional industrial sites. Utility poles may or may not be more permanent than logging roads, but, like stormwater runoff from such roads, runoff from utility poles is not directly related to manufacturing, processing or raw materials storage at an industrial plant. § 122.26(b)(14). Go To Headnote

- One reason why stormwater runoff from utility poles is not associated with industrial activity has to do with Standard Industrial Classification (SIC) codes, the classification system 40 C.F.R. § 122.26(b)(14) uses to define the industrial activities it covers. 40 C.F.R. § 122.26(b)(14)(ii)-(iii), (vi), (viii), (xi). No SIC code cited in § 122.26(b)(14) covers utility poles. Under 40 C.F.R. § 122.26(b)(14), the listed categories of facilities are considered to be engaging in "industrial activity." The EPA uses SIC codes in defining the universe of regulated industrial activities. Go To Headnote

Nrdc v. County of L.A., 636 F.3d 1235, 2011 U.S. App. LEXIS 4647 (9th Cir Mar. 10, 2011), reprinted as amended at 673 F.3d 880, 2011 U.S. App. LEXIS 14443 (9th Cir. Cal. 2011), opinion withdrawn by, opinion replaced by 2011 U.S. App. LEXIS 26281 (9th Cir. Cal. July 13, 2011).

***Overview:*** *In a Clean Water Act case, 33 U.S.C.S. § 1251 et seq., environmental groups showed that, after stormwater with standards-exceeding pollutants passed through pollution monitoring stations in municipal separate storm sewer systems owned and operated by flood control district it was discharged into two rivers, so judgment for district was reversed.*

- "Co-permittee" means a permittee to a National Pollutant Discharge Elimination System permit that is only responsible for permit conditions relating to the discharge for which it is operator. 40 C.F.R. § 122.26(b)(1). Go To Headnote

Serv. Oil v. United States EPA, 590 F.3d 545, 2009 U.S. App. LEXIS 28384 (8th Cir Dec. 28, 2009).

***Overview:*** *Because violation of the permit application regulations was not within the purview of 33 U.S.C.S. § 1319(g)(1)(A), the court vacated the order assessing a civil penalty primarily on petitioner company's complete failure to apply for its storm water permit prior to starting construction, and remanded for redetermination of the penalty amount.*

- A person proposing a new discharge shall submit an application before the date on which the discharge is to commence. 40 C.F.R. §§ 1221(c)(1), *122.26(c)*. Failure to comply with that requirement cannot be a violation of *33 U.S.C.S. § 1318*(a) because that statute's record-keeping requirements are expressly limited to the owner or operator of any point source. Before any discharge, there is no point source. Thus, the obvious authority for Environmental Protection Agency's permit application regulations was its general rule-making authority under *33 U.S.C.S. § 1361*(a), not its authority in *33 U.S.C.S. § 1318* to require record-keeping by existing point sources. The plain meaning of *33 U.S.C.S. § 1318*(a) is controlling and resolves the issue. *Go To Headnote*

*Northwest Envtl. Def. Ctr. v. Grabhorn, Inc., 2009 U.S. Dist. LEXIS 101359* (D Or Oct. 30, 2009).

***Overview:*** *CWA covered discharges to navigable surface waters via hydrologically connected groundwater, but as to environmental groups' claim that landfill operator violated 33 U.S.C.S. § 1311(a) in relation to discharges into as opposed to from man-made pond, groups failed to establish that pond constituted "waters of United States" under 33 U.S.C.S. § 1362.*

- The Oregon Department of Environmental Quality (DEQ) typically regulates discharges of storm water associated with industrial activities through general National Pollution Discharge Elimination System (NPDES) permits. The DEQ regulates industrial storm water discharges in most Oregon watersheds, including the Tualatin watershed, through the 1200-Z NPDES Permit. The 1200-Z NPDES Permit covers only discharges of storm water. Federal regulations define storm water as storm water runoff, snow melt runoff, and surface runoff and drainage. *40 C.F.R. § 122.26(b)(13)*. The DEQ further defines storm water as water from precipitation or snow melt that collects on or runs off outdoor surfaces such as buildings, roads, paved surfaces and unpaved land surfaces. Or. Admin. R. 340-044-0005(41). Although landfills, land application sites and open dumps can be covered under the 1200-Z NPDES Permit, the general permit is explicitly unavailable to landfills that discharge contaminated storm water, as defined by *40 C.F.R. § 445.2*, to waters of the United States. Federal regulations define "contaminated storm water" as storm water which comes in direct contact with landfill wastes, the waste handling and treatment areas, or landfill wastewater. *40 C.F.R. § 445.2(b)*. *Go To Headnote*

*Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 435 F.3d 758, 2006 U.S. App. LEXIS 2009* (7th Cir Jan. 27, 2006).

***Overview:*** *Organizations representing individuals in the oil and gas industries lacked standing to challenge a general permit for uncontaminated storm water discharges issued by the EPA under 33 U.S.C.S. § 1342, as the organizations' members were exempt from the challenged permitting requirements.*

- In 1999, the Environmental Protection Agency issued its Phase II storm water rules, which define as additional discharges subject to the general permitting requirements small construction sites (one to five acres), smaller municipalities, and additional sources that might be designated on a case-by-case basis. *40 C.F.R. § 122.26(b)(15)*. *Go To Headnote*

*Waterkeepers N. Cal. v. Ag Indus. Mfg., 375 F.3d 913, 2004 U.S. App. LEXIS 14657* (9th Cir July 16, 2004).

***Overview:*** *An advocate's notice to a manufacturer of intent-to-sue regarding alleged water pollution was adequate to confer jurisdiction. The letter put the manufacturer on notice of the alleged violations and gave it an opportunity to correct the problem.*

- The Clean Water Act, *33 U.S.C.S. § 1251* et seq., prohibits the discharge of pollutants into United States waters except as authorized by the statute. *33 U.S.C.S. § 1311.* The Act is administered largely through the National Pollution Discharge Elimination System (NPDES) permit program. *33 U.S.C.S. § 1342.* In 1987, the Act was amended to establish a framework for regulating storm water discharges through the NPDES system. *33 U.S.C.S. § 1342*(p). The discharge of pollutants without an NPDES permit, or in violation of a permit, is illegal. Much of the responsibility for administering the NPDES permitting system has been delegated to the states. *33 U.S.C.S. § 1342*(b). States may issue

individual permits to industrial dischargers or may cover many dischargers under the terms of one general permit. *40 C.F.R. § 122.26(c)*. California has issued a general permit to cover industrial dischargers. Cal. Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES Gen. Permit No. CAS000001. In order to be covered under California's General Permit, individual dischargers must file a notice of intent with the state. Cal. Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES Gen. Permit No. CAS000001 at 1-2 p. 3. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Storm Water Discharges**

*Department of Finance v. Commission on State Mandates, 1 Cal. 5th 749, 378 P.3d 356, 378 P.3d 356, 2016 Cal. LEXIS 7123* (Cal Aug. 29, 2016).

***Overview:*** *Local agencies operating storm drain systems were entitled to reimbursement from the state under Cal. Const., art. XIII B, § 6, for the costs of complying with permit conditions requiring trash receptacles and inspections because these conditions were not federal mandates under the exception in Gov. Code, § 17556, subd. (c), but were state-imposed.*

- State law makes a regional water quality control board responsible for regulating discharges of waste within its jurisdiction. Wat. Code, §§ 13260, 13263. This regulatory authority includes the power to inspect the facilities of any person to ascertain whether waste discharge requirements are being complied with. Wat. Code, § 13267, subd. (c). Thus, state law imposes an overarching mandate that the regional board inspect facilities and sites. In addition, federal law and practice require the regional board to inspect all industrial facilities and construction sites. Under the Clean Water Act, *33 U.S.C. § 1251* et seq., the State Water Resources Control Board, as an issuer of National Pollutant Discharge Elimination System permits, is required to issue permits for storm water discharges associated with industrial activity. *33 U.S.C. § 1342*(p)(3)(A). The term "industrial activity" includes construction activity. *40 C.F.R. § 122.26(b)(14)(x)*. *Go To Headnote*

*Md. Dep't of the Env't v. Riverkeeper, 2016 Md. LEXIS 97* (Md Mar. 11, 2016).

***Overview:*** *Maryland Department of the Environment's decision to issue several stormwater discharge permits to counties in Maryland was supported by substantial evidence, was not arbitrary and capricious, and was legally correct; permits also satisfied federal monitoring requirements and did not violate public participation mandates in 33 U.S.C.S. § 1251(e).*

- Municipal separate storm sewer systems are classified based on the population in the jurisdiction. *40 C.F.R. § 122.26 (b)(4)*, (7), (16). *Go To Headnote*
- Municipal stormwater discharge is highly intermittent, usually characterized by very high flows occurring over relatively short time intervals, and depends on the activities occurring on the lands. *40 C.F.R. § 122.26*. It is also difficult to discern the amount of pollutant that any one discharger contributes to a waterbody because municipalities have so many outfalls, or discharge points, leading into the waters. *Go To Headnote*
- Pursuant to *40 C.F.R. § 122.26(d)(2)(iii)(D)*, applicants for large municipal separate storm sewer systems must submit a proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), and, among other things, why the location is representative. *Go To Headnote*
- Reapplications should focus on maintenance and improvement of municipal separate storm sewer system storm water management programs that were required in the initial applications. The permitting authority can make changes to the municipal separate storm sewer system monitoring program during the reapplication period, but such changes must be appropriate and useful. In other words, when a permittee reapplies for a discharge permit, and if the permitting authority reissues the permit, it is the permitting authority's responsibility to ensure that the reissued permit contains programs that are adequate in light of the initial application requirements in *40 C.F.R. § 122.26(d)*. *Go To Headnote*

*Alaska Cmty. Action on Toxics v. Aurora Energy Servs., Llc, 765 F.3d 1169, 2014 U.S. App. LEXIS 17175* (9th Cir Sept. 3, 2014).

***Overview:*** *Plain terms of Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity prohibited the non-stormwater discharge of coal by defendants. District court erred in concluding it shielded defendants (33 U.S.C.S.§ 1342(k)) from liability for non-stormwater coal discharges.*

- A National Pollutant Discharge Elimination System (NPDES) permit is required for stormwater discharges associated with industrial activity. *33 U.S.C.S. § 1342*(p); *40 C.F.R. § 122.26(c)(1)*. Under Environmental Protection Agency regulations, "stormwater" is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage." *40 C.F.R. § 122.26(b)(13)*. "Storm water discharge associated with industrial activity" is defined as "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." *40 C.F.R. § 122.26(b)(14)*. *Go To Headnote*

*Sherrill v. Mayor & City Council, 31 F. Supp. 3d 750, 2014 U.S. Dist. LEXIS 96512* (D Md July 16, 2014).

***Overview:*** *Pursuant to 42 U.S.C.S. § 6905(a), parties who were required to comply with state sediment control and stormwater management regulations could not be subjected to further inconsistent regulations. As to past owners and operators of the site, the complaint lacked sufficient factual allegations to state a claim under 42 U.S.C.S. § 6972(a)(1)(A), (B).*

- The Federal Water Pollution Control Act, *33 U.S.C.S. § 1251* et seq.??" commonly known as the Clean Water Act??"regulates the discharge of pollutants from point sources into the navigable waters of the United States. Permits are required for stormwater discharges associated with industrial activity. *40 C.F.R. § 122.26(a)(1)(ii)*. Federal law requires an analogous or more stringent regulatory requirement in those states authorized to administer their own permitting programs. *40 C.F.R. § 123.25(a)(9)*. Maryland has obtained such approval and, rather than requiring individual permits for each construction site, has opted to issue a general permit which covers new and existing storm water discharges that are composed in whole or in part of discharges associated with construction activity. Md. Code Regs. 26.08.04.09A(4). The Maryland permitting regulations state that permittees shall comply with requirements to obtain approval for (a) erosion and sediment control plans required under Md. Code Ann., Envir. tit. 4, subtit. 1; and (b) storm water management plans required under Md. Code Ann., Envir. tit. 4, subtit. 2. Md. Code Regs. 26.08.04.09A(5). *Go To Headnote*

*S.F. Baykeeper v. Levin Enters., 2013 U.S. Dist. LEXIS 178501* (ND Cal Dec. 18, 2013).

***Overview:*** *Terminal operators were awarded summary adjudication in part in action by an advocacy group for violation of Clean Water Act because group's notice letter was inadequate under 40 C.F.R. § 135.3; there was no mention of the word "commingling" or idea that discharges from activities covered by permit mixed with discharges from activities not covered.*

- Most discharges composed entirely of storm water are exempt from the Clean Water Act's (CWA's) permitting requirements, but permits are required for discharges associated with "industrial activity." *33 U.S.C.S. § 1342*(p)(1) and (2). The Environmental Protection Agency's (EPA's) implementing regulations at *40 C.F.R. § 122.26* require National Pollutant Discharge Elimination System (NPDES) permit authorization for facilities engaged in industrial activity to discharge to United States waters. There are 11 categories of facilities engaged in industrial activity, grouped according to Standard Industrial Classification (SIC) codes. *40 C.F.R. § 122.26(b)(14)*. Marine transportation facilities are SIC code 4491; industrial activities at transportation facilities are defined as the portions of the facility involved in vehicle maintenance, equipment cleaning, or airport deicing operations. *Go To Headnote*

*Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 2013 U.S. App. LEXIS 6692* (9th Cir Apr. 3, 2013).

***Overview:*** *Resource Conservation and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.S. §§ 6901-6992k, claim failed because wood preservative that escaped from the utility poles through normal wear and tear was not solid waste, as it was applied to utility poles to preserve them and was being used for its intended purpose, not discarded.*

- The 1987 amendments to the Clean Water Act, *33 U.S.C.S. §§ 1251*-1387, and its regulations establish a two-phase approach. In Phase I, EPA requires NPDES permits for the most significant stormwater discharges: those from a prior permitted source or large municipality; those that contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States; and those associated with industrial activity. *33*

U.S.C.S. § 1342(p)(2). In Phase II, EPA requires NPDES permits for stormwater discharges from smaller municipal storm systems and construction sites that disturb between one and five acres. 40 C.F.R. § 122.26(a)(9)(i)(A)-(B). EPA retained authority to regulate other stormwater discharges on a local or regional, as-needed basis. 40 C.F.R. § 122.26(a)(9)(i)(C)-(D). Go To Headnote

- Stormwater runoff from utility poles does not fit within the Environmental Protection Agency (EPA) definition of discharge associated with industrial activity, which is 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 at an industrial plant. 40 C.F.R. § 122.26(b)(14). A utility pole is not a conveyance used for collecting and conveying storm water, nor is it directly related to manufacturing, processing or raw materials storage at an industrial plant. Nor is a utility pole a plant yard, access road, prior industrial area, material handling, storage, or treatment site, or any of the other types of industrial facilities specifically identified in 40 C.F.R. § 122.26(b)(14)(i)-(xi). Go To Headnote

- Among other things, the Environmental Protection Agency (EPA) reasonably can conclude that 40 C.F.R. § 122.26(b)(14) extends only to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities, not to temporary logging roads that lack a closer connection to traditional industrial sites. Utility poles may or may not be more permanent than logging roads, but, like stormwater runoff from such roads, runoff from utility poles is not directly related to manufacturing, processing or raw materials storage at an industrial plant. § 122.26(b)(14). Go To Headnote

- One reason why stormwater runoff from utility poles is not associated with industrial activity has to do with Standard Industrial Classification (SIC) codes, the classification system 40 C.F.R. § 122.26(b)(14) uses to define the industrial activities it covers. 40 C.F.R. § 122.26(b)(14)(ii)-(iii), (vi), (viii), (xi). No SIC code cited in § 122.26(b)(14) covers utility poles. Under 40 C.F.R. § 122.26(b)(14), the listed categories of facilities are considered to be engaging in "industrial activity." The EPA uses SIC codes in defining the universe of regulated industrial activities. Go To Headnote

- The Environmental Protection Agency (EPA) includes steam electric power generating facilities in the definition of industrial activity, but rejects including major electrical powerline corridors in the regulation. 40 C.F.R. § 122.26(b)(14)(vii); National Pollutant Discharge Elimination System Application Regulations for Storm Water Discharges, 53 Fed. Reg. 49,416, 49,432 (proposed Dec. 7, 1988). The EPA prefers that storm water discharges from major powerline corridors not be classified as storm water discharges associated with industrial activity, but rather be part of the class of discharges for which storm water permits are required under Phase II. 55 Fed. Reg. at 48,015 (final rule adopting that approach). If the EPA has rejected including major powerline corridors in the definition of industrial activity, it is reasonable to conclude that EPA did not intend to include individual residential and commercial wooden utility poles in that definition, either. Go To Headnote

- Absent guidance from the Environmental Protection Agency (EPA) that says otherwise, regulation of stormwater runoff from such commonplace things would seem to run counter to EPA's measured regulation of stormwater discharges under 33 U.S.C.S. § 1342(p) and 40 C.F.R. § 122.26(b)(14), and to the court's practice of reading statutes to avoid absurd results. Go To Headnote

- 40 C.F.R. § 122.26(b)(14)(iii), (vii) identifies steam power plants and certain oil and gas transmission facilities as associated with industrial activity. However, power plants are plainly industrial plants, § 122.26(b)(14), while power grids are not, especially given EPA's decision to exempt major electrical powerline corridors from stormwater regulation, § 122.26(b)(14)(vii). If EPA exempts high voltage transmission lines and associated towers from National Pollutant Discharge Elimination System permits, it makes even less sense to require them for neighborhood utility poles. As for likening facilities that transmit electricity to those that convey natural gas, § 122.26(b)(14) suggests that it is the substance being transported-petroleum products-that gives rise to the regulation. Section 122.26(b)(14)(iii) covers only oil and gas transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations. The same contamination concerns do not apply to electricity transmission. Go To Headnote

San Francisco Baykeeper v. W. Bay Sanitary Dist., 2011 U.S. Dist. LEXIS 54883 (ND Cal May 23, 2011).

***Overview:*** *Environmental group was entitled to partial summary judgment in its Clean Water Act suit against a sanitation entity because no genuine dispute existed that certain of the entity's sanitary sewer overflows (SSOs) were discharges of a pollutant to navigable waters of the United States from a point source without a permit.*

- The Environmental Protection Agency (EPA) is required to regulate stormwater discharges to protect water quality. *33 U.S.C.S. § 1342*(p)(6). The EPA's stormwater discharge regulations, *40 C.F.R. § 122.26*, define a Municipal Separate Storm Sewer (MS4) as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) owned or operated by a public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, used for collecting or conveying storm water. *40 C.F.R. § 122.26*. Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, MS4s contain and convey only untreated stormwater. *40 C.F.R. § 122.26(a)(7)*, (b)(8). *Go To Headnote*

*Resurrection Bay Conservation Alliance v. City of Seward, 640 F.3d 1087, 2011 U.S. App. LEXIS 10147* (9th Cir May 19, 2011).

***Overview:*** *Where nonprofit corporations filed a citizen enforcement suit alleging that a city violated the CWA and a district court concluded that an award of fees would be unjust because special circumstances existed, remand was warranted because, inter alia, the district court's analysis misperceived the importance of the CWA's permit requirements.*

- The Clean Water Act's, *33 U.S.C.S. § 1251* et seq., implementing regulations require dischargers of storm water associated with industrial activity and with small construction activity to apply for an individual permit or seek coverage under a promulgated storm water general permit. *40 C.F.R. § 122.26(c)(1)*. The regulations require permit applicants to provide extensive documentation, including: site maps showing topography, including drainage and discharge structures; estimates of impervious surfaces and descriptions of significant materials that in the three years prior to the submittal of the application have been treated, stored or disposed in a manner to allow exposure to storm water and method of treatment, storage or disposal of such materials; a certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a National Pollution Discharge Elimination System permit; and existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of the application. *40 C.F.R. § 122.26(c)(1)(i)(A)*-(D). *Go To Headnote*

*Northwest Envtl. Def. Ctr. v. Brown, 640 F.3d 1063, 2011 U.S. App. LEXIS 10052* (9th Cir May 17, 2011), reversed by, remanded by *133 S. Ct. 1326, 185 L. Ed. 2d 447, 2013 U.S. LEXIS 2373, 81 U.S.L.W. 4190, 24 Fla. L. Weekly Fed. S 110, 76 Env't Rep. Cas. (BNA) 1001, 43 Envtl. L. Rep. 20062 (U.S. 2013).*

***Overview:*** *Stormwater runoff from logging roads into ditches, culverts, and channels being discharged into forest streams and rivers was a point source stormwater discharge associated with industrial activity under 33 U.S.C.S. § 1342(p) and 33 U.S.C.S. § 1362(14) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., for which a permit was required.*

- In 1990, the Environmental Protection Agency (EPA) promulgated Phase I regulations for the storm water discharges specified in § 402(p) *(33 U.S.C.S. § 1342*(p)) of the Clean Water Act (CWA), *33 U.S.C.S. § 1251* et seq. *55 Fed. Reg. 47990* (Nov. 16, 1990); *40 C.F.R. § 122.26*. For discharges associated with industrial activity, which require National Pollutant Discharge Elimination System (NPDES) permits, EPA's regulations provide: Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. *40 C.F.R. § 122.26(b)(14)*. The last sentence of this regulation refers to the Silvicultural Rule, thereby purporting to exempt from the definition of discharges associated with industrial activity any activity that is defined as a nonpoint source in the Silvicultural Rule. *Go To Headnote*
- Industries covered by the § 402(p) *(33 U.S.C.S. § 1342*(p)) of the Clean Water Act, *33 U.S.C.S. § 1251* et seq., Phase I associated with industrial activity regulation are defined in accordance with Standard Industrial Classifications (SIC).

The applicable (and unchallenged) regulation provides that facilities classified as SIC 24 are among those considered to be engaging in "industrial activity." *40 C.F.R. § 122.26(b)(14)(ii)*. It is undisputed that logging, which is covered under SIC 2411 (part of SIC 24), is an industrial activity. SIC 2411 defines logging as establishments primarily engaged in cutting timber and in producing primary forest or wood raw materials in the field. The regulation further defines the term "stormwater discharge associated with industrial activity" as follows: For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites. *40 C.F.R. § 122.26(b)(14)(ii)*. *Go To Headnote*

- The 1987 amendments to the Clean Water Act (CWA), *33 U.S.C.S. § 1251* et seq., do not exempt from the National Pollutant Discharge Elimination System (NPDES) permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers. This collected runoff constitutes a point source discharge of stormwater associated with industrial activity under the terms of § 502(14), *(33 U.S.C.S. § 1362*(14)) of the CWA, *33 U.S.C.S. § 1251* et seq., and § 402(p) *(33 U.S.C.S. § 1342*(p)) of the CWA. Such a discharge requires an NPDES permit. If logging activity is industrial in nature, the EPA is not free to create exemptions from permitting requirements for such activity. The reference to the Silvicultural Rule in *40 C.F.R. § 122.26(b)(14)* does not, indeed cannot, exempt such discharges from EPA's Phase I regulations requiring permits for discharges associated with industrial activity. *Go To Headnote*

*Ecological Rights Found. v. Pac. Gas & Elec. Co., 2011 U.S. Dist. LEXIS 37230* (ND Cal Mar. 31, 2011), affirmed by *713 F.3d 502, 2013 U.S. App. LEXIS 6692, 76 Env't Rep. Cas. (BNA) 1618, 43 Envtl. L. Rep. 20079, 83 A.L.R. Fed. 2d 611 (2013).*

***Overview:*** *In a CWA case, plaintiff alleged that rain caused the oil-pentachlorophenol mixture to wash off of defendants' poles, and that contaminated rainwater was then carried by storm water runoff from the poles to San Francisco Bay and its tributaries. These allegations, accepted as true, failed to establish a point source discharge actionable under CWA.*

- Under Environmental Protection Agency's regulations, Storm water means storm water run off, snow melt runoff, and surface runoff and drainage. *40 C.F.R. § 122.26(b)(13)*. Storm water runoff is not inherently a nonpoint or point source of pollution. *Go To Headnote*

*Nrdc v. County of L.A., 636 F.3d 1235, 2011 U.S. App. LEXIS 4647* (9th Cir Mar. 10, 2011), reprinted as amended at *673 F.3d 880, 2011 U.S. App. LEXIS 14443 (9th Cir. Cal. 2011),* opinion withdrawn by, opinion replaced by *2011 U.S. App. LEXIS 26281* (9th Cir. Cal. July 13, 2011).

***Overview:*** *In a Clean Water Act case, 33 U.S.C.S. § 1251 et seq., environmental groups showed that, after stormwater with standards-exceeding pollutants passed through pollution monitoring stations in municipal separate storm sewer systems owned and operated by flood control district it was discharged into two rivers, so judgment for district was reversed.*

- Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, municipal separate storm sewer systems contain and convey only untreated stormwater. *40 C.F.R. § 122.26(a)(7)*, (b)(8). *Go To Headnote*

- Under Federal Regulations, a municipal separate storm sewer system is 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 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; (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. *40 C.F.R. § 122.26(b)(8)*. *Go To Headnote*

*Gulf Restoration Network v. Hancock County Dev., Llc, 772 F. Supp. 2d 761, 2011 U.S. Dist. LEXIS 17352* (SD Miss Feb. 22, 2011).

***Overview:*** *Developer had caused and was causing storm water to be discharged into waters of the United States without a permit as required by 33 U.S.C.S. § 1342(p)(4)(A) because, inter alia, it was undisputed that there had been and continued to be storm water and surface run off and drainage from the developer's property.*

- Storm water means storm water run off, snow melt runoff, and surface runoff and drainage. *40 C.F.R. § 122.26(b)(13)*. *Go To Headnote*

- "Storm water discharge associated with industrial activity" includes storm water discharges from areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. *40 C.F.R. § 122.26(b)(14)*. *Go To Headnote*

*Serv. Oil v. United States EPA, 590 F.3d 545, 2009 U.S. App. LEXIS 28384* (8th Cir Dec. 28, 2009).

***Overview:*** *Because violation of the permit application regulations was not within the purview of 33 U.S.C.S. § 1319(g)(1)(A), the court vacated the order assessing a civil penalty primarily on petitioner company's complete failure to apply for its storm water permit prior to starting construction, and remanded for redetermination of the penalty amount.*

- One intending to discharge storm water associated with industrial activity must apply for an individual National Pollution Discharge Elimination System permit, or for coverage under a promulgated storm water general permit. *40 C.F.R. § 122.26(c)(1)*. "Industrial activity" includes construction activity except operations that result in the disturbance of less than five acres of total land area. *40 C.F.R. § 122.26(b)(14)(x)*. Environmental Protection Agency's permit regulations provide that operators of facilities described in *40 C.F.R. § 122.26(b)(14)(x)* shall submit permit applications at least 90 days before the start of construction, or when required by an applicable general permit. *40 C.F.R. §§ 122.21(c)(1)*, *122.26(c)*. The North Dakota Department of Health, an authorized state agency, has issued a general permit applying to new and existing discharges of "storm water associated with construction activity. The general permit provides that, to obtain coverage, an operator "shall submit" a Notice of Intent and a Stormwater Pollution Prevention Plan 30 days prior to the start of construction. *Go To Headnote*

*Northwest Envtl. Def. Ctr. v. Grabhorn, Inc., 2009 U.S. Dist. LEXIS 101359* (D Or Oct. 30, 2009).

***Overview:*** *CWA covered discharges to navigable surface waters via hydrologically connected groundwater, but as to environmental groups' claim that landfill operator violated 33 U.S.C.S. § 1311(a) in relation to discharges into as opposed to from man-made pond, groups failed to establish that pond constituted "waters of United States" under 33 U.S.C.S. § 1362.*

- The Oregon Department of Environmental Quality (DEQ) typically regulates discharges of storm water associated with industrial activities through general National Pollution Discharge Elimination System (NPDES) permits. The DEQ regulates industrial storm water discharges in most Oregon watersheds, including the Tualatin watershed, through the 1200-Z NPDES Permit. The 1200-Z NPDES Permit covers only discharges of storm water. Federal regulations define storm water as storm water runoff, snow melt runoff, and surface runoff and drainage. *40 C.F.R. § 122.26(b)(13)*. The DEQ further defines storm water as water from precipitation or snow melt that collects on or runs off outdoor surfaces such as buildings, roads, paved surfaces and unpaved land surfaces. Or. Admin. R. 340-044-0005(41). Although landfills, land application sites and open dumps can be covered under the 1200-Z NPDES Permit, the general permit is explicitly unavailable to landfills that discharge contaminated storm water, as defined by *40 C.F.R. § 445.2*, to waters of the United States. Federal regulations define "contaminated storm water" as storm water which comes in direct contact with landfill wastes, the waste handling and treatment areas, or landfill wastewater. *40 C.F.R. § 445.2(b)*. *Go To Headnote*

*Nrdc v. United States EPA, 526 F.3d 591, 2008 U.S. App. LEXIS 11080* (9th Cir May 23, 2008).

***Overview:*** *EPA's storm water discharge rule, 40 C.F.R. § 122.26, was arbitrary and capricious, 5 U.S.C.S. § 706(2)(A), and constituted impermissible construction of 33 U.S.C.S. § 1342(l)(2) of CWA as amended by 33 U.S.C.S. § 1362(24); position regarding discharge of sediment-laden storm water from oil and gas construction sites conflicted with prior position.*

- The Environmental Protection Agency's (EPA) June 12, 2006, storm water discharge rule, codified at 40 C.F.R. § 122.26, represents a complete departure from its previous interpretation of what constitutes "contamination" under 33 U.S.C.S. § 1342(l )(2) of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq. As such, the United States Court of Appeals for the Ninth Circuit concludes that EPA's inconsistent and conflicting position regarding the discharge of sediment-laden storm water from oil and gas construction sites causes its interpretation of amended 33 U.S.C.S. § 1342(l )(2), as reflected in the storm water discharge rule, 40 C.F.R. § 122.26, to be an arbitrary and capricious one. This conclusion is reinforced by the fact that neither the amending statute, § 323 of the Energy Policy Act, the statutory definition under 33 U.S.C.S. § 1362(24), nor the statutory exemption under 33 U.S.C.S. § 1342(l )(2) make any mention at all of "sediment"--or of whether it is covered or not. Therefore, the promulgated storm water discharge rule, including the corresponding regulation at 40 C.F.R. § 122.26, is arbitrary and capricious and constitutes an impermissible construction of 33 U.S.C.S. § 1342(l )(2) of the CWA. Go To Headnote

Northwest Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188, 2007 U.S. Dist. LEXIS 14737 (D Or Mar. 1, 2007), reversed by, remanded by 617 F.3d 1176, 2010 U.S. App. LEXIS 17129, 71 Env't Rep. Cas. (BNA) 1740, 40 Envtl. L. Rep. 20221 (9th Cir. Or. 2010), reversed by, remanded by *640 F.3d 1063, 2011 U.S. App. LEXIS 10052, 72 Env't Rep. Cas. (BNA) 1897, 41 Envtl. L. Rep. 20178 (9th Cir. Or. 2011)*supra.

***Overview:*** *Environmental group's Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., action was dismissed because the silvicultural exemption applied to defendant's logging roads because timber harvesting operations were expressly defined to be a nonpoint source activity and there was no regulation of stormwater on forest roads.*

- Section 402(p), 33 U.S.C.S. § 1342(p), of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., directs the Environmental Protection Agency (EPA) to study stormwater discharges, the extent of pollutants in them, and methods to control them to the extent necessary to mitigate impacts on water quality. The EPA is required to issue regulations to designate stormwater discharges, other than the Phase I discharges, and to establish a program to regulate them as necessary to protect water quality. 33 U.S.C.S. § 1342(p)(5)-(6). These are known as Phase II discharges. In 1999, the EPA issued the final Phase II stormwater regulations which designated two additional categories of stormwater discharges that required National Pollutant Discharge Elimination System (NPDES) permits: (1) municipal separate storm sewer systems serving less than 100,000 people; and (2) construction sites that disturb one to five acres of land. 40 C.F.R. § 122.26(a)(9)(I). Go To Headnote

Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 435 F.3d 758, 2006 U.S. App. LEXIS 2009 (7th Cir Jan. 27, 2006).

***Overview:*** *Organizations representing individuals in the oil and gas industries lacked standing to challenge a general permit for uncontaminated storm water discharges issued by the EPA under 33 U.S.C.S. § 1342, as the organizations' members were exempt from the challenged permitting requirements.*

- In 1999, the Environmental Protection Agency issued its Phase II storm water rules, which define as additional discharges subject to the general permitting requirements small construction sites (one to five acres), smaller municipalities, and additional sources that might be designated on a case-by-case basis. 40 C.F.R. § 122.26(b)(15). Go To Headnote

Sierra Club v. El Paso Gold Mines, 421 F.3d 1133, 2005 U.S. App. LEXIS 18161 (10th Cir Aug. 24, 2005).

***Overview:*** *If a landowner's mine shaft, which was admittedly a point source, was "discharging" pollutants, it was liable for violating 33 U.S.C.S. §§ 1311(a), 1342, of the Clean Water Act, whether or not the owner caused the discharge, but due to fact issues on whether the shaft's pollutants were discharged into a creek, summary judgment had been improper.*

- Discharges from inactive mines can violate the Clean Water Act, 33 U.S.C.S. § 1251 et seq. 40 C.F.R. § 122.26(b)(14)(iii) states that active or inactive mining operations are among the industrial activities that require a stormwater discharge permit under 33 U.S.C.S. § 1342(p). An Environmental Protection Agency policy statement states that discharges from abandoned mine adits are point sources which require a traditional National Pollutant Discharge Elimination System (NPDES) permit. These authorities merely establish a rule that inactive or abandoned mining sites are not entirely exempt from NPDES regulation. Go To Headnote

*Friends of the Earth v. EPA, 346 F. Supp. 2d 182, 2004 U.S. Dist. LEXIS 23806* (DDC Nov. 29, 2004).

***Overview:*** *Challenge to EPA's approval of proposed "total maximum daily loads" (TMDLs) of pollutants for the Anacostia River failed because, inter alia, sufficient evidence existed that TMDLs were reasonably calculated to achieve daily water quality standards.*

- *40 C.F.R. § 122.26(d)(2)(iv)*states that management programs for storm water permit application may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. *Go To Headnote*

*Waterkeepers N. Cal. v. Ag Indus. Mfg., 375 F.3d 913, 2004 U.S. App. LEXIS 14657* (9th Cir July 16, 2004).

***Overview:*** *An advocate's notice to a manufacturer of intent-to-sue regarding alleged water pollution was adequate to confer jurisdiction. The letter put the manufacturer on notice of the alleged violations and gave it an opportunity to correct the problem.*

- The Clean Water Act, *33 U.S.C.S. § 1251* et seq., prohibits the discharge of pollutants into United States waters except as authorized by the statute. *33 U.S.C.S. § 1311.* The Act is administered largely through the National Pollution Discharge Elimination System (NPDES) permit program. *33 U.S.C.S. § 1342.* In 1987, the Act was amended to establish a framework for regulating storm water discharges through the NPDES system. *33 U.S.C.S. § 1342*(p). The discharge of pollutants without an NPDES permit, or in violation of a permit, is illegal. Much of the responsibility for administering the NPDES permitting system has been delegated to the states. *33 U.S.C.S. § 1342*(b). States may issue individual permits to industrial dischargers or may cover many dischargers under the terms of one general permit. *40 C.F.R. § 122.26(c)*. California has issued a general permit to cover industrial dischargers. Cal. Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES Gen. Permit No. CAS000001. In order to be covered under California's General Permit, individual dischargers must file a notice of intent with the state. Cal. Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES Gen. Permit No. CAS000001 at 1-2 p. 3. *Go To Headnote*

*River Ravine Rescue, Inc. v. City of S. St. Paul, 2004 U.S. Dist. LEXIS 12988* (D Minn July 9, 2004).

***Overview:*** *Environmental group's claim that defendant city discharged pollutants without a permit in violation of the Clean Water Act was dismissed on summary judgment, where the city had subsequently obtained a permit and the claim was mooted.*

- The Clean Water Act prohibits the discharge of any pollutant from a point source into navigable waters unless the discharge complies with the terms of a National Pollutant Discharge Elimination System (NPDES) permit. *33 U.S.C.S. §§ 1311*(a), 1342. NPDES permits establish discharge conditions aimed at maintaining the chemical, physical, and biological integrity of the Nation's waters. NPDES permits are required for storm water discharges from construction activity that disturbs at least five acres of total land area. NPDES permits are also required for storm water discharges from construction activity that disturbs less than five acres of total land area if the activity is part of a common plan of development that disturbs at least five acres. *40 C.F.R. § 122.26(a)(1)(ii)*, (b)(14)(x). *Go To Headnote*

*Conservation Law Found. v. Hannaford Bros. Co., 327 F. Supp. 2d 325, 2004 U.S. Dist. LEXIS 14358* (D Vt May 14, 2004).

***Overview:*** *Where the EPA and a state agency did not require storm drain owners to obtain a National Pollution Discharge Elimination System permit, the owners did not violate the CWA by discharging pollutants without a permit.*

- Under the Phase II rule, Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, *64 Fed. Reg. 68,722* (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123 and 124), National Pollutant Discharge Elimination System permits are required for stormwater discharges from small municipal sewer systems and from small construction sites. *40 C.F.R. § 122.26(a)(9)(i)*. The Phase II rule also preserves the residual authority of the Environmental Protection Agency (EPA) and authorizes state agencies to designate that a stormwater discharge requires a permit. *40 C.F.R. § 122.26(a)(9)(i)*. EPA's retention of its residual designation authority has been upheld as a legitimate exercise of its statutory authority pursuant to § 402(p)(2)(E) and (p)(6) *(33 U.S.C.S. § 1342*(p)(2)(E) and (p)(6)) of the Clean Water Act, *33 U.S.C.S. §§ 1251*-1387. *Go To Headnote*

- The Environmental Protection Agency (EPA) or an authorized state agency may exercise its residual designation authority to require a permit if: The Director, or in states with approved National Pollutant Discharge Elimination System (NPDES) programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" that address the pollutant(s) of concern; or the Director, or in states with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. *40 C.F.R. § 122.26(a)(9)(i)(C)*, (D). *Go To Headnote*

*Jones v. E.R. Snell Contr., Inc., 333 F. Supp. 2d 1344, 2004 U.S. Dist. LEXIS 11062* (ND Ga Jan. 30, 2004).

***Overview:*** *A county was granted summary judgment because landowner failed to prove county was a "discharger" under Clean Water Act; claims were not covered by the RCRA; and a state law claimed was barred by the landowner's failure to provide ante-litem notice.*

- Solid waste, as defined by the Resource Conservation and Recovery Act, does not include solid or dissolved materials in industrial discharges which are point sources subject to permits under *33 U.S.C.S. § 1342. 42 U.S.C.S. § 6903*(27). An industrial activity which would give rise to an industrial discharge includes construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. *40 C.F.R. § 122.26(b)(14)(x)*. *Go To Headnote*

*N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., Llc, 278 F. Supp. 2d 654, 2003 U.S. Dist. LEXIS 13674* (ED NC July 25, 2003).

***Overview:*** *Plaintiffs had standing to bring Clean Water Act action against tract owners who had conducted ditching activities where there was an injury in fact, fairly traceable to the ditching activities, and the relief sought would redress their injuries.*

- Under the Clean Water Act (CWA), a permit is required for stormwater discharges associated with industrial activity. *33 U.S.C.S. § 1342*(p)(3)(A). It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary. Environmental Protection Agency (EPA) regulations related to the National Pollutant Discharge Elimination System (NPDES) program define "industrial activity" to include construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. *40 C.F.R. § 122.26(b)(14)(x)*. *Go To Headnote*

*City of Abilene v. United States EPA, 325 F.3d 657, 2003 U.S. App. LEXIS 6305* (5th Cir Apr. 2, 2003).

***Overview:*** *EPA municipal permits under the Clean Water Act were upheld. The conditions of the permits were authorized under EPA's broad statutory discretion. Tenth Amendment was not violated; cities voluntarily chose the permits, as opposed to an alternative.*

- Because storm water inevitably contains pollutants such as sand or cellar dirt, *33 U.S.C.S. § 1362*(6), a National Pollutant Discharge Elimination System permit is required for the discharge of certain types of storm water into the waters of the United States. Permits for municipal and industrial storm water discharges are governed by *33 U.S.C.S. § 1342*(p) and *40 C.F.R. § 122.26*. While permits for discharges of storm water associated with industrial activity must impose effluent limitations, *33 U.S.C.S. § 1342*(p) authorizes the United States Environmental Protection Agency to issue permits for discharges from municipal separate storm sewer systems (MS4s) that effectively prohibit the introduction of non-storm water into the MS4 and establish management practices and other methods to reduce the discharge of pollutants to the maximum extent practicable. *33 U.S.C.S. § 1342*(p)(3). This more flexible type of permit is referred to as a "management permit." *Go To Headnote*

*Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497* (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- Under the United States Environmental Protection Agency's final administrative rule under *33 U.S.C.S. § 1342*(p) (Phase II Rule), National Pollutant Discharge Elimination System (NPDES) permits are required for discharges from small municipal separate storm sewer systems (small MS4s) and storm water discharges from construction activity disturbing between one and five acres (small construction sites). *40 C.F.R. §§ 122.26(a)(9)(i)(A)*-(B). Small MS4s may seek permission to discharge by submitting an individualized set of best-management plans in six specified categories, *40 C.F.R. § 122.34*, either in the form of an individual permit application, or in the form of a notice of intent to comply with a general permit. *40 C.F.R. § 122.33(b)*. Small MS4s may also seek permission to discharge through an alternative process, under which a permit may be sought without requiring the operator to regulate third parties, *40 C.F.R. §§ 122.33(b)(2)(ii)*, *122.26(d)*. Small construction sites may apply for individual NPDES permits or seek coverage under a promulgated general permit. *40 C.F.R. § 122.26(c)*. The Environmental Protection Agency also preserved authority to regulate other categories of harmful storm water discharges on a regional, as-needed basis. *40 C.F.R. § 122.26(a)(9)(i)(C)*-(D). *Go To Headnote*

- While it is possible to read the provision in *40 C.F.R. § 122.26(d)(2)(iv)(D)(1)* as requiring the regulation of site planning activities by third party construction professionals, a better reading of the provision is that it requires the municipal separate storm sewer systems operator to consider water quality impacts in planning municipal separate storm sewer system connections at construction sites. Therefore, the provision poses no Tenth Amendment problem. *Go To Headnote*

- The United States Environmental Protection Agency's (EPA) final administrative rule (Rule) under 33 U.S.C.S. § 1432(p) preserves authority for United States Environmental Protection Agency and authorizes states to designate currently unregulated stormwater dischargers as requiring permits under the Rule if future circumstances indicate that they warrant regulation to protect water quality under the terms of *33 U.S.C.S. § 1342*(p)(6). *40 C.F.R. § 122.26(a)(9)*. *Go To Headnote*

- The text of the United States Environmental Protection Agency's (EPA) final administrative rule under *33 U.S.C.S. § 1342*(p) requires a discharger to obtain a permit if the National Pollutant Discharge Elimination System permit authority determines that stormwater controls are needed for the discharge based on wasteload allocations that are part of total maximum daily loads (TMDLs) that address the pollutant(s) of concern or that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. *40 C.F.R. §§ 122.26(a)(9)(i)(C)*-(D). *Go To Headnote*

*Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497* (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- Small municipal separate storm sewer systems seeking an individualized permit under the Phase I model under *33 U.S.C.S. § 1342*(p) are relieved of the requirements of *40 C.F.R. §§ 122.26(d)(1)(ii)*, (d)(2) mandating that larger operators demonstrate their legal authority to control discharges to the municipal separate storm sewer system through ordinance or other binding measures. *40 C.F.R. § 122.33(b)(2)(ii)*. *Go To Headnote*

*Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 2002 U.S. App. LEXIS 18844* (9th Cir Sept. 16, 2002).

***Overview:*** *Dairy operators were penalized for repeated violations of Clean Water Act and failure to obtain discharge permits; citizen-plaintiff's notice of suit was timely and proper.*

- Concentrated animal feeding operations (CAFO) are animal feeding operations where animals are stabled or confined for a total of 45 days or more in any 12 month period in an area where neither crops, vegetation or crop residue is

sustained. *40 C.F.R. § 122.23(a)(3)*. A CAFO is subject to effluent guidelines, *40 C.F.R. § 412.12(a)*, and is considered to be engaged in industrial activities. *40 C.F.R. § 122.26(b)(14)(i)*, (v). Therefore, it must obtain an individual permit for storm water discharges. *33 U.S.C.S. § 1342*(p)(2)(B); Wash. Admin. Code §§ 173.220.020, 173.220.040. *Go To Headnote*

*Miss. River Revival, Inc. v. City of Minneapolis, 145 F. Supp. 2d 1062, 2001 U.S. Dist. LEXIS 6164* (D Minn May 2, 2001).

***Overview:*** *Plaintiffs claims were dismissed as moot where no relief that remained available under the federal statute would deter defendants from discharging storm water without a permit, which was the violation plaintiffs had alleged.*

- Storm water discharges are subject to the National Pollution Discharge Elimination System (NPDES) permitting requirements of the Clean Water Act, *33 U.S.C.S. § 1251* et seq. *33 U.S.C.S. § 1342*(p). The Clean Water Act, *33 U.S.C.S. § 1251* et seq., strictly prohibits such discharges unless the discharger is in compliance with the NPDES requirements. *33 U.S.C.S. § 1311*(a). The Minnesota Pollution Control Agency is required by law to take action on completed NPDES permit applications within one year. *40 C.F.R. § 122.26(e)(7)(ii)*. *Go To Headnote*

*United States v. Tgr Corp., 171 F.3d 762, 1999 U.S. App. LEXIS 5312* (2d Cir Mar. 26, 1999).

***Overview:*** *A brook that was not owned or operated by a public body was not a part of a waste water system, but was a navigable water subject to the Clean Water Act.*

- To qualify as a "municipal separate storm sewer," a conveyance must be owned or operated by a State, city, town, borough, county, parish, district, association, or other public body and must be designed or used for collecting or conveying storm water, *40 C.F.R. § 122.26(b)(8)*. *Go To Headnote*

Na Mamo O "aha'ino v. *Galiher, 28 F. Supp. 2d 1258, 1998 U.S. Dist. LEXIS 18924* (D Haw Nov. 25, 1998).

***Overview:*** *No National Pollutant Discharge Elimination System permit was required where construction activities on farm land did not fall within the parameters of the regulation and were not carried out pursuant to a larger common plan of development.*

- Section 301(a) of the Clean Water Act (act) prohibits the discharge of any pollutant into the nation's waters, except when specifically authorized under the act. *33 U.S.C.S. § 1311*(a). Section 402(a) authorizes the issuance of National Pollution Discharge Elimination System (NPDES) permits to particular entities, allowing discharge of limited amounts of pollutants into surface waters. *33 U.S.C.S. § 1342*(a). NPDES permits are required for storm water discharges from construction activity including clearing, grading, and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale. *40 C.F.R. § 122.26(b)(14)(x)*. *Go To Headnote*

- 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. *33 U.S.C.S. § 1362*(14). Construction, as described in *40 C.F.R. § 122.26(b)(14)(x)*, is a point source activity. Non-point source pollution is not specifically defined in the Clean Water Act, but is described by the Ninth Circuit as any source of water pollution or pollutants not associated with a discrete conveyance. *Go To Headnote*

- *40 C.F.R. § 122.26(b)(14)(x)*excludes from the National Pollution Discharge Elimination System permit requirement those construction activities that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale. *Go To Headnote*

- In order to fall within the exception of *40 C.F.R. § 122.26(b)(14)(x)*, the disturbed acreage must be less than five acres and the construction must not have occurred pursuant to a larger common plan of development. The "plan" in a common plan of development is broadly defined by the Environmental Protection Agency (EPA) as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot. "Part of a larger common plan of development or sale" is a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan. Thus, if a

distinct construction activity has been identified onsite by the time the National Pollution Discharge Elimination System application would be submitted, that distinct activity should be included as part of a larger plan. Go To Headnote

San Francisco Baykeeper v. City of Saratoga, 1998 U.S. App. LEXIS 3942 (9th Cir Mar. 5, 1998).

***Overview:*** *A city was liable for permit violations if the discharge of fecal coliform came from city-owned or operated drains.*

- The Environmental Protection Agency's regulations implementing the Clean Water Act make clear that a city would be liable if it could be considered the operator of the storm outfall violating the regulations. 40 C.F.R. § 122.26(a)(3)(vi). Go To Headnote

Hughey v. Jms Dev. Corp., 78 F.3d 1523, 1996 U.S. App. LEXIS 6073 (11th Cir Apr. 1, 1996).

***Overview:*** *An order granting an injunction in a Clean Water Act case, which merely required a developer to obey the Clean Water Act, did not give the developer fair and precisely drawn notice of what the injunction actually prohibited.*

- Under Environmental Protection Agency guidelines, 40 C.F.R. § 122.26(b)(14)(x), storm water discharge associated with industrial activity is inclusive of construction activity, which is in turn defined as clearing, grading, and excavation activities except operations that result in the disturbance of less than five acres of total land area, which are not part of a larger common plan of development or sale. This regulation, to the extent it sought to exempt from the definition of "industrial activity" construction sites of less than five acres, was invalidated on the grounds that it was arbitrary and capricious. Even so, the regulation still provides that industrial activity is inclusive of construction. Go To Headnote

Concerned Area Residents for the Env't v. Southview Farm, 834 F. Supp. 1422, 1993 U.S. Dist. LEXIS 14835 (WD NY Oct. 19, 1993).

***Overview:*** *Farm's runoff was agricultural storm water discharge within Clean Water Act's exception for collected or channeled storm water discharges that ordinarily constituted point source discharges, notwithstanding presence of pollutants in discharge.*

- "Storm water," according to the Environmental Protection Agency, means "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). "Runoff" has been defined as wastewaters generated by rainfall that drain over terrain into navigable waters, picking up pollutants along the way. Go To Headnote

Hughey v. Jms Dev. Corp., 1993 U.S. Dist. LEXIS 20428 (ND Ga Mar. 29, 1993).

***Overview:*** *A developer was required to have a permit before discharging storm water, and prior acquisition of the permit was not grounds to amend the court's order; and there was a genuine issue of material fact as to property owner's standing.*

- Until October 31, 1992, § 402(p) of the Clean Water Act, 33 U.S.C.S. § 1342(p), prohibited the Environmental Protection Agency, or states to which issue National Pollutant Discharge Elimination System (NPDES) permitting authority had been delegated, from requiring NPDES permits prior to October 1, 1992 for storm-water discharges. § 402(p)(1). The section, however, excepted from this moratorium discharges associated with industrial activity. § 402(p)(2)(B). Federal regulations define storm water discharge associated with industrial activity as construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale. 40 C.F.R. § 122.26(b)(14)(x). Go To Headnote

American Mining Congress v. United States EPA, 965 F.2d 759, 1992 U.S. App. LEXIS 11656 (9th Cir May 27, 1992).

***Overview:*** *Petitioners failed to show that a rule adopted by the Environmental Protection Agency to regulate storm water discharges to prevent pollutants was retroactive or improperly applied to certain inactive mining operations.*

- The Environmental Protection Agency (EPA) may require a permit for a discharge associated with industrial activity. Congress did not stipulate that the activity must occur concurrently with the discharge of storm water. The EPA has determined that discharges from areas of past industrial activity at a variety of facilities, including mines, may be associated with that industrial activity. *40 C.F.R. § 122.26(b)(14)(iii)*. The definition of discharge associated with industrial activity includes discharges from areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. This conclusion is consistent with the language of the Clean Water Act, *33 U.S.C.S. § 1342*(p)(2)(B). *Go To Headnote*

- The Environmental Protection Agency's (EPA) regulation, *40 C.F.R. § 122.26(b)(14)(iii)*, meets the reasonableness standard. The EPA notes that some mine sites represent a significant source of contaminated storm water runoff. *55 Fed. Reg. 48,033.* This finding is well documented, *46 Fed. Reg. 3,136, 3,144 (1981).* Moreover, the EPA exempts from the permit requirement mine sites where storm water does not come into contact with any overburden, raw material, byproduct, or waste product. *40 C.F.R. § 122.26(b)(14)(iii)*. This exemption narrows EPA's regulation of inactive mines to only those sites at which storm water discharge is likely to have become contaminated through association with industrial activity. *Go To Headnote*

- The Environmental Protection Agency's storm water regulation, *40 C.F.R. § 122.26(b)(14)(iii)*, does not offend any Congressional intent to regulate abandoned mines exclusively through the abandoned mine lands program. *Go To Headnote*

- The Environmental Protection Agency's (EPA) storm water rule excludes from the definition of "associated with industrial activity" those discharges from inactive mines that have been reclaimed under the Surface Mining Control and Rehabilitation Act, *30 US.C.S. § 1201*-1328, or equivalent federal or state laws for non-coal mines. *40 C.F.R. § 122.26(b)(14)(iii)*. *Go To Headnote*

- The Environmental Protection Agency's storm water rule, *40 C.F.R. 122.26(b)(14)(iii)*, exempts from the definition of "associated with industrial activity" non-coal mines reclaimed under federal or state laws similar to the Surface Mining Control and Rehabilitation Act, *30 U.S.C.S. §§ 1201*-1328. Because sites reclaimed under older laws might continue to discharge contaminated storm water, the EPA limits the exemption to mines released from reclamation requirements on or after the rule's effective date. *55 Fed. Reg. 48,033.* *Go To Headnote*

- The Environmental Protection Agency's storm water rule, *40 C.F.R. § 122.26(b)(14)(iii)*, requires only that owners or operators apply for permits for future discharges from inactive mines. Although the rule may reduce the financial attractiveness of mine ownership, it does not impose liability for past conduct. *Go To Headnote*

- The storm water rule, *40 C.F.R. § 122.26(b)(14)(iii)*, specifies that operators of inactive mine sites that discharge contaminated storm water must apply for a storm water permit by September 30, 1991 for group applicants, and by November 18, 1991 for individual applicants. *55 Fed. Reg. 48,071-72; 56 Fed. Reg. 12,098.* Compliance with the terms of any permit issued pursuant to the application will be required no later than three years after the date of issuance. Clean Water Act, *33 U.S.C.S. § 1342*(p)(4)(A). Thus, only future discharges will be subject to permit requirements as a result of the rule. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Nonpoint Source Pollution**

*Northwest Envtl. Def. Ctr. v. Brown, 640 F.3d 1063, 2011 U.S. App. LEXIS 10052* (9th Cir May 17, 2011), reversed by, remanded by *133 S. Ct. 1326, 185 L. Ed. 2d 447, 2013 U.S. LEXIS 2373, 81 U.S.L.W. 4190, 24 Fla. L. Weekly Fed. S 110, 76 Env't Rep. Cas. (BNA) 1001, 43 Envtl. L. Rep. 20062 (U.S. 2013).*

***Overview:*** *Stormwater runoff from logging roads into ditches, culverts, and channels being discharged into forest streams and rivers was a point source stormwater discharge associated with industrial activity under 33 U.S.C.S. § 1342(p) and 33 U.S.C.S. § 1362(14) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., for which a permit was required.*

- For purposes of § 402(p) *(33 U.S.C.S. § 1342*(p)) of the Clean Water Act, *33 U.S.C.S. § 1251* et seq., the definition of a "facility engaging in industrial activity" is very broad. The applicable Phase I rule provides that many industrial facilities beyond traditional industrial plants are considered to be engaging in "industrial activity," including mines, landfills, junkyards, and construction sites. *40 C.F.R. § 122.26(b)(14)(iii)*, (v), (x). *Go To Headnote*

- The 1987 amendments to the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., do not exempt from the National Pollutant Discharge Elimination System (NPDES) permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers. This collected runoff constitutes a point source discharge of stormwater associated with industrial activity under the terms of § 502(14), (33 U.S.C.S. § 1362(14)) of the CWA, 33 U.S.C.S. § 1251 et seq., and § 402(p) (33 U.S.C.S. § 1342(p)) of the CWA. Such a discharge requires an NPDES permit. If logging activity is industrial in nature, the EPA is not free to create exemptions from permitting requirements for such activity. The reference to the Silvicultural Rule in 40 C.F.R. § 122.26(b)(14) does not, indeed cannot, exempt such discharges from EPA's Phase I regulations requiring permits for discharges associated with industrial activity. Go To Headnote

Na Mamo O "aha'ino v. Galiher, 28 F. Supp. 2d 1258, 1998 U.S. Dist. LEXIS 18924 (D Haw Nov. 25, 1998).

***Overview:*** *No National Pollutant Discharge Elimination System permit was required where construction activities on farm land did not fall within the parameters of the regulation and were not carried out pursuant to a larger common plan of development.*

- 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. 33 U.S.C.S. § 1362(14). Construction, as described in 40 C.F.R. § 122.26(b)(14)(x), is a point source activity. Non-point source pollution is not specifically defined in the Clean Water Act, but is described by the Ninth Circuit as any source of water pollution or pollutants not associated with a discrete conveyance. Go To Headnote

**Environmental Law : Water Quality : Clean Water Act : Recordkeeping & Reporting**

Md. Dep't of the Env't v. Riverkeeper, 2016 Md. LEXIS 97 (Md Mar. 11, 2016).

***Overview:*** *Maryland Department of the Environment's decision to issue several stormwater discharge permits to counties in Maryland was supported by substantial evidence, was not arbitrary and capricious, and was legally correct; permits also satisfied federal monitoring requirements and did not violate public participation mandates in 33 U.S.C.S. § 1251(e).*

- Pursuant to 40 C.F.R. § 122.26(d)(2)(iii)(D), applicants for large municipal separate storm sewer systems must submit a proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), and, among other things, why the location is representative. Go To Headnote

- Reapplications should focus on maintenance and improvement of municipal separate storm sewer system storm water management programs that were required in the initial applications. The permitting authority can make changes to the municipal separate storm sewer system monitoring program during the reapplication period, but such changes must be appropriate and useful. In other words, when a permittee reapplies for a discharge permit, and if the permitting authority reissues the permit, it is the permitting authority's responsibility to ensure that the reissued permit contains programs that are adequate in light of the initial application requirements in 40 C.F.R. § 122.26(d). Go To Headnote

- The Environmental Protection Agency does not require an applicant to repeat in full the process in 40 C.F.R. § 122.26(d)(1)-(2). The Environmental Protection Agency explained that it would be redundant to request the same information again including characterization of data at § 122.26(d)(2)(iii), where it has already been provided and has not changed. But an applicant should identify any proposed changes or improvements to monitoring activities. Go To Headnote

- Although National Pollution Discharge Elimination System permit writers are granted the flexibility to modify program components, including monitoring, the Environmental Protection Agency does not allow permit writers to reissue permits and abdicate their responsibility in restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.S. § 1251(a). 40 C.F.R. 122.26(d) required, among other things, a proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls

or field screening points to be sampled (or the location of instream stations), and, among other things, why the location is representative. And, the permits must include monitoring sufficient to yield data which are representative of the monitored activity. *40 C.F.R. § 122.48(b)*. *Go To Headnote*

*Nrdc v. County of L.A., 725 F.3d 1194, 2013 U.S. App. LEXIS 16416* (9th Cir Aug. 8, 2013), writ of certiorari denied by *134 S. Ct. 2135, 188 L. Ed. 2d 1124, 2014 U.S. LEXIS 3212, 82 U.S.L.W. 3650 (U.S. 2014).*

***Overview:*** *Pollution exceedances detected at monitoring stations of the county and the county flood control district were sufficient to establish the county defendants' liability as a matter of law for violations of the terms of their National Pollutant Discharge Elimination System permit issued pursuant to the Clean Water Act.*

- The Clean Water Act requires every National Pollutant Discharge Elimination System (NPDES) permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. *33 U.S.C.S. § 1342*(a)(2); *40 C.F.R. § 122.44(i)(1)* provides that each NPDES permit shall include conditions meeting the following monitoring requirements to assure compliance with permit limitations. That is, a NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. *40 C.F.R. § 122.26(d)(2)(i)(F)* provides that permit applications for discharges from large and medium municipal storm sewers shall include monitoring procedures necessary to determine compliance and noncompliance with permit conditions. *Go To Headnote*

- Environmental Protection Agency (EPA) regulations make clear that while municipal separate storm sewer NPDES permits need not require monitoring of each stormwater source at the precise point of discharge, they may instead establish a monitoring scheme sufficient to yield data which are representative of the monitored activity. *40 C.F.R. § 122.48(b)*. In fact, EPA regulations require permittees to propose a monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations) and explain why the chosen location is representative. *40 C.F.R. § 122.26(d)(2)(iii)(D)*. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Water Quality Standards**

*Conservation Law Found. v. Hannaford Bros. Co., 327 F. Supp. 2d 325, 2004 U.S. Dist. LEXIS 14358* (D Vt May 14, 2004).

***Overview:*** *Where the EPA and a state agency did not require storm drain owners to obtain a National Pollution Discharge Elimination System permit, the owners did not violate the CWA by discharging pollutants without a permit.*

- The Environmental Protection Agency (EPA) or an authorized state agency may exercise its residual designation authority to require a permit if: The Director, or in states with approved National Pollutant Discharge Elimination System (NPDES) programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" that address the pollutant(s) of concern; or the Director, or in states with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. *40 C.F.R. § 122.26(a)(9)(i)(C)*, (D). *Go To Headnote*

*Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497* (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- The text of the United States Environmental Protection Agency's (EPA) final administrative rule under *33 U.S.C.S. § 1342*(p) requires a discharger to obtain a permit if the National Pollutant Discharge Elimination System permit authority determines that stormwater controls are needed for the discharge based on wasteload allocations that are part of total maximum daily loads (TMDLs) that address the pollutant(s) of concern or that the discharge, or category of

discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. *40 C.F.R. §§ 122.26(a)(9)(i)(C)*-(D). *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Wetlands**

*N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., Llc, 278 F. Supp. 2d 654, 2003 U.S. Dist. LEXIS 13674* (ED NC July 25, 2003).

***Overview:*** *Plaintiffs had standing to bring Clean Water Act action against tract owners who had conducted ditching activities where there was an injury in fact, fairly traceable to the ditching activities, and the relief sought would redress their injuries.*

- Under the Clean Water Act (CWA), a permit is required for stormwater discharges associated with industrial activity. *33 U.S.C.S. § 1342*(p)(3)(A). It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary. Environmental Protection Agency (EPA) regulations related to the National Pollutant Discharge Elimination System (NPDES) program define "industrial activity" to include construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. *40 C.F.R. § 122.26(b)(14)(x)*. *Go To Headnote*

*Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497* (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- Reducing the discharge of pollutants from a municipal separate storm sewer systems that receives discharges from areas of new development according to *40 C.F.R. § 122.26(d)(2)(iv)(A)* may be accomplished without any regulation of developers; an municipal separate storm sewer systems operator could reduce pollutant discharges by constructing artificial wetlands or implementing other structural treatment controls. A municipal separate storm sewer systems could prevent illicit discharges as required by *40 C.F.R. § 122.26(d)(2)(iv)(B)* simply by sealing off points of entry where illicit discharges are detected. Moreover, this option allows a municipal separate storm sewer system simply to request a discharger to seek its own National Pollutant Discharge Elimination System permitting arrangement, relieving the municipal separate storm sewer system of any direct regulation of problem dischargers. A municipal separate storm sewer system may similarly monitor and control pollutants from landfills and hazardous waste facilities in satisfaction of *40 C.F.R. § 122.26(d)(2)(iv)(C)* without directly regulating third parties. Finally, a municipal separate storm sewer system may maintain structural and non-structural best management practices regarding construction sites in satisfaction of *40 C.F.R. § 122.26(d)(2)(iv)(D)* without regulating third parties. *Go To Headnote*

**Governments : Agriculture & Food : Processing, Storage & Distribution**

*Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 2002 U.S. App. LEXIS 18844* (9th Cir Sept. 16, 2002).

***Overview:*** *Dairy operators were penalized for repeated violations of Clean Water Act and failure to obtain discharge permits; citizen-plaintiff's notice of suit was timely and proper.*

- Concentrated animal feeding operations (CAFO) are animal feeding operations where animals are stabled or confined for a total of 45 days or more in any 12 month period in an area where neither crops, vegetation or crop residue is sustained. *40 C.F.R. § 122.23(a)(3)*. A CAFO is subject to effluent guidelines, *40 C.F.R. § 412.12(a)*, and is considered to be engaged in industrial activities. *40 C.F.R. § 122.26(b)(14)(i)*, (v). Therefore, it must obtain an individual permit for storm water discharges. *33 U.S.C.S. § 1342*(p)(2)(B); Wash. Admin. Code §§ 173.220.020, 173.220.040. *Go To Headnote*

**Governments : Local Governments : Claims By & Against**

*San Francisco Baykeeper v. City of Saratoga, 1998 U.S. App. LEXIS 3942* (9th Cir Mar. 5, 1998).

***Overview:*** *A city was liable for permit violations if the discharge of fecal coliform came from city-owned or operated drains.*

- The Environmental Protection Agency's regulations implementing the Clean Water Act make clear that a city would be liable if it could be considered the operator of the storm outfall violating the regulations. *40 C.F.R. § 122.26(a)(3)(vi)*. *Go To Headnote*

**Governments : Local Governments : Licenses**

*City of Abilene v. United States EPA, 325 F.3d 657, 2003 U.S. App. LEXIS 6305* (5th Cir Apr. 2, 2003).

***Overview:*** *EPA municipal permits under the Clean Water Act were upheld. The conditions of the permits were authorized under EPA's broad statutory discretion. Tenth Amendment was not violated; cities voluntarily chose the permits, as opposed to an alternative.*

- Because storm water inevitably contains pollutants such as sand or cellar dirt, *33 U.S.C.S. § 1362*(6), a National Pollutant Discharge Elimination System permit is required for the discharge of certain types of storm water into the waters of the United States. Permits for municipal and industrial storm water discharges are governed by *33 U.S.C.S. § 1342*(p) and *40 C.F.R. § 122.26*. While permits for discharges of storm water associated with industrial activity must impose effluent limitations, *33 U.S.C.S. § 1342*(p) authorizes the United States Environmental Protection Agency to issue permits for discharges from municipal separate storm sewer systems (MS4s) that effectively prohibit the introduction of non-storm water into the MS4 and establish management practices and other methods to reduce the discharge of pollutants to the maximum extent practicable. *33 U.S.C.S. § 1342*(p)(3). This more flexible type of permit is referred to as a "management permit." *Go To Headnote*

*Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497* (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- Under the United States Environmental Protection Agency's final administrative rule under *33 U.S.C.S. § 1342*(p) (Phase II Rule), National Pollutant Discharge Elimination System (NPDES) permits are required for discharges from small municipal separate storm sewer systems (small MS4s) and storm water discharges from construction activity disturbing between one and five acres (small construction sites). *40 C.F.R. §§ 122.26(a)(9)(i)(A)*-(B). Small MS4s may seek permission to discharge by submitting an individualized set of best-management plans in six specified categories, *40 C.F.R. § 122.34*, either in the form of an individual permit application, or in the form of a notice of intent to comply with a general permit. *40 C.F.R. § 122.33(b)*. Small MS4s may also seek permission to discharge through an alternative process, under which a permit may be sought without requiring the operator to regulate third parties, *40 C.F.R. §§ 122.33(b)(2)(ii)*, *122.26(d)*. Small construction sites may apply for individual NPDES permits or seek coverage under a promulgated general permit. *40 C.F.R. § 122.26(c)*. The Environmental Protection Agency also preserved authority to regulate other categories of harmful storm water discharges on a regional, as-needed basis. *40 C.F.R. § 122.26(a)(9)(i)(C)*-(D). *Go To Headnote*

- Operators of small municipal separate storm sewer system may opt to avoid the requirements of *33 U.S.C.S. § 1342*(p), Phase II, individual and general permits under an alternative permit option. *40 C.F.R. §§ 122.33(b)(2)(ii)*, *122.26(d)*. This alternative permit allows operators of small municipal separate storm sewer systems to seek individualized permission to discharge based on the permitting program established by the Phase I Rule for large and medium-sized municipal separate storm sewer systems. This option requires the permit seeker to propose management programs that address substantive concerns similar to those raised in the six minimum control measures designed to protect water

quality addressing illicit discharges, but does not require the permit seeker to regulate the actions of third parties upstream from the point of discharge to federal waters. Go To Headnote

Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497 (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- Small municipal separate storm sewer systems seeking an individualized permit under the Phase I model under 33 U.S.C.S. § 1342(p) are relieved of the requirements of 40 C.F.R. §§ 122.26(d)(1)(ii), (d)(2) mandating that larger operators demonstrate their legal authority to control discharges to the municipal separate storm sewer system through ordinance or other binding measures. 40 C.F.R. § 122.33(b)(2)(ii). Go To Headnote

**Governments : Public Improvements : General Overview**

San Francisco Baykeeper v. City of Saratoga, 1998 U.S. App. LEXIS 3942 (9th Cir Mar. 5, 1998).

***Overview:*** *A city was liable for permit violations if the discharge of fecal coliform came from city-owned or operated drains.*

- The Environmental Protection Agency's regulations implementing the Clean Water Act make clear that a city would be liable if it could be considered the operator of the storm outfall violating the regulations. 40 C.F.R. § 122.26(a)(3)(vi). Go To Headnote

**Governments : Public Improvements : Sanitation & Water**

Conservation Law Found. v. Hannaford Bros. Co., 327 F. Supp. 2d 325, 2004 U.S. Dist. LEXIS 14358 (D Vt May 14, 2004).

***Overview:*** *Where the EPA and a state agency did not require storm drain owners to obtain a National Pollution Discharge Elimination System permit, the owners did not violate the CWA by discharging pollutants without a permit.*

- Under the Phase II rule, Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123 and 124), National Pollutant Discharge Elimination System permits are required for stormwater discharges from small municipal sewer systems and from small construction sites. 40 C.F.R. § 122.26(a)(9)(i). The Phase II rule also preserves the residual authority of the Environmental Protection Agency (EPA) and authorizes state agencies to designate that a stormwater discharge requires a permit. 40 C.F.R. § 122.26(a)(9)(i). EPA's retention of its residual designation authority has been upheld as a legitimate exercise of its statutory authority pursuant to § 402(p)(2)(E) and (p)(6) (33 U.S.C.S. § 1342(p)(2)(E) and (p)(6)) of the Clean Water Act, 33 U.S.C.S. §§ 1251-1387. Go To Headnote

Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497 (9th Cir Jan. 14, 2003).

***Overview:*** *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

- Under the United States Environmental Protection Agency's final administrative rule under 33 U.S.C.S. § 1342(p) (Phase II Rule), National Pollutant Discharge Elimination System (NPDES) permits are required for discharges from small municipal separate storm sewer systems (small MS4s) and storm water discharges from construction activity disturbing between one and five acres (small construction sites). 40 C.F.R. §§ 122.26(a)(9)(i)(A)-(B). Small MS4s may seek permission to discharge by submitting an individualized set of best-management plans in six specified categories, 40 C.F.R. § 122.34, either in the form of an individual permit application, or in the form of a notice of intent to comply with a general permit. 40 C.F.R. § 122.33(b). Small MS4s may also seek permission to discharge

through an alternative process, under which a permit may be sought without requiring the operator to regulate third parties, *40 C.F.R. §§ 122.33(b)(2)(ii)*, *122.26(d)*. Small construction sites may apply for individual NPDES permits or seek coverage under a promulgated general permit. *40 C.F.R. § 122.26(c)*. The Environmental Protection Agency also preserved authority to regulate other categories of harmful storm water discharges on a regional, as-needed basis. *40 C.F.R. § 122.26(a)(9)(i)(C)*-(D). *Go To Headnote*

- Operators of small municipal separate storm sewer system may opt to avoid the requirements of *33 U.S.C.S. § 1342*(p), Phase II, individual and general permits under an alternative permit option. *40 C.F.R. §§ 122.33(b)(2)(ii)*, *122.26(d)*. This alternative permit allows operators of small municipal separate storm sewer systems to seek individualized permission to discharge based on the permitting program established by the Phase I Rule for large and medium-sized municipal separate storm sewer systems. This option requires the permit seeker to propose management programs that address substantive concerns similar to those raised in the six minimum control measures designed to protect water quality addressing illicit discharges, but does not require the permit seeker to regulate the actions of third parties upstream from the point of discharge to federal waters. *Go To Headnote*

- Reducing the discharge of pollutants from a municipal separate storm sewer systems that receives discharges from areas of new development according to *40 C.F.R. § 122.26(d)(2)(iv)(A)* may be accomplished without any regulation of developers; an municipal separate storm sewer systems operator could reduce pollutant discharges by constructing artificial wetlands or implementing other structural treatment controls. A municipal separate storm sewer systems could prevent illicit discharges as required by *40 C.F.R. § 122.26(d)(2)(iv)(B)* simply by sealing off points of entry where illicit discharges are detected. Moreover, this option allows a municipal separate storm sewer system simply to request a discharger to seek its own National Pollutant Discharge Elimination System permitting arrangement, relieving the municipal separate storm sewer system of any direct regulation of problem dischargers. A municipal separate storm sewer system may similarly monitor and control pollutants from landfills and hazardous waste facilities in satisfaction of *40 C.F.R. § 122.26(d)(2)(iv)(C)* without directly regulating third parties. Finally, a municipal separate storm sewer system may maintain structural and non-structural best management practices regarding construction sites in satisfaction of *40 C.F.R. § 122.26(d)(2)(iv)(D)* without regulating third parties. *Go To Headnote*

- While it is possible to read the provision in *40 C.F.R. § 122.26(d)(2)(iv)(D)(1)* as requiring the regulation of site planning activities by third party construction professionals, a better reading of the provision is that it requires the municipal separate storm sewer systems operator to consider water quality impacts in planning municipal separate storm sewer system connections at construction sites. Therefore, the provision poses no Tenth Amendment problem. *Go To Headnote*

**Real Property Law : Mining : Regulation**

*American Mining Congress v. United States EPA, 965 F.2d 759, 1992 U.S. App. LEXIS 11656* (9th Cir May 27, 1992).

***Overview:*** *Petitioners failed to show that a rule adopted by the Environmental Protection Agency to regulate storm water discharges to prevent pollutants was retroactive or improperly applied to certain inactive mining operations.*

- The Environmental Protection Agency's storm water regulation, *40 C.F.R. § 122.26(b)(14)(iii)*, does not offend any Congressional intent to regulate abandoned mines exclusively through the abandoned mine lands program. *Go To Headnote*

**Real Property Law : Mining : Surface Rights**

*American Mining Congress v. United States EPA, 965 F.2d 759, 1992 U.S. App. LEXIS 11656* (9th Cir May 27, 1992).

***Overview:*** *Petitioners failed to show that a rule adopted by the Environmental Protection Agency to regulate storm water discharges to prevent pollutants was retroactive or improperly applied to certain inactive mining operations.*

- The national pollutant discharge elimination system (NPDES) permit program of the Clean Water Act, (Act), *33 U.S.C.S. §§ 1311*(a), 1342(a), regulates point source discharges of pollutants from inactive mines regardless of whether the Environmental Protection Agency (EPA) classifies such discharges as associated with industrial activity under *33 U.S.C.S. § 1342*(p)(2)(B). Nothing in the language or legislative history of the abandoned mine lands program or the Surface Mining Control and Rehabilitation Act, *30 U.S.C.S. § 1201*-1238, indicates a Congressional intent to exempt inactive mines from the NPDES permit requirement. There is no evidence that the EPA's storm water rule, *40 C.F.R. § 122.26(b)(14)(iii)*, duplicates, varies, or frustrates the goals or administration of SMCRA. The rule is fully consistent with the EPA's obligation to cooperate with the Secretary of the Interior in carrying out the provisions of SMCRA. *30 U.S.C.S. § 1292*(b). *Go To Headnote*

**Transportation Law : Air Transportation : Airports : Establishment, Maintenance & Operation**

*Buchholz v. Dayton Int'l Airport, 1995 U.S. Dist. LEXIS 9490* (SD Ohio June 26, 1995).

***Overview:*** *The court granted a preliminary injunction in a citizens' suit against the city airport, whose stormwater detention basin received chemicals from the deicing of aircraft, violating the Clean Water Act and the Resource Conservation and Recovery Act.*

- The term "stormwater discharge associated with industrial activity" includes transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171, which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance, including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication, equipment cleaning operations, airport deicing operations or which are otherwise identified under 40 C.F.R. §§ (b)(14)(i)-(vii) or (ix)-(xi) are associated with industrial activity, pursuant to *40 C.F.R. § 122.26(b)(14)*(viii). *Go To Headnote*

## Research References & Practice Aids

**NOTES APPLICABLE TO ENTIRE CHAPTER:**

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325,* Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: *71 FR 25504,* May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: *74 FR 66496,* Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: *75 FR 49556,* Aug. 13, 2010; *77 FR 42181,* July 18, 2012.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Decision, see: *81 FR 43492,* July 5, 2016.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Final report, see: *82 FR 51160,* Nov. 1, 2017.]

**NOTES APPLICABLE TO ENTIRE PART:**

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: *61 FR 41698,* Aug. 9, 1998.]

**RESEARCH GUIDES**

2-8(IV) Bender's Federal Practice Forms, (Matthew Bender), Rule 8(IV). General Rules of Pleading --"Environmental Law" through "Insurance", Form No. 8(IV):3 Complaint to Halt Violations of Clean Water Act.



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**End of Document**

# ATTACHMENT NO. 4

# 40 CFR 122.42

This document is current through the December 13, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through December 4, 2017.



## § 122.42 Additional conditions applicable to specified categories of NPDES permits (applicable to State NPDES programs, see § 123.25).

The following conditions, in addition to those set forth in § 122.41, apply to all NPDES permits within the categories specified below:

**(a)**Existing manufacturing, commercial, mining, and silvicultural dischargers. In addition to the reporting requirements under § 122.41(1), all existing manufacturing, commercial, mining, and silvicultural dischargers must notify the Director as soon as they know or have reason to believe:

**(1)**That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

**(i)**One hundred micrograms per liter (100 X mg/l);

**(ii)**Two hundred micrograms per liter (200 X mg/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 X mg/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;

**(iii)**Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with § 122.21(g)(7); or

**(iv)**The level established by the Director in accordance with § 122.44(f).

**(2)**That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

**(i)**Five hundred micrograms per liter (500 X mg/l);

**(ii)**One milligram per liter (1 mg/l) for antimony;

**(iii)**Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with § 122.21(g)(7).

**(iv)**The level established by the Director in accordance with § 122.44(f).

**(b)**Publicly owned treatment works. All POTWs must provide adequate notice to the Director of the following:

**(1)**Any new introduction of pollutants into the POTW from an indirect discharger which would be subject to section 301 or 306 of CWA if it were directly discharging those pollutants; and

**(2)**Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

**(3)**For purposes of this paragraph, adequate notice shall include information on (i) the quality and quantity of effluent introduced into the POTW, and (ii) any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

**(c)**Municipal separate storm sewer systems. The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under § 122.26(a)(1)(v) must submit an annual report by the anniversary of the date of the issuance of the permit for such system. As of December 21, 2020 all reports submitted in compliance with this section must be submitted electronically by the owner, operator, or the duly authorized representative of the MS4 to the Director or initial recipient, as defined in *40 CFR 127.2(b)*, in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, the owner, operator, or the duly authorized representative of the MS4 may be required to report electronically if specified by a particular permit or if required to do so by state law. The report shall include:

**(1)**The status of implementing the components of the storm water management program that are established as permit conditions;

**(2)**Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with § 122.26(d)(2)(iii) of this part; and

**(3)**Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under § 122.26(d)(2)(iv) and (d)(2)(v) of this part;

**(4)**A summary of data, including monitoring data, that is accumulated throughout the reporting year;

**(5)**Annual expenditures and budget for year following each annual report;

**(6)**A summary describing the number and nature of enforcement actions, inspections, and public education programs;

**(7)**Identification of water quality improvements or degradation;

**(d)**Storm water discharges. The initial permits for discharges composed entirely of storm water issued pursuant to § 122.26(e)(7) of this part shall require compliance with the conditions of the permit as expeditiously as practicable, but in no event later than three years after the date of issuance of the permit.

**(e)**Concentrated animal feeding operations (CAFOs). Any permit issued to a CAFO must include the requirements in paragraphs (e)(1) through (e)(6) of this section.

**(1)**Requirement to implement a nutrient management plan. Any permit issued to a CAFO must include a requirement to implement a nutrient management plan that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412. The nutrient management plan must, to the extent applicable:

**(i)**Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

**(ii)**Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;

**(iii)**Ensure that clean water is diverted, as appropriate, from the production area;

**(iv)**Prevent direct contact of confined animals with waters of the United States;

**(v)**Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;

**(vi)**Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;

**(vii)**Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

**(viii)**Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and

**(ix)**Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

**(2)**Recordkeeping requirements.

**(i)**The permittee must create, maintain for five years, and make available to the Director, upon request, the following records:

**(A)**All applicable records identified pursuant paragraph (e)(1)(ix) of this section;

**(B)**In addition, all CAFOs subject to 40 CFR part 412 must comply with record keeping requirements as specified in § 412.37(b) and (c) and § 412.47(b) and (c).

**(ii)**A copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director upon request.

**(3)**Requirements relating to transfer of manure or process wastewater to other persons. Prior to transferring manure, litter or process wastewater to other persons, Large CAFOs must provide the recipient of the manure, litter or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the requirements of 40 CFR part 412. Large CAFOs must retain for five years records of the date, recipient name and address, and approximate amount of manure, litter or process wastewater transferred to another person.

**(4)**Annual reporting requirements for CAFOs. The permittee must submit an annual report to the Director. As of December 21, 2020 all annual reports submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in *40 CFR 127.2(b)*, in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, the permittee may be required to report electronically if specified by a particular permit or if required to do so by state law. The annual report must include:

**(i)**The number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

**(ii)**Estimated amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months (tons/gallons);

**(iii)**Estimated amount of total manure, litter and process wastewater transferred to other person by the CAFO in the previous 12 months (tons/gallons);

**(vi)**Summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including, for each discharge, the date of discovery, duration of discharge, and approximate volume; and

(v) Total number of acres under control of the CAFO that were used for land application of manure, litter and process wastewater in the previous 12 months;

**(vi)**Summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume; and

**(vii)**A statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner; and

**(viii)**The actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, the results of calculations conducted in accordance with paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section, and the amount of manure, litter, and process wastewater applied to each field during the previous 12 months; and, for any CAFO that implements a nutrient management plan that addresses rates of application in accordance with paragraph (e)(5)(ii) of this section, the results of any soil testing for nitrogen and phosphorus taken during the preceding 12 months, the data used in calculations conducted in accordance with paragraph (e)(5)(ii)(D) of this section, and the amount of any supplemental fertilizer applied during the previous 12 months.

**(5)**Terms of the nutrient management plan. Any permit issued to a CAFO must require compliance with the terms of the CAFO's site-specific nutrient management plan. The terms of the nutrient management plan are the information, protocols, best management practices, and other conditions in the nutrient management plan determined by the Director to be necessary to meet the requirements of paragraph (e)(1) of this section. The terms of the nutrient management plan, with respect to protocols for land application of manure, litter, or process wastewater required by paragraph (e)(1)(viii) of this section and, as applicable, *40 CFR 412.4(c)*, must include the fields available for land application; field-specific rates of application properly developed, as specified in paragraphs (e)(5)(i) through (ii) of this section, to ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and any timing limitations identified in the nutrient management plan concerning land application on the fields available for land application. The terms must address rates of application using one of the following two approaches, unless the Director specifies that only one of these approaches may be used:

**(i)**Linear approach. An approach that expresses rates of application as pounds of nitrogen and phosphorus, according to the following specifications:

**(A)**The terms include maximum application rates from manure, litter, and process wastewater for each year of permit coverage, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, per year, for each field to be used for land application, and certain factors necessary to determine such rates. At a minimum, the factors that are terms must include: The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses of a field such as pasture or fallow fields; the realistic yield goal for each crop or use identified for each field; the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field; credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; and accounting for all other additions of plant available nitrogen and phosphorus to the field. In addition, the terms include the form and source of manure, litter, and process wastewater to be land-applied; the timing and method of land application; and the methodology by which the nutrient management plan accounts for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

**(B)**Large CAFOs that use this approach must calculate the maximum amount of manure, litter, and process wastewater to be land applied at least once each year using the results of the most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application; or

**(ii)**Narrative rate approach. An approach that expresses rates of application as a narrative rate of application that results in the amount, in tons or gallons, of manure, litter, and process wastewater to be land applied, according to the following specifications:

**(A)**The terms include maximum amounts of nitrogen and phosphorus derived from all sources of nutrients, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, for each field, and certain factors necessary to determine such amounts. At a minimum, the factors that are terms must include: the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses such as pasture or fallow fields (including alternative crops identified in accordance with paragraph (e)(5)(ii)(B) of this section); the realistic yield goal for each crop or use identified for each field; and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field. In addition, the terms include the methodology by which the nutrient management plan accounts for the following factors when calculating the amounts of manure, litter, and process wastewater to be land applied: Results of soil tests conducted in accordance with protocols identified in the nutrient management plan, as required by paragraph (e)(1)(vii) of this section; credits for all nitrogen in the field that will be plant available; the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; the form and source of manure, litter, and process wastewater; the timing and method of land application; and volatilization of nitrogen and mineralization of organic nitrogen.

**(B)**The terms of the nutrient management plan include alternative crops identified in the CAFO's nutrient management plan that are not in the planned crop rotation. Where a CAFO includes alternative crops in its nutrient management plan, the crops must be listed by field, in addition to the crops identified in the planned crop rotation for that field, and the nutrient management plan must include realistic crop yield goals and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop. Maximum amounts of nitrogen and phosphorus from all sources of nutrients and the amounts of manure, litter, and process wastewater to be applied must be determined in accordance with the methodology described in paragraph (e)(5)(ii)(A) of this section.

**(C)**For CAFOs using this approach, the following projections must be included in the nutrient management plan submitted to the Director, but are not terms of the nutrient management plan: The CAFO's planned crop rotations for each field for the period of permit coverage; the projected amount of manure, litter, or process wastewater to be applied; projected credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; and the predicted form, source, and method of application of manure, litter, and process wastewater for each crop. Timing of application for each field, insofar as it concerns the calculation of rates of application, is not a term of the nutrient management plan.

**(D)**CAFOs that use this approach must calculate maximum amounts of manure, litter, and process wastewater to be land applied at least once each year using the methodology required in paragraph (e)(5)(ii)(A) of this section before land applying manure, litter, and process wastewater and must rely on the following data:

**(1)**A field-specific determination of soil levels of nitrogen and phosphorus, including, for nitrogen, a concurrent determination of nitrogen that will be plant available consistent with the methodology required by paragraph (e)(5)(ii)(A) of this section, and for phosphorus, the results of the most recent soil test conducted in accordance with soil testing requirements approved by the Director; and

**(2)**The results of most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application, in order to determine the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

**(6)**Changes to a nutrient management plan. Any permit issued to a CAFO must require the following procedures to apply when a CAFO owner or operator makes changes to the CAFO's nutrient management plan previously submitted to the Director:

**(i)**The CAFO owner or operator must provide the Director with the most current version of the CAFO's nutrient management plan and identify changes from the previous version, except that the results of calculations made in accordance with the requirements of paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section are not subject to the requirements of paragraph (e)(6) of this section.

**(ii)**The Director must review the revised nutrient management plan to ensure that it meets the requirements of this section and applicable effluent limitations and standards, including those specified in 40 CFR part 412, and must determine whether the changes to the nutrient management plan necessitate revision to the terms of the nutrient management plan incorporated into the permit issued to the CAFO. If revision to the terms of the nutrient management plan is not necessary, the Director must notify the CAFO owner or operator and upon such notification the CAFO may implement the revised nutrient management plan. If revision to the terms of the nutrient management plan is necessary, the Director must determine whether such changes are substantial changes as described in paragraph (e)(6)(iii) of this section.

**(A)**If the Director determines that the changes to the terms of the nutrient management plan are not substantial, the Director must make the revised nutrient management plan publicly available and include it in the permit record, revise the terms of the nutrient management plan incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit.

**(B)**If the Director determines that the changes to the terms of the nutrient management plan are substantial, the Director must notify the public and make the proposed changes and the information submitted by the CAFO owner or operator available for public review and comment. The process for public comments, hearing requests, and the hearing process if a hearing is held must follow the procedures applicable to draft permits set forth in *40 CFR 124.11* through *124.13*. The Director may establish, either by regulation or in the CAFO's permit, an appropriate period of time for the public to comment and request a hearing on the proposed changes that differs from the time period specified in *40 CFR 124.10*. The Director must respond to all significant comments received during the comment period as provided in *40 CFR 124.17*, and require the CAFO owner or operator to further revise the nutrient management plan if necessary, in order to approve the revision to the terms of the nutrient management plan incorporated into the CAFO's permit. Once the Director incorporates the revised terms of the nutrient management plan into the permit, the Director must notify the owner or operator and inform the public of the final decision concerning revisions to the terms and conditions of the permit.

**(iii)**Substantial changes to the terms of a nutrient management plan incorporated as terms and conditions of a permit include, but are not limited to:

**(A)**Addition of new land application areas not previously included in the CAFO's nutrient management plan. Except that if the land application area that is being added to the nutrient management plan is covered by terms of a nutrient management plan incorporated into an existing NPDES permit in accordance with the requirements of paragraph (e)(5) of this section, and the CAFO owner or operator applies manure, litter, or process wastewater on the newly added land application area in accordance with the existing field-specific permit terms applicable to the newly added land application area, such addition of new land would be a change to the new CAFO owner or operator's nutrient management plan but not a substantial change for purposes of this section;

**(B)**Any changes to the field-specific maximum annual rates for land application, as set forth in paragraphs (e)(5)(i) of this section, and to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as set forth in paragraph (e)(5)(ii) of this section;

**(C)**Addition of any crop or other uses not included in the terms of the CAFO's nutrient management plan and corresponding field-specific rates of application expressed in accordance with paragraph (e)(5) of this section; and

**(D)**Changes to site-specific components of the CAFO's nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S.

**(iv)**For EPA-issued permits only. Upon incorporation of the revised terms of the nutrient management plan into the permit, *40 CFR 124.19* specifies procedures for appeal of the permit decision. In addition to the procedures specified at *40 CFR 124.19*, a person must have submitted comments or participated in the public hearing in order to appeal the permit decision.

## Statutory Authority

The Clean Water Act, *33 U.S.C. 1251* et seq.

## History

*[48 FR 14153*, Apr. 1, 1983, as amended at *49 FR 38049*, Sept. 26, 1984; *50 FR 4514*, Jan. 31, 1985; *55 FR 48073*, Nov. 16, 1990; *57 FR 60448*, Dec. 18, 1992; *68 FR 7176, 7268*, Feb. 12, 2003; *71 FR 6978, 6984*, Feb. 10, 2006; *72 FR 40245, 40250*, July 24, 2007; *73 FR 70418, 70483*, Nov. 20, 2008; *80 FR 64064, 64098*, Oct. 22, 2015]

Annotations

## Notes

**[EFFECTIVE DATE NOTE:**

*72 FR 40245, 40250*, July 24, 2007, amended paragraph (e)(1), effective July 24, 2007; *73 FR 70418, 70483*, Nov. 20, 2008, amended paragraph (e), effective Dec. 22, 2008; *80 FR 64064, 64098*, Oct. 22, 2015, revised introductory text in paragraphs (c) and (e)(4) and paragraph (e)(4)(vi), effective Dec. 21, 2015.]

## Case Notes

**LexisNexis® Notes**

Case Notes Applicable to Entire Part
Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances
Environmental Law : Hazardous Wastes & Toxic Substances : Treatment, Storage & Disposal
Environmental Law : Solid Wastes : Disposal Standards
Environmental Law : Water Quality : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation
Environmental Law : Water Quality : Clean Water Act : Recordkeeping & Reporting

**Case Notes Applicable to Entire Part**

*Part Note*

**Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances**

*Mcclellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103* (ED Cal June 20, 1988).

***Overview:*** *A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.*

- The Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES) regulations, codified at *40 C.F.R. § 122*, contemplate that discharges of volatile organics will be addressed on a case-by-case basis. *40 C.F.R. § 122.21(g)(7)(ii)* requires industrial permit applicants to report quantitative data for volatile organics in each outfall containing process wastewater. *40 C.F.R. § 122.42(a)* requires permittees to notify the permitting authority as soon as they know or have reason to believe that an activity has occurred or will occur that would result in the discharge of a toxic pollutant which is not limited in the permit in excess of specified levels. These sections are specifically made applicable to state NPDES programs through *40 C.F.R. § 123.25*. *Go To Headnote*

**Environmental Law : Hazardous Wastes & Toxic Substances : Treatment, Storage & Disposal**

*Mcclellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103* (ED Cal June 20, 1988).

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**Environmental Law : Solid Wastes : Disposal Standards**

*Public Interest Research Group v. Hercules, Inc., 830 F. Supp. 1525, 1993 U.S. Dist. LEXIS 9486* (D NJ Mar. 31, 1993).

***Overview:*** *A citizen groups' required statutory notice of alleged violations of the Clean Water Act by a corporation prior to commencing suit required dismissal by summary judgment of all additional allegations contained in the suit not mentioned in the notice.*

- The National Pollutant Discharge Elimination System (NPDES), *33 U.S.C.S. § 1342*(a)(1), authorizes the Administrator of the United States Environmental Protection Agency (EPA) to issue discharge permits in accordance with national standards promulgated by the Administrator. NPDES permits require permitees to establish and maintain records; to install, use, and maintain monitoring equipment; to sample effluent; and to submit regular reports to the EPA. *33 U.S.C.S. § 1318*(a)(4)(A). These reports are known as "discharge monitoring reports" (DMR) and they must be submitted at regular intervals specified in the permit. *40 C.F.R. § 122.41(1)(4)*. Criminal penalties can be imposed for the submission of false information in the DMRs. *40 C.F.R. § 122.41(k)(2)*. In addition, permittees have an

affirmative obligation to correct any past errors or omissions in reporting of which they subsequently become aware. *40 C.F.R. § 122.42(1)(8)*. *Go To Headnote*

**Environmental Law : Water Quality : General Overview**

*Sierra Club v. Union Oil Co., 1985 U.S. Dist. LEXIS 14129* (ND Cal Nov. 5, 1985).

***Overview:*** *An oil company was not liable under the Clean Water Act for exceeding effluent limitations on wastewater discharge, because the exceedances were caused by factors beyond the company's reasonable control, thereby qualifying as excusable "upsets."*

- Exceedances attributable to temporary malfunctions of equipment also qualify as "upsets" within the meaning of *40 C.F.R. § 122.42(n)*. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Overview**

*Public Interest Research Group of New Jersey v. New Jersey Dept. of Envtl. Protection & Energy, 1993 U.S. Dist. LEXIS 4945* (D NJ Apr. 13, 1993).

***Overview:*** *In a citizen suit under 33 U.S.C.S. § 1365(a)(1)(A) of the Clean Water Act, a permit holder was held liable for numerous permit violations in addition to those for which liability had been proved, and the Gwaltney standard was satisfied for use of past violations as evidence of continuing violations of reporting of sample type and frequency data.*

- Pursuant with statutory authority, permittees are required to submit Discharge Monitoring Reports ("DMRs") at regular intervals as specified in each permit. *33 U.S.C.S. § 1361*(a); *40 C.F.R. § 122.41(1)(4) (1991)*. Federal regulations provide for criminal penalties for the submission of false information in these reports, *40 C.F.R. § 122.41(k)(2) (1991)*, and impose an affirmative obligation on permittees to correct any past errors or omissions in reporting of which they subsequently become aware. *40 C.F.R. § 122.42(1)(8) (1991)*. Thus, the Clean Water Act and its corresponding regulations give the New Jersey Department of Environmental Protection and Energy the authority to require permittees to file DMRs containing information prescribed by the agency. *Go To Headnote*

*Public Interest Research Group v. Hercules, Inc., 830 F. Supp. 1525, 1993 U.S. Dist. LEXIS 9486* (D NJ Mar. 31, 1993).

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***Overview:*** *A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.*

• The Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES) regulations, codified at *40 C.F.R. § 122*, contemplate that discharges of volatile organics will be addressed on a case-by-case basis. *40 C.F.R. § 122.21(g)(7)(ii)* requires industrial permit applicants to report quantitative data for volatile organics in each outfall containing process wastewater. *40 C.F.R. § 122.42(a)* requires permittees to notify the permitting authority as soon as they know or have reason to believe that an activity has occurred or will occur that would result in the discharge of a toxic pollutant which is not limited in the permit in excess of specified levels. These sections are specifically made applicable to state NPDES programs through *40 C.F.R. § 123.25*. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations**

*Waterkeeper Alliance, Inc. v. United States EPA, 2005 U.S. App. LEXIS 6533* (2d Cir Feb. 28, 2005).

***Overview:*** *EPA's concentrated animal feeding operations (CAFO) rule violated the Clean Water Act, 33 U.S.C.S. § 1342, because it empowered National Pollutant Discharge Elimination System authorities to issue permits to large CAFOs in the absence of any meaningful review of the CAFOs' nutrient management plans and required all CAFOs to apply for permits.*

• The concentrated animal feeding operations (CAFO) rule, *40 C.F.R. § 122.23*, fails to require that the terms of the nutrient management plans be included in National Pollutant Discharge Elimination System permits, it also fails to provide the public with any other means of access to them. After all, the rule provides only that a copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director of the state permitting authority upon request. *40 C.F.R. § 122.42(e)(2)(ii)*. The Rule does not similarly require that copies of the nutrient management plans be made available to the public by the CAFOs. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation**

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• The concentrated animal feeding operations (CAFO) rule, *40 C.F.R. § 122.23*, fails to require that the terms of the nutrient management plans be included in National Pollutant Discharge Elimination System permits, it also fails to provide the public with any other means of access to them. After all, the rule provides only that a copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director of the state permitting authority upon request. *40 C.F.R. § 122.42(e)(2)(ii)*. The Rule does not similarly require that copies of the nutrient management plans be made available to the public by the CAFOs. *Go To Headnote*

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*Public Interest Research Group of New Jersey v. New Jersey Dept. of Envtl. Protection & Energy, 1993 U.S. Dist. LEXIS 4945* (D NJ Apr. 13, 1993).

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• Pursuant with statutory authority, permittees are required to submit Discharge Monitoring Reports ("DMRs") at regular intervals as specified in each permit. *33 U.S.C.S. § 1361*(a); *40 C.F.R. § 122.41(1)(4) (1991)*. Federal regulations provide for criminal penalties for the submission of false information in these reports, *40 C.F.R. § 122.41(k)(2) (1991)*, and impose an affirmative obligation on permittees to correct any past errors or omissions in reporting of

which they subsequently become aware. *40 C.F.R. § 122.42(1)(8) (1991)*. Thus, the Clean Water Act and its corresponding regulations give the New Jersey Department of Environmental Protection and Energy the authority to require permittees to file DMRs containing information prescribed by the agency. *Go To Headnote*

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***Overview:*** *A citizen groups' required statutory notice of alleged violations of the Clean Water Act by a corporation prior to commencing suit required dismissal by summary judgment of all additional allegations contained in the suit not mentioned in the notice.*

- The National Pollutant Discharge Elimination System (NPDES), *33 U.S.C.S. § 1342*(a)(1), authorizes the Administrator of the United States Environmental Protection Agency (EPA) to issue discharge permits in accordance with national standards promulgated by the Administrator. NPDES permits require permitees to establish and maintain records; to install, use, and maintain monitoring equipment; to sample effluent; and to submit regular reports to the EPA. *33 U.S.C.S. § 1318*(a)(4)(A). These reports are known as "discharge monitoring reports" (DMR) and they must be submitted at regular intervals specified in the permit. *40 C.F.R. § 122.41(1)(4)*. Criminal penalties can be imposed for the submission of false information in the DMRs. *40 C.F.R. § 122.41(k)(2)*. In addition, permittees have an affirmative obligation to correct any past errors or omissions in reporting of which they subsequently become aware. *40 C.F.R. § 122.42(1)(8)*. *Go To Headnote*

## Research References & Practice Aids

**NOTES APPLICABLE TO ENTIRE CHAPTER:**

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325,* Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: *71 FR 25504,* May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: *74 FR 66496,* Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: *75 FR 49556,* Aug. 13, 2010; *77 FR 42181,* July 18, 2012.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Decision, see: *81 FR 43492,* July 5, 2016.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Final report, see: *82 FR 51160,* Nov. 1, 2017.]

**NOTES APPLICABLE TO ENTIRE PART:**

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: *61 FR 41698,* Aug. 9, 1998.]

# ATTACHMENT NO. 5

# 40 CFR 123.24





## § 123.24 Memorandum of Agreement with the Regional Administrator.

**(a)**Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.

**(b)**The Memorandum of Agreement shall include the following:

**(1)**

**(i)**Provisions for the prompt transfer from EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.). If existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

NOTE: For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to the outstanding Federal permit which would simultaneously be terminated.

**(ii)**Where a State has been authorized by EPA to issue permits in accordance with § 123.23(b) on the Federal Indian reservation of the Indian Tribe seeking program approval, provisions describing how the transfer of pending permit applications, permits, and any other information relevant to the program operation not already in the possession of the Indian Tribe (support files for permit issuance, compliance reports, etc.) will be accomplished.

**(2)**Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection.

**(3)**Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. These procedures must also implement the requirements of *40 CFR 123.41(a)* and *123.43* and *40* CFR part 127 (including the required data elements in appendix A to part 127).

**(4)**Provisions on the State's compliance monitoring and enforcement program, including:

**(i)**Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for

EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

**(ii)**Procedures to assure coordination of enforcement activities.

**(5)**When appropriate, provisions for joint processing of permits by the State and EPA for facilities or activities which require permits from both EPA and the State under different programs. (See § 124.4.)

NOTE: To promote efficiency and to avoid duplication and inconsistency, States are encouraged to enter into joint processing agreements with EPA for permit issuance. Likewise, States are encouraged (but not required) to consider steps to coordinate or consolidate their own permit programs and activities.

**(6)**Provisions for modification of the Memorandum of Agreement in accordance with this part.

**(c)**The Memorandum of Agreement, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended through the procedures set forth in this part. The State/EPA Agreement may not override the Memorandum of Agreement.

NOTE: Detailed program priorities and specific arrangements for EPA support of the State program will change and are therefore more appropriately negotiated in the context of annual agreements rather than in the MOA. However, it may still be appropriate to specify in the MOA the basis for such detailed agreements, e.g., a provision in the MOA specifying that EPA will select facilities in the State for inspection annually as part of the State/EPA agreement.

**(d)**The Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under section 402(d)(3), (e) or (f) of CWA. While the Regional Administrator and the State may agree to waive EPA review of certain "classes or categories" of permits, no waiver of review may be granted for the following classes or categories:

**(1)**Discharges into the territorial sea;

**(2)**Discharges which may affect the waters of a State other than the one in which the discharge originates;

**(3)**Discharges proposed to be regulated by general permits (see § 122.28);

**(4)**Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;

**(5)**Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;

**(6)**Discharges from any major discharger or from any discharger within any of the 21 industrial categories listed in appendix A to part 122;

**(7)**Discharges from other sources with a daily average discharge exceeding 0.5 (one-half) million gallons per day, except that EPA review of permits for discharges of non-process wastewater may be waived regardless of flow.

**(e)**Whenever a waiver is granted under paragraph (d) of this section, the Memorandum of Agreement shall contain:

**(1)**A statement that the Regional Administrator retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director written notice of termination; and

**(2)**A statement that the State shall supply EPA with copies of final permits.

## Statutory Authority

**AUTHORITY NOTE APPLICABLE TO ENTIRE PART:**

Clean Water Act, *33 U.S.C. 1251* et seq.

## History

*[48 FR 14178,* Apr. 1, 1983; *50 FR 6941,* Feb. 19, 1985, as amended at *54 FR 18784,* May 2, 1989; *58 FR 67981,* Dec. 22, 1993; *63 FR 45114, 45122,* Aug. 24, 1998; *80 FR 64064, 64099,* Oct. 22, 2015]

Annotations

## Notes

**[EFFECTIVE DATE NOTE:**

*80 FR 64064, 64099,* Oct. 22, 2015, revised paragraph (b)(3), effective Dec. 21, 2015.]

## Case Notes

**LexisNexis® Notes**

Case Notes Applicable to Entire Part
Environmental Law : Federal & State Interrelationships : General Overview
Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Permits
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Storm Water Discharges
Environmental Law : Water Quality : Clean Water Act : Enforcement : Citizen Suits : General Overview

**Case Notes Applicable to Entire Part**

*Part Note*

**Environmental Law : Federal & State Interrelationships : General Overview**

*Sierra Club v. United States EPA, 475 F. Supp. 2d 29, 2007 U.S. Dist. LEXIS 12704* (DDC Feb. 26, 2007).

***Overview:*** *EPA's duty under 33 U.S.C.S. § 1342(d)(4), 40 C.F.R. §§ 123.24, 123.44(h)(2), and Fla. Admin. Code Ann. R. 62-620.510 was discretionary, and thus, court lacked jurisdiction under 33 U.S.C.S. § 1365(a)(2) to compel EPA to take over permitting process from State of Florida with regard to a mill's request for a permit to discharge water under the CWA.*

- The United States Environmental Protection Agency (EPA) and Florida set out policies and procedures for the state's National Pollutant Discharge Elimination System program in a Memorandum of Agreement (MOA). *40 C.F.R. § 123.24*. The MOA also addresses EPA permit objections: The Florida Department of Environmental Protection's requests for a hearing on an objection and the procedure for resolving the objection shall be governed by *40 C.F.R. § 123.44*. If the EPA's objections are not satisfied within 90 days of the objection (or 30 days following a public hearing on the objection), exclusive authority to issue the permit vests in EPA. *Go To Headnote*

- Fla. Admin. Code Ann. R. 62-620.510 and a Memorandum of Agreement outlined in *40 C.F.R. § 123.24* make clear that the United States Environmental Protection Agency's assumption of jurisdiction is automatic and do not require action

by any party. Fla. Admin. Code Ann. R. 62-620.510(18)(b). Therefore, these Florida provisions do not create a nondiscretionary "duty or act" sufficient to trigger a federal district court's jurisdiction under the Clean Water Act. 33 U.S.C.S. § 1365(a)(2). Go To Headnote

**Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure**

Sierra Club v. United States EPA, 475 F. Supp. 2d 29, 2007 U.S. Dist. LEXIS 12704 (DDC Feb. 26, 2007).

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**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations**

Askins v. Ohio Dep't of Agric., 809 F.3d 868, 2016 U.S. App. LEXIS 57 (6th Cir Jan. 6, 2016).

***Overview:*** *Clean Water Act did not permit suits against regulators for regulatory functions and the landowners' private-citizen suit was dismissed for lack of subject-matter jurisdiction, 33 U.S.C.S. §§ 1314, 1342, 1365. Violation of the notification requirement was not actionable in a citizen suit, and notification as condition of permit was not prescribed.*

- The Clean Water Act grants the U.S. Environmental Protection Agency (EPA) express rights and responsibilities to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, but preserves states' primary responsibilities and rights to abate pollution, 33 U.S.C.S. § 1251(a)-(b). The Clean Water Act requires certain animal feeding operations to obtain a permit under the national pollutant discharge elimination system (NPDES) prior to discharging any pollutant into navigable waters, 33 U.S.C.S. §§ 1311(a), 1342(a). The U.S. EPA may approve a state to administer a state-NPDES program, but the U.S. EPA retains authority to supervise it and withdraw approval, 33 U.S.C.S. § 1342(b)-(c); 40 C.F.R. § 123.24. Once approved, a state must seek permission from the U.S. EPA before it can transfer all or part of the state-NPDES program to another state agency, 40 C.F.R. § 123.62(c). Go To Headnote

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Permits**

Sierra Club v. United States EPA, 475 F. Supp. 2d 29, 2007 U.S. Dist. LEXIS 12704 (DDC Feb. 26, 2007).

***Overview:*** *EPA's duty under 33 U.S.C.S. § 1342(d)(4), 40 C.F.R. §§ 123.24, 123.44(h)(2), and Fla. Admin. Code Ann. R. 62-620.510 was discretionary, and thus, court lacked jurisdiction under 33 U.S.C.S. § 1365(a)(2) to compel EPA to take over permitting process from State of Florida with regard to a mill's request for a permit to discharge water under the CWA.*

- The United States Environmental Protection Agency (EPA) and Florida set out policies and procedures for the state's National Pollutant Discharge Elimination System program in a Memorandum of Agreement (MOA). *40 C.F.R. § 123.24*. The MOA also addresses EPA permit objections: The Florida Department of Environmental Protection's requests for a hearing on an objection and the procedure for resolving the objection shall be governed by *40 C.F.R. § 123.44*. If the EPA's objections are not satisfied within 90 days of the objection (or 30 days following a public hearing on the objection), exclusive authority to issue the permit vests in EPA. *Go To Headnote*

- Fla. Admin. Code Ann. R. 62-620.510 and a Memorandum of Agreement outlined in *40 C.F.R. § 123.24* make clear that the United States Environmental Protection Agency's assumption of jurisdiction is automatic and do not require action by any party. Fla. Admin. Code Ann. R. 62-620.510(18)(b). Therefore, these Florida provisions do not create a nondiscretionary "duty or act" sufficient to trigger a federal district court's jurisdiction under the Clean Water Act. *33 U.S.C.S. § 1365*(a)(2). *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications**

*Askins v. Ohio Dep't of Agric., 809 F.3d 868, 2016 U.S. App. LEXIS 57* (6th Cir Jan. 6, 2016).

***Overview:*** *Clean Water Act did not permit suits against regulators for regulatory functions and the landowners' private-citizen suit was dismissed for lack of subject-matter jurisdiction, 33 U.S.C.S. §§ 1314, 1342, 1365. Violation of the notification requirement was not actionable in a citizen suit, and notification as condition of permit was not prescribed.*

- The Clean Water Act grants the U.S. Environmental Protection Agency (EPA) express rights and responsibilities to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, but preserves states' primary responsibilities and rights to abate pollution, *33 U.S.C.S. § 1251*(a)-(b). The Clean Water Act requires certain animal feeding operations to obtain a permit under the national pollutant discharge elimination system (NPDES) prior to discharging any pollutant into navigable waters, *33 U.S.C.S. §§ 1311*(a), 1342(a). The U.S. EPA may approve a state to administer a state-NPDES program, but the U.S. EPA retains authority to supervise it and withdraw approval, *33 U.S.C.S. § 1342*(b)-(c); *40 C.F.R. § 123.24*. Once approved, a state must seek permission from the U.S. EPA before it can transfer all or part of the state-NPDES program to another state agency, *40 C.F.R. § 123.62(c)*. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Storm Water Discharges**

*Askins v. Ohio Dep't of Agric., 809 F.3d 868, 2016 U.S. App. LEXIS 57* (6th Cir Jan. 6, 2016).

***Overview:*** *Clean Water Act did not permit suits against regulators for regulatory functions and the landowners' private-citizen suit was dismissed for lack of subject-matter jurisdiction, 33 U.S.C.S. §§ 1314, 1342, 1365. Violation of the notification requirement was not actionable in a citizen suit, and notification as condition of permit was not prescribed.*

- The Clean Water Act grants the U.S. Environmental Protection Agency (EPA) express rights and responsibilities to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, but preserves states' primary responsibilities and rights to abate pollution, *33 U.S.C.S. § 1251*(a)-(b). The Clean Water Act requires certain animal feeding operations to obtain a permit under the national pollutant discharge elimination system (NPDES) prior to discharging any pollutant into navigable waters, *33 U.S.C.S. §§ 1311*(a), 1342(a). The U.S. EPA may approve a state to administer a state-NPDES program, but the U.S. EPA retains authority to supervise it and withdraw approval, *33 U.S.C.S. § 1342*(b)-(c); *40 C.F.R. § 123.24*. Once approved, a state must seek permission from the U.S. EPA before it can transfer all or part of the state-NPDES program to another state agency, *40 C.F.R. § 123.62(c)*. *Go To Headnote*

**Environmental Law : Water Quality : Clean Water Act : Enforcement : Citizen Suits : General Overview**

*Sierra Club v. United States EPA, 475 F. Supp. 2d 29, 2007 U.S. Dist. LEXIS 12704* (DDC Feb. 26, 2007).

***Overview:*** *EPA's duty under 33 U.S.C.S. § 1342(d)(4), 40 C.F.R. §§ 123.24, 123.44(h)(2), and Fla. Admin. Code Ann. R. 62-620.510 was discretionary, and thus, court lacked jurisdiction under 33 U.S.C.S. § 1365(a)(2) to compel EPA to take over permitting process from State of Florida with regard to a mill's request for a permit to discharge water under the CWA.*

- Fla. Admin. Code Ann. R. 62-620.510 and a Memorandum of Agreement outlined in *40 C.F.R. § 123.24* make clear that the United States Environmental Protection Agency's assumption of jurisdiction is automatic and do not require action by any party. Fla. Admin. Code Ann. R. 62-620.510(18)(b). Therefore, these Florida provisions do not create a nondiscretionary "duty or act" sufficient to trigger a federal district court's jurisdiction under the Clean Water Act. *33 U.S.C.S. § 1365*(a)(2). *Go To Headnote*

## Research References & Practice Aids

**NOTES APPLICABLE TO ENTIRE CHAPTER:**

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325,* Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: *71 FR 25504,* May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: *74 FR 66496,* Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: *75 FR 49556,* Aug. 13, 2010; *77 FR 42181,* July 18, 2012.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Decision, see: *81 FR 43492,* July 5, 2016.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Final report, see: *82 FR 51160,* Nov. 1, 2017.]

**NOTES APPLICABLE TO ENTIRE PART:**

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 123 Reorganizations, see: *62 FR 61170,* Nov. 14, 1997.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 123 Final interpretive rule, see: *81 FR 30183,* May 16, 2016.]



End of Document

# ATTACHMENT NO. 6

55 FR 47990

November 16, 1990

Rules and Regulations

**Reporter**
55 FR 47990

***Federal Register* > *1990* > *November* > *November 16, 1990* > *Rules and Regulations* > *FEDERAL REGISTER***

## Notice

*Part 1 of 2*. You are viewing a very large document that has been divided into parts.

**Title:** National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges

**Action:** Final rule.

## Agency

FEDERAL REGISTER

**Identifier:** [FRL-3834-7] > RIN 2040-AA79

## Administrative Code Citation

40 CFR Parts 122, 123, and 124

## Synopsis

SUMMARY: Today's final rule begins to implement section 402(p) of the Clean Water Act (CWA) (added by section 405 of the Water Quality Act of 1987 (WQA)), which requires the Environmental Protection Agency (EPA) to establish regulations setting forth National Pollutant Discharge Elimination System (NPDES) permit application requirements for: storm water discharges associated with industrial activity; discharges from a municipal separate storm sewer system serving a population of 250,000 or more; and discharges from municipal separate storm sewer systems serving a population of 100,000 or more, but less than 250,000.

Today's rule also clarifies the requirements of section 401 of the WQA, which amended CWA section 402(1)(2) to provide that NPDES permits shall not be required for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of such operations. This rule

sets forth NPDES permit application requirements addressing storm water discharges associated with industrial activity and storm water discharges from large and medium municipal separate storm sewer systems.

## Text

SUPPLEMENTARY INFORMATION:

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I. Background and Water Quality Concerns

The 1972 amendments to the Federal Water Pollution Control Act (referred to as the Clean Water Act or CWA), prohibit the discharge of any pollutant to navigable waters from a point source unless the discharge is authorized by an NPDES permit. Efforts to improve water quality under the NPDES program traditionally and primarily focused on reducing pollutants in discharges of industrial process wastewater and municipal sewage. This program emphasis developed for a number of reasons. At the onset of the program in 1972, many sources of industrial process wastewater and municipal sewage were not adequately controlled and represented pressing environmental problems. In addition, sewage outfalls and industrial process discharges were easily identified as responsible for poor, often drastically degraded, water quality conditions. However, as pollution control measures were initially developed for these discharges, it became evident that more diffuse sources (occurring over a wide area) of water pollution, such as agricultural and urban runoff were also major causes of water quality problems. Some diffuse sources of water pollution, such as agricultural storm water discharges and irrigation return flows, are statutorily exempted from the NPDES program.

Since enactment of the 1972 amendments to the CWA, considering the rise of economic activity and population, significant progress in controlling water pollution has been made, particularly with regard to industrial process wastewater and municipal sewage. Expenditures by EPA, the States, and local governments to construct and upgrade sewage treatment facilities have substantially increased the population served by higher levels of treatment. Backlogs of expired permits for industrial process wastewater discharges have been reduced. Continued improvements are expected for these discharges as the NPDES program continues to place increasing emphasis on water quality-based pollution controls, especially for toxic pollutants.

Although assessments of water quality are difficult to perform and verify, several national assessments of water quality are available. For the purpose of these assessments, urban runoff was considered to be a diffuse source or nonpoint source pollution. From a legal standpoint, however, most urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program. The "National Water Quality Inventory, 1988 Report to Congress" provides a general assessment of water quality based on biennial reports submitted by the States under section 305(b) of the CWA. In preparing the section 305(b) Reports, the States

were asked to indicate the fraction of the States' waters that were assessed, as well as the fraction of the States' waters that were fully supporting, partly supporting, or not supporting designated uses. The Report indicates that of the rivers, lakes, and estuaries that were assessed by States (approximately one-fifth of stream miles, one-third of lake acres and one-half of estuarine waters), roughly 70% to 75% are supporting the uses for which they are designated. For waters with use impairments, States were asked to determine impacts due to diffuse sources (agricultural and urban runoff and other sources), municipal sewage, industrial process wastewaters, combined sewer overflows, and natural and other sources, then combine impacts to arrive at estimates of the relative percentage of State waters affected by each source. In this manner, the relative importance of the various sources of pollution that are causing use impairments was assessed and weighted national averages were calculated. Based on 37 States that provided information on sources of pollution, industrial process wastewaters were cited as the cause of nonsupport for 7.5% of rivers and streams, 10% of lakes, and 6% of estuaries. Municipal sewage was the cause of nonsupport for 13% of rivers and streams, 5% lakes, 48% estuaries, 41% of the Great Lake shoreline, and 11% of coastal waters. The Assessment concluded that pollution from diffuse sources, such as runoff from agricultural, urban areas, construction sites, land disposal and resource extraction, is cited by the States as the leading cause of water quality impairment. These sources appear to be increasingly important contributors of use impairment as discharges of industrial process wastewaters and municipal sewage plants come under increased control and as intensified data collection efforts provide additional information. Some examples of diffuse sources cited as causing use impairment are: for rivers and streams, 9% from separate storm sewers, 6% from construction and 13% from resource extraction; for lakes, 28% from separate storm sewers and 26% from land disposal; for the Great Lakes shoreline, 10% from separate storm sewers, 34% from resource extraction, and 82% from land disposal; for estuaries, 28% from separate storm sewers and 27% from land disposal; and for coastal areas, 20% from separate storm sewers and 29% from land disposal.

The States conducted a more comprehensive study of diffuse pollution sources under the sponsorship of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and EPA. The study resulted in the report "America's Clean Water -- The States' Nonpoint Source Assessment, 1985" which indicated that 38 States reported urban runoff as a major cause of beneficial use impairment. In addition, 2l States reported construction site runoff as a major cause of use impairment.

To provide a better understanding of the nature of urban runoff from commercial and residential areas, from 1978 through 1983, EPA provided funding and guidance to the Nationwide Urban Runoff Program (NURP). The NURP included 28 projects across the Nation, conducted separately at the local level but centrally reviewed, coordinated, and guided.

One focus of the NURP was to characterize the water quality of discharges from separate storm sewers which drain residential, commercial, and light industrial (industrial parks) sites. The majority of samples collected in the study were analyzed for eight conventional pollutants and three metals. Data collected under the NURP indicated that on an annual loading basis, suspended solids in discharges from separate storm sewers draining runoff from residential, commercial and light industrial areas are around an order of magnitude greater than solids in discharges from municipal secondary sewage treatment plants. In addition, the study indicated that annual loadings of chemical oxygen demand (COD) are comparable in magnitude to effluent from secondary sewage treatment plants. When analyzing annual loadings associated with urban runoff, it is important to recognize that discharges of urban runoff are highly intermittent, and that the short-term loadings associated with individual events will be high and may have shockloading effects on receiving water, such as low dissolved oxygen levels. NURP data also showed that fecal coliform counts in urban runoff are typically in the tens to hundreds of thousands per 100 ml of runoff during warm weather conditions, although the study suggested that fecal coliform may not be the most appropriate indicator organism for identifying potential health risks in storm water runoff. Although NURP did not evaluate oil and grease, other studies have demonstrated that urban runoff is an extremely important source of oil pollution to receiving waters, with hydrocarbon levels in urban runoff typically being reported at a range of 2 to 15 mg/l. These hydrocarbons tend to accumulate in bottom sediments where they may persist for long periods of time and exert adverse impacts on benthic organisms.

A portion of the NURP study involved monitoring 120 priority pollutants in storm water discharges from lands used for residential, commercial and light industrial activities. Seventy-seven priority pollutants were detected in samples of storm water discharges from residential, commercial and light industrial lands taken during the NURP study, including 14 inorganic and 63 organic pollutants. Table A-1 shows the priority pollutants which were detected in at least ten percent of the discharge samples which were sampled for priority pollutants.

**Table A-1. -- Priority Pollutants Detected in at Least 10% of NURP Samples**

**[In percent]**

| | **Frequency of detection** |
|---|---|
| Metals and inorganics: | |
| Antimony | 13 |
| Arsenic | 52 |
| Beryllium | 12 |
| Cadmium | 48 |
| Chromium | 58 |
| Copper | 91 |
| Cyanides | 23 |
| Lead | 94 |
| Nickel | 43 |
| Selenium | 11 |
| Zinc | 94 |
| Pesticides: | |
| Alpha-hexachlorocyclohexane | 20 |
| Alpha-endosulfan | 19 |
| Chlordane | 17 |
| Lindane | 15 |
| Halogenated aliphatics: | |
| Methane, dichloro- | 11 |
| Phenols and cresols: | |
| Phenol | 14 |
| Phenol, pentachloro- | 19 |
| Phenol, 4-nitro | 10 |
| Phthalate esters: | |
| Phthalate, bis(2-ethylhexyl) | 22 |
| Polycyclic aromatic hydrocarbons: | |
| Chrysene | 10 |
| Fluoranthene | 16 |
| Phenanthrene | 12 |
| Pyrene | 15 |

The NURP data also showed a significant number of these samples exceeded various EPA freshwater water quality criteria.

The NURP study provides insight on what can be considered background levels of pollutants for urban runoff, as the study focused primarily on monitoring runoff from residential, commercial and light industrial areas. However, NURP concluded that the quality of urban runoff can be adversely impacted by several sources of pollutants that were not directly evaluated in the study and are generally not reflected in the NURP data, including illicit connections, construction site runoff, industrial site runoff and illegal dumping.

Other studies have shown that many storm sewers contain illicit discharges of non-storm water and that large amounts of wastes, particularly used oils, are improperly disposed in storm sewers. Removal of these discharges present opportunities for dramatic improvements in the quality of storm water discharges. Storm water discharges from industrial facilities may contain toxics and conventional pollutants when material management practices allow exposure to storm water, in addition to wastes from illicit connections and improperly disposed wastes.

In some municipalities, illicit connections of sanitary, commercial and industrial discharges to storm sewer systems have had a significant impact on the water quality of receiving waters. Although the NURP study did not emphasize the identification of illicit connections to storm sewers (other than to assure that monitoring sites used in the study were free from sanitary sewage contamination), the study concluded that illicit connections can result in high bacterial counts and dangers to public health. The study also noted that removing such discharges presented opportunities for dramatic improvements in the quality of urban storm water discharges.

Studies have shown that illicit connections to storm sewers can create severe, wide-spread contamination problems. For example, the Huron River Pollution Abatement Program inspected 660 businesses, homes and other buildings located in Washtenaw County, Michigan and identified 14% of the buildings as having improper storm drain connections. Illicit discharges were detected at a higher rate of 60% for automobile related businesses, including service stations, automobile dealerships, car washes, body shops and light industrial facilities. While some of the problems discovered in this study were the result of improper plumbing or illegal connections, a majority were approved connections at the time they were built.

Intensive construction activities may result in severe localized impacts on water quality because of high unit loads of pollutants, primarily sediments. Construction sites can also generate other pollutants such as phosphorus and nitrogen from fertilizer, pesticides, petroleum products, construction chemicals and solid wastes. These materials can be toxic to aquatic organisms and degrade water for drinking and water-contact recreation. Sediment loadings rates from construction sites are typically 10 to 20 times that of agricultural lands, with runoff rates as high as 100 times that of agricultural lands, and typically 1,000 to 2,000 times that of forest lands. Even a small amount of construction may have a significant negative impact on water quality in localized areas. Over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades.

II. Water Quality Act of 1987

The WQA contains three provisions which specifically address storm water discharges. The central WQA provision governing storm water discharges is section 405, which adds section 402(p) to the CWA. Section 402(p)(1) provides that EPA or NPDES States cannot require a permit for certain storm water discharges until October 1, 1992, except: for storm water discharges listed under section 402(p)(2). Section 402(p)(2) lists five types of storm water discharges which are required to obtain a permit prior to October 1, 1992:

(A) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(B) A discharge associated with industrial activity;

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more;

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more, but less than 250,000; or

(E) A discharge for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

Section 402(p)(4)(A) requires EPA to promulgate final regulations governing storm water permit application requirements for storm water discharges associated with industrial activity and discharges from large municipal separate storm sewer systems (systems serving a population of 250,000 or more), "no later than two years" after the date of enactment (*i.e.*, no later than February 4, 1989). Section 402(p)(4)(B) also requires EPA to promulgate final regulations governing storm water permit application requirements for discharges from medium municipal separate storm sewer systems (systems serving a population of 100,000 or more but less than 250,000) "no later than four years" after enactment (*i.e.*, no later than February 4, 1991).

In addition, section 402(p)(4) provides that permit applications for storm water discharges associated with industrial activity and discharges from large municipal separate storm sewer systems "shall be filed no later than three years" after the date of enactment of the WQA (*i.e.*, no later than February 4, 1990). Permit applications for discharges from medium municipal systems must be filed "no later than five years" after enactment (*i.e.*, no later than February 4, 1992).

The WQA clarified and amended the requirements for permits for storm water discharges in the new CWA section 402(p)(3). The Act clarified that permits for discharges associated with industrial activity must meet all of the applicable provisions of section 402 and section 301 including technology and water quality based standards. However, the new Act makes significant changes to the permit standards for discharges from municipal storm sewers. Section 402(p)(3)(B) provides that permits for such discharges:

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

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

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

These changes are discussed in more detail later in today's rule.

The EPA, in consultation with the States, is required to conduct two studies on storm water discharges that are in the class of discharges for which EPA and NPDES States cannot require permits prior to October 1, 1992. The first study will identify those storm water discharges or classes of storm water discharges for which permits are not required prior to October 1, 1992, and determine, to the maximum extent practicable, the nature and extent of pollutants in such discharges. The second study is for the purpose of establishing procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality. Based on the two studies the EPA, in consultation with State and local officials, is required to issue regulations no later than October 1, 1992, which designate additional storm water discharges to be regulated to protect water quality and establish a comprehensive program to regulate such designated sources. This program must, at a minimum, (A) Establish priorities, (B) establish requirements for State storm water management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

Section 401 of the WQA amends section 402(1)(2) of the CWA to provide that the EPA shall not require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities if the storm water discharge is not contaminated by contact with, or does not come into contact with, any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of such operations.

Section 503 of the WQA amends section 502(14) of the CWA to exclude agricultural storm water discharges from the definition of point source.

III. Remand of 1984 Regulations

On December 4, 1987, the United States Court of Appeals for the District of Columbia Circuit vacated *40 CFR 122.26*, (as promulgated on September 26, 1984, *49 FR 37998*, September 26, 1984), and remanded the regulations to EPA for further rulemaking (*NRDC* v. *EPA*, No. 80-1607). EPA had requested the remand because of significant changes made by the storm water provisions of the WQA. The effect of the decision was to invalidate the storm water discharge regulations then found at § 122.26.

Storm water discharges which had been issued an NPDES permit prior to February 4, 1987, were not affected by the Court remand or the February 12, 1988, rule implementing the court order *(53 FR 4157).* (*See* section 402(p)(2)(A) of the CWA.) Similarly, the remand did not affect the authority of EPA or an NPDES State to require a permit for any storm water discharge (except an agricultural storm water discharge) designated under section 402(p)(2)(E) of the CWA. The notice of the remand clarified that such designated discharges meet the regulatory definition of point source found at *40 CFR 122.2* and that EPA or an NPDES State can rely on the statutory authority and require the filing of an application (Form 1 and Form 2C) for an NPDES permit with respect to such discharges on a case-by-case basis.

IV. Codification Rule and Case-by-Case Designations

*Codification Rule*

On January 4, 1989, *(54 FR 255),* EPA published a final rule which codified numerous provisions of the WQA into EPA regulations. The codification rule included several provisions dealing with storm water discharges. The codification rule promulgated the language found at section 402(p) (1) and (2) of the amended Clean Water Act at *40 CFR 122.26(a)(1)*. In addition, the codification rule promulgated the language of Section 503 of the WQA which exempted agricultural storm water discharges from the definition of point source at *40 CFR 122.2*, and section 401 of the WQA addressing uncontaminated storm water discharges from mining or oil and gas operations at *40 CFR 122.26(a)(2)*.

EPA also codified the statutory authority of section 402(p)(2)(E) of the CWA for the Administrator or the State Director, as the case may be, to designate storm water discharges for a permit on a case-by-case basis at *40 CFR 122.26(a)(1)(v)*.

*Case by Case Designations*

Section 402(p)(2)(E) of the CWA authorizes case-by-case designations of storm water discharges for immediate permitting if the Administrator or the State Director determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

In determining that a storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States for the purpose of a designation under section 402(p)(2)(E), the legislative history for the provision provides that "EPA or the State should use any available water quality or sampling data to determine whether the latter two criteria (contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States) are met, and should require additional sampling as necessary to determine whether or not these criteria are met." Conference Report, *Cong. Rec.* S16443 (daily ed. October 16, 1986). In accordance with this legislative history, today's rule promulgates permit application requirements for certain storm water discharges, including discharges designated on a case-by-case basis. EPA will consider a number of factors when determining whether a storm water discharge is a significant contributor of pollution to the waters of the United States. These factors include: the location of the discharge with respect to waters of the United States; the size of the discharge; the quantity and nature of the pollutants reaching waters of the United States; and any other relevant factors. Today's rule incorporates these factors at *40 CFR 122.26(a)(1)(v)*.

Under today's rule, case-by-case designations are made under regulatory procedures found at *40 CFR 124.52*. The procedures at *40 CFR 124.52* require that whenever the Director decides that an individual permit is required, the Director shall notify the discharger in writing that the discharge requires a permit and the reasons for the decision. In addition, an application form is sent with the notice. Section 124.52 provides a 60 day period from the date of notice for submitting a permit application. Although this 60 day period may be appropriate for many designated storm water discharges, site specific factors may dictate that the Director provide additional time for submitting a permit application. For example, due to the complexities associated with designation of a municipal separate storm sewer system for a system- or jurisdiction-wide permit, the Director may

provide the applicant with additional time to submit relevant information or may require that information be submitted in several phases.

V. Consent Decree of October 20, 1989

On April 20, 1989, EPA was served notice of intent to sue by Kathy Williams *et al,* because of the Agency's failure to promulgate final storm regulations on February 4, 1989, pursuant to Section 402(p)(4) of the CWA. A suit was filed by the same party on July 20, 1989, alleging the same cause of action, to wit: the Agency's failure to promulgate regulations under section 402(p)(4) of the CWA. On October 20, 1989, EPA entered into a consent decree with Kathy Williams *et al,* wherein the Federal District Court, District of Oregon, Southern Division, decreed that the Agency promulgate final regulations for storm water discharges identified in sections 402(p)(2) (B) and (C) of the CWA no later than July 20, 1990. *Kathy Williams et al.,* v. *William K. Reilly, Administrator, et al.,* No. 89-6265-E (D-Ore.) In July 1990, the consent degree was amended to provide for a promulgation date of October 31. Today's rule is promulgated in compliance with the terms of the consent decree as amended.

VI. Today's Final Rule and Response to Comments

*A. Overview*

Section 405 of the WQA alters the regulatory approach to control pollutants in storm water discharges by adopting a phased and tiered approach. The new provision phases in permit application requirements, permit issuance deadlines and compliance with permit conditions for different categories of storm water discharges. The approach is tiered in that storm water discharges associated with industrial activity must comply with sections 301 and 402 of the CWA (requiring control of the discharge of pollutants that utilize the Best Available Technology (BAT) and the Best Conventional Pollutant Control Technology (BCT) and where necessary, water quality-based controls), but permits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls, and must include a requirement to effectively prohibit non-storm water discharges into the storm sewers. Furthermore, EPA in consultation with State and local officials must develop a comprehensive program to designate and regulate other storm water discharges to protect water quality.

This final regulation establishes requirements for the storm water permit application process. It also sets forth the required components of municipal storm water quality management plans, as well as a preliminary permitting strategy for industrial activities. In implementing these regulations, EPA and the States will strive to achieve environmental results in a cost effective manner by placing high priority on pollution prevention activities, and by targeting activities based on reducing risk from particularly harmful pollutants and/or from discharges to high value waters. EPA and the States will also work with applicants to avoid cross media transfers of storm water contaminants, especially through injection to shallow wells in the Class V Underground Injection Control Program.

In addition, EPA recognizes that problems associated with storm water, combined sewer overflows (CSOs) and infiltration and inflow (I&I) are all inter-related even though they are treated somewhat differently under the law. EPA believes that it is important to begin linking these programs and activities and, because of the potential cost to local governments, to investigate the use of innovative, non-traditional approaches to reducing or preventing contamination of storm water.

The application process for developing municipal storm water management plans provides an ideal opportunity between steps 1 and 2 for considering the full range of nontraditional, preventive approaches, including municipalities, public awareness/education programs, use of vegetation and/or land conservancy practices, alternative paving materials, creative ways to eliminate I&I and illegal hook-ups, and potentials for water reuse. EPA has already announced its plans to present an award for the best creative, cost effective approaches to storm water and CSOs beginning in 1991.

This rulemaking establishes permit application requirements for classes of storm water discharges that were specifically identified in section 402(p)(2). These priority storm water discharges include storm water discharges associated with industrial activity and discharges from a municipal separate storm sewer serving a population of 100,000 or more.

This rulemaking was developed after careful consideration of 450 sets of comments, comprising over 3200 pages, that were received from a variety of industries, trade associations, municipalities, State and Federal Agencies, environmental groups, and private citizens. These comments were received during a 90-day comment period which extended from December 7, 1988, to

March 7, 1989. EPA received several requests for an extension of the comment period from 30-days up to 90-days. Many arguments were advanced for an extension including: the extent and complexity of the proposal, the existence of other concurrent EPA proposals, and the need for technical evaluations of the proposal. EPA considered these comments as they were received, but declined to extend the comment period beyond 90 days. The standard comment period on proposals normally range from 30 to 60 days. In light of the statutory deadline of February 4, 1989, additional time for the comment period beyond what was already a substantially lengthened comment period would have been inappropriate. The number and extent of the comments received on this proposal indicated that interested parties had substantially adequate time to review and comment on the regulation. Furthermore, the public was invited to attend six public meetings in Washington DC, Chicago, Dallas, Oakland, Jacksonville, and Boston to present questions and comments. EPA is convinced that substantial and adequate public participation was sought and received by the Agency.

Numerous commenters have also requested that the rule be reproposed due to the extent of the proposal and the number of options and issues upon which the Agency requested comments. EPA has decided against a reproposal. The December 7, 1988, notice of proposed rulemaking was extremely detailed and thoroughly identified major issues in such a manner as to allow the public clear opportunities to comment. The comments that were received were extensive, and many provided valuable information and ideas that have been incorporated into the regulation. Accordingly, the Agency is confident it has produced a workable and rational approach to the initial regulation of storm water discharges and a regulation that reflects the experience and knowledge of the public as provided in the comments, and which was developed in accordance with the procedural requirements of the Administrative Procedures Act (APA). EPA believes that while the number of issues raised by the proposal was extensive, the number of detailed comments indicates that the public was able to understand the issues in order to comment adequately. Thus, a reproposal is unnecessary.

*B. Definition of Storm Water*

The December 7, 1988, notice requested comment on defining storm water as storm water runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration (other than infiltration contaminated by seepage from sanitary sewers or by other discharges) and drainage related to storm events or snow melt. This definition is consistent with the regulatory definition of "storm sewer" at *40 CFR 35.2005(b)(47)* which is used in the context of grants for construction of treatment works. This definition aids in distinguishing separate storm water sewers from sanitary sewers, combined sewers, process discharge outfalls and non-storm water, non-process discharge outfalls.

The definition of "storm water" has an important bearing on the NPDES permitting scheme under the CWA. The following discusses the interrelationship of NPDES permitting requirements for storm water discharges addressed by this rule and NPDES permitting requirements for other non-storm water discharges which may be discharged via the storm sewer as a storm water discharge. Today's rule addresses permit application requirements for storm water discharges associated with industrial activity and for discharges from municipal separate storm sewer systems serving a population of 100,000 or more. Storm water discharges associated with industrial activity are to be covered by permits which contain technology-based controls based on BAT/BCT considerations or water quality-based controls, if necessary. A permit for storm water discharges from an industrial facility may also cover other non-storm water discharges from the facility. Today's rule establishes individual (Form 1 and Form 2F) and group application requirements for storm water discharges associated with industrial activity. In addition, EPA or authorized NPDES States with authorized general permit programs may issue general permits which establish alternative application or notification requirements for storm water discharges covered by the general permit(s). Where a storm water discharge associated with industrial activity is mixed with a non-storm water discharge, both discharges must be covered by an NPDES permit (this can be in the same permit or with multiple permits). Permit application requirements for these "combination" discharges are discussed later in today's notice.

Today's rule also addresses permit application requirements for discharges from municipal separate storm sewer systems serving a population of 100,000 or more. Under today's rule, appropriate municipal owners or operators of these systems must obtain NPDES permits for discharges from these systems. These permits are to establish controls to the maximum extent practicable (MEP), effectively prohibit non-storm water discharges to the municipal separate storm sewer system and, where necessary, contain applicable water quality-based controls. Where non-storm water discharges or storm water discharges associated with industrial activity discharge through a municipal separate storm sewer system (including systems serving a population of 100,000 or more as well as other systems), which ultimately discharges to a waters of the United States, such discharges through a municipal storm sewer need to be covered by an NPDES permit that is independent of the permit issued

for discharges from the municipal separate storm sewer system. Today's rule defines the term "illicit discharge" to describe any discharge through a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the CWA. Section 402(p)(3)(B) of the CWA requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer. As discussed in more detail below, today's rule begins to implement the "effective prohibition" by requiring municipal operators of municipal separate storm sewer systems serving a population of 100,000 or more to submit a description of a program to detect and control certain non-storm water discharges to their municipal system. Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit (other than the permit for the discharge from the municipal separate storm sewer). For reasons discussed in more detail below, in general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below through their municipal separate storm sewer system, even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed. However, operators of such non-storm water discharges need to obtain NPDES permits for these discharges under the present framework of the CWA (rather than the municipal operator of the municipal separate storm sewer system). (Note that section 516 of the Water Quality Act of 1987 requires EPA to conduct a study of de minimis discharges of pollutants to waters of the United States and to determine the most effective and appropriate methods of regulating any such discharges.)

EPA received numerous comments on the proposed regulatory definition of storm water, many of which proposed exclusions or additions to the definition. Several commenters suggested that the definition should include or not include detention and retention reservoir releases, water line flushing, fire hydrant flushing, runoff from fire fighting, swimming pool drainage and discharge, landscape irrigation, diverted stream flows, uncontaminated pumped ground water, rising ground waters, discharges from potable water sources, uncontaminated waters from cooling towers, foundation drains, non-contact cooling water (such as HVAC or heating, ventilation and air conditioning condensation water that POTWs require to be discharged to separate storm sewers rather than sanitary sewers), irrigation water, springs, roof drains, water from crawl space pumps, footing drains, lawn watering, individual car washing, flows from riparian habitats and wetlands. Most of these comments were made with regard to the concern that these were commonly occurring discharges which did not pose significant environmental problems. It was also noted that, unless these flows are classified as storm water, permits would be required for these discharges.

In response to the comments which requested EPA to define the term "storm water" broadly to include a number of classes of discharges which are not in any way related to precipitation events, EPA believes that this rulemaking is not an appropriate forum for addressing the appropriate regulation under the NPDES program of such non-storm water discharges, even though some classes of non-storm water discharges may typically contain only minimal amounts of pollutants. Congress did not intend that the term storm water be used to describe any discharge that has a de minimis amount of pollutants, nor did it intend for section 402(p) to be used to provide a moratorium from permitting other non-storm water discharges. Consequently, the final definition of storm water has not been expanded from what was proposed. However, as discussed in more detail later in today's notice, municipal operators of municipal separate storm sewer systems will generally not be held responsible for "effectively prohibiting" limited classes of these discharges through their municipal separate storm sewer systems.

The proposed rule included infiltration in the definition of storm water. In this context one commenter suggested that the term infiltration be defined. Infiltration is defined at *40 CFR 35.2005(b)(20)* as water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections or manholes. Infiltration does not include, and is distinguished from, inflow. Another commenter urged that ground water infiltration not be classified as storm water because the chemical characteristics and contaminants of ground water will differ from surface storm water because of a longer contact period with materials in the soil and because ground water quality will not reflect current practices at the site. In today's rule, the definition of storm water excludes infiltration since pollutants in these flows will depend on a large number of factors, including interactions with soil and past land use practices at a given site. Further infiltration flows can be contaminated by sources that are not related to precipitation events, such as seepage from sanitary sewers. Accordingly the final regulatory language does not include infiltration in the definition of storm water. Such flows may be subject to appropriate permit conditions in industrial permits. As discussed in more detail below, municipal management programs must address infiltration where identified as a source of pollutants to waters of the United States.

One commenter questioned the status of discharges from detention and retention basins used to collect storm water. This regulation covers discharges of storm water associated with industrial activity and discharges from municipal separate storm sewer systems serving a population of 100,000 or more into waters of the United States. Therefore, discharges from basins that are part of a conveyance system for a storm water discharge associated with industrial activity or part of a municipal separate storm sewer system serving a population of 100,000 or more are covered by this regulation. Flows which are channeled into basins and which do not discharge into waters of the United States are not addressed by today's rule.

Several commenters requested that the term illicit connection be replaced with a term that does not connote illegal discharges or activity, because many discharges of non-storm water to municipal separate storm sewer systems occurred prior to the establishment of the NPDES program and in accordance with local or State requirements at the time of the connection. EPA disagrees that there should be a change in this terminology. The fact that these connections were at one time legal does not confer such status now. The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit through municipal separate storm sewers to waters of the United States. Thus, classifying such discharges as illicit properly identifies such discharges as being illegal.

A commenter wanted clarification of the terms "other discharges" and "drainage" that are used in the definition of "storm water." As noted above, today's rule clarifies that infiltration is not considered storm water. Thus the portion of the definition of storm water that refers to "other discharges" has also been removed. However, the term drainage has been retained. "Drainage" does not take on any meaning other than the flow of runoff into a conveyance, as the word is commonly understood.

One commenter stated that irrigation flows combined with storm water discharges should be excluded from consideration in the storm water program. The Agency would note that irrigation return flows are excluded from regulation under the NPDES program. Section 402(l)(1) states that the Administrator or the State shall not require permits for discharges composed entirely of return flows from irrigated agriculture. The legislative history of the 1977 Clean Water Act, which enacted this language, states that the word "entirely" was intended to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production. Congressional Record Vol. 123 (1977), pg. 4360, Senate Report No. 95-370. Accordingly, a storm water discharge component, from an industrial facility for example, included in such "joint" discharges may be regulated pursuant to an NPDES permit either at the point at which the storm water flow enters or joins the irrigation flow, or where the combined flow enters waters of the United States or a municipal separate storm sewer.

Some commenters expressed concern about including street wash waters as storm water. One commenter argued including street wash waters in the definition of storm water should not be construed to eliminate the need for management practices relating to construction activities where sediment may simply wash into storm drains. EPA agrees with these points and the concerns that storm sewers may receive material that pose environmental problems if street wash waters are included in the definition. Accordingly, such discharges are no longer in the definition as proposed, and must be addressed by municipal management programs as part of the prohibition on non-storm water discharges through municipal separate storm sewer systems.

Several commenters requested that the terms discharge and point source, in the context of permits for storm water discharge, be clarified. Several commenters stated that the EPA should clarify that storm water discharge does not include "sheet flow" off of an industrial facility. EPA interprets this as request for clarification on the status of the terms "point source" and "discharge" under these regulations. In response, this rulemaking only covers storm water discharges from point sources. A point source is defined at *40 CFR 122.2* as "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff." EPA agrees with one commenter that this definition is adequate for defining what discharges of storm water are covered by this rulemaking. EPA notes that this definition would encompass municipal separate storm sewers. In view of this comprehensive definition of point source, EPA need clarify in this rulemaking only that a storm water discharge subject to NPDES regulation does not include storm water that enters the waters of the United States via means other than a "point source." As further discussed below, storm water from an industrial facility which enters and is subsequently discharged through a municipal separate storm sewer is a "discharge associated with industrial activity" which must be covered by an individual or general permit pursuant to today's rule.

EPA would also note that individual facilities have the burden of determining whether a permit application should be submitted to address a point source discharge. Those unsure of the classification of storm water flow from a facility, should file permit applications addressing the flow, or prior to submitting the application consult permitting authorities for clarification.

One commenter stated that "point source" for this rulemaking should be defined, for the purposes of achieving better water quality, as those areas where "discharges leave the municipal [separate storm sewer] system." EPA notes in response that "point source" as currently defined will address such discharges, while keeping the definition of discharge and point source within the framework of the NPDES program, and without adding potentially confusing and ambiguous additional definitions to the regulation. If this comment is asserting that the term point source should not include discharges from sources through the municipal system, EPA disagrees. As discussed in detail below, discharges through municipal separate storm sewer systems which are not connected to an operable treatment works are discharges subject to NPDES permit requirements at (*40 CFR 122.3(c)*), and may properly be deemed point sources.

One industry argued that the definition of "point source" should be modified for storm water discharges so as to exclude discharges from land that is not artificially graded and which has a propensity to form channels where precipitation runs off. EPA intends to embrace the broadest possible definition of point source consistent with the legislative intent of the CWA and court interpretations to include any identifiable conveyance from which pollutants might enter the waters of the United States. In most court cases interpreting the term "point source", the term has been interpreted broadly. For example, the holding in *Sierra Club v. Abston Construction Co., Inc., 620 F.2d 41 (5th Cir. 1980)* indicates that changing the surface of land or establishing grading patterns on land will result in a point source where the runoff from the site is ultimately discharged to waters of the United States:

Simple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters, does not constitute a point source discharge, absent some effort to *change the surface*, to *direct* the water flow or otherwise impede its progress * * * Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the (discharger) at least initially collected or channeled the water and other materials. A point source of pollution may also be present where (dischargers) design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the (dischargers) have done nothing beyond the mere collection of rock and other materials * * * Nothing in the Act relieves (dischargers) from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a * * * drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act." *620 F.2d at 45* (emphasis added).

Under this approach, point source discharges of storm water result from structures which increase the imperviousness of the ground which acts to collect runoff, with runoff being conveyed along the resulting drainage or grading patterns.

The entire thrust of today's regulation is to control pollutants that enter receiving water from storm water conveyances. It is these conveyances that will carry the largest volume of water and higher levels of pollutants. The storm water permit application process and permit conditions will address circumstances and discharges peculiar to individual facilities.

One industry commented that the definition of waters of the State under some State NPDES programs included municipal storm sewer systems. The commenter was concerned that certain industrial facilities discharging through municipal storm sewers in these states would be required to obtain an NPDES permit, despite EPA's proposal not to require permits from such facilities generally. In response, EPA notes that section 510 of the CWA, approved States are able to have stricter requirements in their NPDES program. In approved NPDES States, the definition of waters of the State controls with regard to what constitutes a discharge to a water body. However, EPA believes that this will have little impact, since, as discussed below, all industrial dischargers, including those discharging through municipal separate storm sewer systems, will be subject to general or individual NPDES permits, regardless of any additional State requirements.

One municipality commented that neither the term "point source" nor "discharge" should be used in conjunction with industrial releases into urban storm water systems because that gives the impression that such systems are navigable waters. EPA disagrees that any confusion should result from the use of these terms in this context. In this rulemaking, EPA always addresses

such discharges as "discharges through municipal separate storm sewer systems" as opposed to "discharges to waters of the United States." Nonetheless, such industrial discharges through municipal storm sewer systems are subject to the requirements of today's rule, as discussed elsewhere.

One commenter desired clarification with regard to what constituted an outfall, and if an outfall could be a pipe that connected two storm water conveyances. This rulemaking defines outfall as a point of discharge into the waters of the United States, and not a conveyance which connects to Sections of municipal separate storm sewer. In response to another comment, this rulemaking only addresses discharges to waters of United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body. *See, e.q.*, *Exxon Coro. v. Train, 554 F.2d 1310, 1312 n.1 (5th Cir. 1977); McClellan Ecological Seepage Situation v. Weinberger, 707 F.Supp. 1182, 1195-96 (E.D. Cal. 1988)).*

In the WQA and other places, the term "storm water" is presented as a single word. Numerous comments were received by EPA as to the appropriate spelling. Many of these comments recommended that two words for storm water is appropriate. EPA has decided to use an approach consistent with the Government Printing Office's approved form where storm water appears as two words.

*C. Responsibility for Storm Water Discharges Associated With Industrial Activity Through Municipal Separate Storm Sewers*

The December 7, 1988, notice of proposed rulemaking requested comments on the appropriate permitting scheme for storm water discharges associated with industrial activity through municipal separate storm sewers. EPA proposed a permitting scheme that would define the requirement to obtain coverage under an NPDES permit for a storm water discharge associated with industrial activity through a municipal separate storm sewer in terms of the classification of the municipal separate storm sewer. EPA proposed holding municipal operators of large or medium municipal separate storm sewer systems primarily responsible for applying for and obtaining an NPDES permit covering system discharges as well as storm water discharges (including storm water discharges associated with industrial activity) through the system. Under the proposed approach, operators of storm water discharges associated with industrial activity which discharge through a large or medium municipal separate storm sewer system would generally not be required to obtain permit coverage for their discharge (unless designated as a significant contributor of pollution pursuant to section 402(p)(2)(E)) provided the municipality was notified of: The name, location and type of facility and a certification that the discharge has been tested (if feasible) for non-storm water (including the results of any testing). The notification procedure also required the operator of the storm water discharge associated with industrial activity to determine that: The discharge is composed entirely of storm water; the discharge does not contain hazardous substances in excess of reporting quantities; and the facility is in compliance with applicable provisions of the NPDES permit issued to the municipality for storm water.

In the proposal, EPA also requested comments on whether a decision on regulatory requirements for storm water discharges associated with industrial activity through other municipal separate storm sewer systems (generally those serving a population of less than 100,000) should be postponed until completion of two studies of storm water discharges required under section 402(p)(5) of the CWA.

EPA favored these approaches because they appeared to reduce the potential administrative burden associated with preparing and processing the thousands of permit applications associated with the rulemaking and provide EPA additional flexibility in developing permitting requirements for storm water discharges associated with industrial activity. EPA also expressed its belief, based upon an analysis of ordinances controlling construction site runoff in place in certain cities, that municipalities generally possessed legal authority sufficient to control contributions of industrial storm water pollutants to their separate storm sewers to the degree necessary to implement the proposed rule. EPA commented that municipal controls on industrial sources implemented to comply with an NPDES permit issued to the municipality would likely result in a level of storm water pollution control very similar to that put directly on the industrial source through its own NPDES permit. This was to be accomplished by requiring municipal permitees, to the maximum extent practicable, to require industrial facilities in the municipality to develop and implement storm water controls based on a consideration of the same or similar factors as those used to make BAT/BCT determinations. (*See 40 CFR 125.3 (d)(2)* and (d)(3)).

The great majority of commenters on the December 7, 1988, notice addressed this aspect of the proposal. Based on consideration of the comments received on the notice, EPA has decided that it is appropriate to revise the approach in its

proposed rule to require direct permit coverage for all storm water discharges associated with industrial activity, including those that discharge through municipal separate storm sewers. In response to this decision, EPA has continued to analyze the appropriate manner to respond to the large number of storm water discharges subject to this rulemaking. The development of EPA's policy regarding permitting these discharges is discussed in more detail in the section VI.D of today's preamble.

EPA notes that the status of discharges associated with industrial activity which pass through a municipal separate storm sewer system under section 402(p) raises difficult legal and policy questions. EPA believes that treating these discharges under permits separate from those issued to the municipality will most fully address both the legal and policy concerns raised in public comment.

Certain commenters supported EPA's proposal. Some commenters claimed that EPA lacked any authority to permit industrial discharges which were not discharged immediately to waters of the U.S. Other commenters agreed with EPA's statements in the proposal that its approach would result in a more manageable administrative burden for EPA and the NPDES states. However, numerous comments also were received which provided various arguments in support of revising the proposed approach. These comments addressed several areas including the definition of discharge under the CWA, the requirements and associated statutory time frames of section 402(p), as well as the resource and enforcement constraints of municipalities. EPA is persuaded by these comments and has modified its approach accordingly. The key comments on this issue are discussed below.

EPA disagrees with commenters who suggested that EPA lacks authority to permit separately industrial discharges through municipal sewers. The CWA prohibits the discharge of a pollutant except pursuant to an NPDES permit. Section 502(12)(A) of the CWA defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." [1] There is no qualification in the statutory language regarding the source of the pollutants being discharged. Thus, pollutants from a remote location which are discharged through a point source conveyance controlled by a different entity (such as a municipal storm sewer) are nonetheless discharges for which a permit is required.

EPA's regulatory definition of the term "discharge" reflects this broad construction. EPA defines the term to include

additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; *discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which does not lead to a treatment works;* and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.

*40 CFR § 122.2 (1989)* (emphasis added). The only exception to this general rule is the one contemplated by section 307(b) of the CWA, *i.e.*, the introduction of pollutants into publicly-owned treatment works. EPA treats these as "indirect discharges," subject not to NPDES requirements, but to pretreatment standards under section 307(b).

In light of its construction of the term discharge, EPA has consistently maintained that a person who sends pollutants from a remote location through a point source into a water of the U.S. may be held liable for the unpermitted discharge of that pollutant. Thus, EPA asserts the authority to require a permit either from the operator of the point source conveyance, (such as a municipal storm sewer or a privately-owned treatment works), or from any person causing pollutants to be present in that conveyance and discharged through the point source, or both. *See Decision of the General Counsel (of EPA) No. 43* ("In re Friendswood Development Co.") (June 11, 1976) (operator of privately owned treatment work and dischargers to it are both subject to NPDES permit requirements). *See also, 40 CFR 122.3(g), 122.44(m)* (NPDES permit writer has discretion to permit contributors to a privately owned treatment works as direct dischargers). In other words, where pollutants are added by one person to a conveyance owned/operated by another person, and that conveyance discharges those pollutants through a point source, EPA may permit either person or both to ensure that the discharge is properly controlled. Pollutants from industrial sites discharged through a storm sewer to a point source are appropriately treated in this fashion.

Furthermore, EPA believes that storm water from an industrial plant which is discharged through a municipal storm sewer is a "discharge associated with industrial activity." Today's rule, as in the proposal, defines discharges associated with industrial activity solely in terms of the origin of the storm water runoff. There is no distinction for how the storm water reaches the

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[1] Indeed, the DC Circuit has held, in the storm water context, that EPA may not exempt any point source discharges of pollutants from the requirement to obtain an NPDES permit. *NRDC v. Costle, 569 F.2d 1369, 1377 (DC Cir. 1977).*

waters of the U.S. In other words, pollutants in storm water from an industrial plant which are discharged are "associated with industrial activity," regardless of whether the industrial facility operates the conveyance discharging the storm water (or whether the storm water is ultimately discharged through a municipal storm sewer). Indeed, there is no distinction in the "industrial" nature of these two types of discharges. The pollutants of concern in an industrial storm water discharge are present when the storm water leaves the facility, either through an industrial or municipal storm water conveyance. EPA has no data to suggest that the pollutants in industrial storm water entering a municipal storm sewer are any different than those in storm water discharged immediately to a water of the U.S. Thus, industrial storm water in a municipal sewer is properly classified as "associated with industrial activity." Although EPA proposed not to cover these discharges by separate permit, the Agency believes that it is clearly not precluded from doing so.

Many comments also supported the proposed approach, noting that holding municipalities primarily responsible for obtaining a permit which covers industrial storm water discharges through municipal systems would reduce the administrative burden associated with preparing and processing thousands of permit applications -- permit applications that would be submitted if each industrial discharger through a large or medium municipal separate storm sewer system had to apply individually (or as part of a group application).

EPA appreciates these concerns. Yet EPA also recognizes that there are also significant problems with putting the burden of controlling these sources on the municipalities (except for designated discharges) which must be balanced with the concerns about the permit application burden on industries. The industrial permitting strategy discussed in section VI.D below attempts to achieve this balance.

EPA also does not believe that the administrative burden will be nearly as significant as originally thought, for several reasons. First, as discussed in section VI.F.2 below and in response to significant public comment, EPA has significantly narrowed the scope of the definition of "associated with industrial activity" to focus in on those facilities which are most commonly considered "industrial" and thought to have the potential for the highest levels of pollutants in their storm water discharges. EPA believes this is a more appropriate way to ensure a manageable scope for the industrial storm water program in light of the statutory language of section 402(p), since it does not attempt to arbitrarily distinguish industrial facilities on the basis of the ownership of the conveyance through which a facility discharges its storm water. Second, EPA's industrial permitting strategy discussed in section VI.D is designed around aggressive use of general permits to cover the vast majority of industrial sources. These general permits will require industrial facilities to develop storm water control plans and practices similar to those that would have been required by the municipality. Yet, general permits will eliminate the need for thousands of individual or group permit applications, greatly reducing the burden on both industry EPA/States. Finally, even under the proposal, EPA believes that a large number of industrial dischargers would have been appropriate for designation for individual permitting under section 402(p)(2)(E), with the attendant individual application requirements. Today's approach will actually decrease the overall burden on these facilities; rather than filing an individual permit application upon designation, these facilities will generally be covered by a general permit.

By contrast, several commenters asserted that not only does EPA have the authority to cover these discharges by separate permit, it is required to by the language of section 402(p). As discussed above, storm water from an industrial plant which passes through a municipal storm sewer to a point source and is discharged to waters of the U.S. is a "discharge associated with industrial activity." Therefore, it is subject to the appropriate requirements of section 402(p). The operator of the discharge (or the industrial facility where the storm water originates) must apply for a permit within three years of the 1987 amendments (*i.e.*, Feb. 4, 1990); [2] EPA must issue a permit by one year later (Feb. 4, 1991); and the permit must require compliance within three years of permit issuance. That permit must ensure that the discharge is in compliance with all appropriate provisions of sections 301 and 402. Commenters asserted that EPA's proposal would violate these two requirements of the law. First, the statute requires all industrial storm water discharges to obtain a permit in the first round of permitting (*i.e.*, February 4, 1990). However, Congress established a different framework to address discharges from small municipal separate storm sewer systems. Section 402(p) requires EPA to complete two studies of storm water discharges, and based on those studies, promulgate additional regulations, including requirements for state storm water management programs by October 1, 1992. EPA is prohibited from issuing permits for storm water discharges from small municipal systems until October 1, 1992 unless

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[2] It should be noted that EPA did not promulgate the required storm water regulations by February, 1989, as contemplated by section 402(p)(4)(A). As discussed below, today's rule generally requires industrial storm water discharges to file a permit application in one year.

the discharge is designated under section 402(p)(2)(E). Thus, industrial storm water discharges from these systems would not be covered by a permit until later than contemplated by statute. Second, permits for municipal storm sewer systems require controls on storm water discharges "to the maximum extent practicable," as opposed to the BAT/BCT requirements of section 301(b)(2). Yet, all industrial storm water discharges must comply with section 301(b)(2). Thus, covering industrial storm water under a municipal storm water permit will not ensure the legally-required level of control of industrial storm water discharges.

In addition to comments on the requirements of section 402(p), EPA received several comments questioning whether EPA's proposal to cover industrial pollutants in municipal separate storm sewers solely in the permit issued to the municipality would ensure adequate control of these pollutants due to both inadequate resources and enforcement. Some municipalities stated that the burdens of this responsibility would be too great with regard to source identification and general administration of the program. These commenters claimed they lacked the necessary technical and regulatory expertise to regulate such sources. Commenters also noted that additional resources to control these sources would be difficult to obtain given the restrictions on local taxation in many states and the fact that EPA will not be providing funding to local governments to implement their storm water programs.

Municipalities also expressed concerns regarding enforcement of EPA's proposed approach. Some municipalities remarked that they did not have appropriate legal authority to address these discharges. Several commenters also stated that requiring municipalities to be responsible for addressing storm water discharges associated with industrial activity through their municipal system would result in unequal treatment of industries nationwide because of different municipal requirements and enforcement procedures. Several municipal entities expressed concern with regard to their responsibility and liability for pollutants discharged to their municipal storm sewer system, and further asserted that it was unfair to require municipalities to bear the full cost of controlling such pollutants. Other municipalities suggested that overall municipal storm water control would be impaired, since municipalities would spend a disproportionate amount of resources trying to control industrial discharges through their sewers, rather than addressing other storm water problems. In a related vein, certain commenters suggested that, where industrial storm water was a significant problem in a municipal sewer, EPA's proposed approach would hamper enforcement at the federal/state level, since all enforcement measures could be directed only at the municipality, rather than at the most direct source of that problem.

In response to all of these concerns, EPA has decided to require storm water discharges associated with industrial activity which discharge through municipal separate storm sewers to obtain separate individual or general NPDES permits. EPA believes that this change will adequately address all of the key concerns raised by commenters.

The Agency was particularly influenced by concerns that many municipalities lacked the authority under state law to address industrial storm water practices. EPA had assumed that since several cities regulate construction site activities, that they could regulate other industrial operations in a similar manner. Several commenters suggested otherwise. In light of these concerns, EPA agrees with certain commenters that municipal controls on industrial facilities, in lieu of federal control, might not comply with section 402(p)(3)(A) for those facilities. [3] This calls into question whether EPA's proposed approach would have reasonably implemented Congressional intent to address industrial storm water early and stringently in the permitting process.

EPA also agrees with those commenters who argued that municipal controls on industrial storm water sources were not directly analogous to the pretreatment program under section 307(b), as EPA suggested in the preamble to the proposal. The authority of cities to control the type and volume of industrial pollutants into a POTW is generally unquestioned under the laws of most states, since sewage and industrial waste treatment is a service provided by the municipality. Thus, EPA has greater confidence that cities can and will adopt effective pretreatment programs. By contrast, many cities are limited in the types of controls they can impose on flows into storm sewers; cities are more often limited to regulations on quantity of industrial flows to prevent flooding the system. So too, the pretreatment program allows for federal enforcement of local pretreatment requirements. Enforcement against direct dischargers (including dischargers through municipal storm sewers) is possible only when the municipal requirements are contained in an NPDES permit.

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[3] EPA notes that the legal issue raised by commenters regarding whether industrial storm water would be controlled to BAT if covered by a municipal permit at the MEP level is primarily a theoretical issue. As explained above, the proposal assumed that cities would establish controls on industry very similar to those established in an NPDES permit using best professional judgment. EPA's key concern, rather, is whether cities can, in fact, establish such controls. Thus, today's final rule should not appreciably change the requirements to be imposed on industrial sources, only how those requirements are enforced.

Although today's rule will require industrial discharges through municipal storm sewers to be covered by separate permit, EPA still believes that municipal operators of large and medium municipal systems have an important role in source identification and the development of pollutant controls for industries that discharge storm water through municipal separate storm sewer systems is appropriate. Under the CWA, large and medium municipalities are responsible for reducing pollutants in discharges from municipal separate storm sewers to the maximum extent practicable. Because storm water from industrial facilities may be a major contributor of pollutants to municipal separate storm sewer systems, municipalities are obligated to develop controls for storm water discharges associated with industrial activity through their system in their storm water management program. (*See* section VI.H.7. of today's preamble.) The CWA provides that permits for municipal separate storm sewers shall require municipalities to reduce pollutants to the maximum extent practicable. Permits issued to municipalities for discharges from municipal separate storm sewers will reflect terms, specified controls, and programs that achieve that goal. As with all NPDES permits, responsibility and liability is determined by the discharger's compliance with the terms of the permit. A municipality's responsibility for industrial storm water discharged through their system is governed by the terms of the permit issued. If an industrial source discharges storm water through a municipal separate storm sewer in violation of requirements incorporated into a permit for the industrial facility's discharge, that industrial operator of the discharge may be subject to an enforcement action instituted by the Director of the NPDES program.

Today's rule also requires operators of storm water discharges associated with industrial activity through large and medium municipal systems to provide municipal entities of the name, location, and type of facility that is discharging to the municipal system. This information will provide municipalities with a base of information from which management plans can be devised and implemented. This requirement is in addition to any requirements contained in the industrial facility's permit. As in the proposal, the notification process will assist cities in development of their industrial control programs.

EPA intends for the NPDES program, through requirements in permits for storm water discharges associated with industrial activity, to work in concert with municipalities in the industrial component of their storm water management program efforts. EPA believes that permitting of municipal storm sewer systems and the industrial discharges through them will act in a complementary manner to fully control the pollutants in those sewer systems. This will fully implement the intent of Congress to control industrial as well as large and medium municipal storm water discharges as expeditiously and effectively as possible. This approach will also address the concerns of municipalities that they lack sufficient authority and resources to control all industrial contributions to their storm sewers and will be liable for discharges outside of their control.

The permit application requirements for large and medium municipal separate storm sewer systems, discussed in more detail later in today's preamble, address the responsibilities of the municipal operators of these systems to identify and control pollutants in storm water discharges associated with industrial activity. Permit applications for large and medium municipal separate storm sewer systems are to identify the location of facilities which discharge storm water associated with industrial activity to the municipal system (*see* section VI.H.7. of the preamble). In addition, municipal applicants will provide a description of a proposed management program to reduce, to the maximum extent practicable, pollutants from storm water discharges associated with industrial activity which discharge to the municipal system (*see* section VI.H.7.c of this preamble). EPA notes that each municipal program will be tailored to the conditions in that city. Differences in regional weather patterns, hydrology, water quality standards, and storm sewer systems themselves dictate that storm water management practices will vary to some degree in each municipality. Accordingly, similar industrial storm water discharges may be treated differently in terms of the requirements imposed by the municipality, depending on the municipal program. Nonetheless, any individual or general permit issued to the industrial facility must comply with section 402(p)(3)(A) of the CWA.

EPA intends to provide assistance and guidance to municipalities and permitting authorities for developing storm water management programs that achieve permit requirements. EPA intends to issue a guidance document addressing municipal permit applications in the near term.

Controls developed in management plans for municipal system permits may take a variety of forms. Where necessary, municipal permittees can pursue local remedies to develop measures to reduce pollutants or halt storm water discharges with high levels of pollutants through municipal storm sewer systems. Some local entities have already implemented ordinances or laws that are designed to reduce the discharge of pollutants to municipal separate storm sewers, while other municipalities have developed a variety of techniques to control pollutants in storm water. Alternatively, where appropriate, municipal permittees may develop end-of-pipe controls to control pollutants in these discharges such as regional wet detention ponds or diverting flow to publicly owned treatment works. Finally, municipal applicants may bring individual storm water discharges, which

cannot be adequately controlled by the municipal permittees or general permit coverage, to the attention of the permitting authority. Then, at the Director's discretion, appropriate additional controls can be required in the permit for the facility generating the targeted storm water discharge.

One commenter suggested that municipal operators of municipal separate storm sewers should have control over all storm water discharges from a facility that discharges both through the municipal system and to waters of the United States. In response, under this regulatory and statutory scheme, industries that discharge storm water directly into the waters of the United States, through municipal separate storm sewer systems, or both are required to obtain permit coverage for their discharges. However, municipalities are not precluded from exercising control over such facilities through their own municipal authorities.

It is important to note that EPA has established effluent guideline limitations for storm water discharges for nine subcategories of industrial dischargers (Cement Manufacturing (40 CFR part 411), Feedlots (40 CFR part 412), Fertilizer Manufacturing (40 CFR part 418), Petroleum Refining (40 CFR part 419), Phosphate Manufacturing (40 CFR part 422), Steam Electric (40 CFR part 423), Coal Mining (40 CFR part 434), Ore Mining and Dressing (40 CFR part 440) and Asphalt (40 CFR part 441)). Most of the existing facilities in these subcategories already have individual permits for their storm water discharges. Under today's rule, facilities with existing NPDES permits for storm water discharges through a municipal storm sewer will be required to maintain these permits and apply for an individual permit, under § 122.26(c), when existing permits expire. EPA received numerous comments supporting this decision because requiring facilities that have existing permits to comply with today's requirements immediately would be inefficient and not serve improved water quality.

Sections 402(p) (1) and (2) of the CWA provide that discharges from municipal separate storm sewer systems serving a population of less than 100,000 are not required to obtain a permit prior to October 1, 1992, unless designated on a case-by-case basis under section 402(p)(2)(E). However, as discussed above, storm water discharges associated with industrial activity through such municipal systems are not excluded. Thus, under today's rule, all storm water discharges associated with industrial activity that discharge through municipal separate storm sewer systems are required to obtain NPDES permit coverage, including those which discharge through systems serving populations less than 100,000. EPA believes requiring permits will address the legal concerns raised by commenters regarding these sources. In addition, it will allow for control of these significant sources of pollution while EPA continues to study under section 402(p)(6) whether to require the development of municipal storm water management plans in these municipalities. If these municipalities do ultimately obtain NPDES permits for their municipal separate storm sewer systems, early permitting of the industrial contributions may aid those cities in their storm water management efforts.

In the December 7, 1988, proposal, EPA recognized that storm water discharges associated with industrial activity from Federal facilities through municipal separate storm sewer systems may pose unique legal and administrative situations. EPA received numerous comments on this issue, with most of these comments coming from cities and counties. The comments reflected a general concern with respect to a municipality's ability to control Federal storm water discharges through municipal separate storm sewer systems. Most municipalities stated that they do not have the legal authority to adequately enforce against problem storm water discharges from Federal facilities and that these facilities should be required to obtain separate storm water permits. Some commenters stated that they have no Constitutional authority to regulate Federal facilities or establish regulation for such facilities. Some commenters indicated that Federal facilities could not be inspected, monitored, or subjected to enforcement for national security and other jurisdictional reasons. Some commenters argued that without clearly stated legal authority for the municipality, such dischargers should be required to obtain permits. One municipality pointed out that Federal facilities within city limits are exempted from their Erosion and Sediment Control Act and that permits for these facilities should be required.

Under today's rule, Federal facilities which discharge storm water associated with industrial activity through municipal separate storm sewer systems will be required to obtain NPDES permit coverage under Federal or State law. EPA believes this will cure the legal authority problems at the local level raised by the commenters. EPA notes that this requirement is consistent with section 313(a) of the CWA.

*D. Preliminary Permitting Strategy for Storm Water Discharges Associated With Industrial Activity*

Many of the comments received on the December 7, 1988, proposal focused on the difficulties that EPA Regions and authorized NPDES States, with their finite resources, will have in implementing an effective permitting program for the large number of storm water discharges associated with industrial activity. Many commenters noted that problems with implementing permit programs are caused not only by the large number of industrial facilities subject to the program, but by the difficulties associated with identifying appropriate technologies for controlling storm water at various sites and the differences in the nature and extent of storm water discharges from different types of industrial facilities.

EPA recognizes these concerns; and based on a consideration of comments from authorized NPDES States, municipalities, industrial facilities and environmental groups on the permitting framework and permit application requirements for storm water discharges associated with industrial activity, EPA is in the process of developing a preliminary strategy for permitting storm water discharges associated with industrial activity. In developing this strategy, EPA recognizes that the CWA provides flexibility in the manner in which NPDES permits are issued. [4] EPA intends to use this flexibility in designing a workable and reasonable permitting system. In accordance with these considerations, EPA intends to publish in the near future a discussion of its preliminary permitting strategy for implementing the NPDES storm water program.

The preliminary strategy is intended to establish a framework for developing permitting priorities, and includes a four tier set of priorities for issuing permits to be implemented over time:

-- *Tier I -- baseline permitting:* One or more general permits will be developed to initially cover the majority of storm water discharges associated with industrial activity;

-- *Tier II -- watershed permitting:* Facilities within watersheds shown to be adversely impacted by storm water discharges associated with industrial activity will be targeted for permitting.

-- *Tier III -- industry specific permitting:* Specific industry categories will be targeted for individual or industry-specific permits; and

-- *Tier IV -- facility specific permitting:* A variety of factors will be used to target specific facilities for individual permits.

Tier I -- Baseline Permitting

EPA intends to issue general permits that initially cover the majority of storm water discharges associated with industrial activity in States without authorized NPDES programs. These permits will also serve as models for States with authorized NPDES programs.

The consolidation of many sources under one permit will greatly reduce the otherwise overwhelming administrative burden associated with permitting storm water discharges associated with industrial activity. This approach has a number of additional advantages, including:

-- Requirements will be established for discharges covered by the permit;

-- Facilities whose discharges are covered by the permit will have an opportunity for substantial compliance with the CWA;

-- The public, including municipal operators of municipal separate storm sewers which may receive storm water discharges associated with industrial activity, will have access under section 308(b) of the CWA to monitoring data and certain other information developed by the permittee;

-- EPA will have the opportunity to begin to collect and review data on storm water discharges from priority industries, thereby supporting the development of subsequent permitting activities;

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[4] The courts in *NRDC v. Train, 396 F.Supp. 1393 (D.D.C. 1975)aff'd, NRDC v. Costle, 568 F.2d 1369 (DC Cir. 1977),* have acknowledged the administrative burden placed on the Agency by requiring individual permits for a large number of storm water discharges. These courts have recognized EPA's discretion to use certain administrative devices, such as area permits or general permits to help manage its workload. In addition, the courts have recognized flexibility in the type of permit conditions that are established, including requirements for best management practices.

-- Applicable requirements of municipal storm water management programs established in permits for discharges from municipal separate storm sewer systems will be enforceable directly against non-complying industrial facilities that generate the discharges;

-- The public will be given an opportunity to comment on permitting activities;

-- The baseline permits will provide a basis for bringing selected enforcement actions by eliminating many issues which might otherwise arise in an enforcement proceeding; and

-- Finally, the baseline permits will provide a focus for public comment on the development of subsequent phases of the permitting strategy for storm water discharges, including the development of priorities for State storm water management programs developed under section 402(p)(6) of the CWA.

Initially, the coverage of the baseline permits will be broad, but the coverage is intended to shrink as other permits are issued for storm water discharges associated with industrial activities pursuant to Tier II through IV activities.

2. Tier II -- Watershed Permitting

Facilities within watersheds shown to be adversely impacted by storm water discharges associated with industrial activity will be targeted for individual and general permitting. This process can be initiated by identifying receiving waters (or segments of receiving waters) where storm water discharges associated with industrial activity have been identified as a source of use impairment or are suspected to be contributing to use impairment.

3. Tier III -- Industry Specific Permitting

Specific industry categories will be targeted for individual or industry-specific general permits. These permits will allow permitting authorities to focus attention and resources on industry categories of particular concern and/or industry categories where tailored requirements are appropriate. EPA will work with the States to coordinate the development of model permits for selected classes of industrial storm water discharges. EPA is also working to identify priority industrial categories in the two reports to Congress required under section 402(p)(5) of the CWA. In addition, group applications that are received can be used to develop model permits for the appropriate industries.

4. Tier IV -- Facility Specific Permitting

Individual permits will be appropriate for some storm water discharges in addition to those identified under Tier II and III activities. Individual permits should be issued where warranted by: the pollution potential of the discharge; the need for individual control mechanisms; and in cases where reduced administrative burdens exist. For example, individual NPDES permits for facilities with process discharges should be expanded during the normal process of permit reissuance to cover storm water discharges from the facility.

5. Relationship of Strategy to Permit Applications Requirements

The preliminary long-term permitting strategy described above identifies several permit schemes that EPA anticipates will be used in addressing storm water discharges associated with industrial activity. One issue that arises with this strategy is determining the appropriate information needed to develop and issue permits for these discharges. The NPDES regulatory scheme provides three major options for obtaining permit coverage for storm water discharges associated with industrial activity: (1) Individual permit applications; (2) group applications; and (3) case-by-case requirements developed for general permit coverage.

a. *Individual permit application requirements.* Today's notice establishes requirements for individual permit applications for storm water discharges associated with industrial activity. These application requirements are applicable for all storm water discharges associated with industrial activity, except where the operator of the discharge is participating in a group application or a general permit is issued to cover the discharge and the general permit provides alternative means to obtain permit coverage. Information in individual applications is intended to be used in developing the site-specific conditions generally associated with individual permits.

Individual permit applications are expected to play an important role in all tiers of the Strategy, even where general permits are used. Although general permits may provide for notification requirements that operate in lieu of the requirement to submit individual permit applications, the individual permit applications may be needed under several circumstances. Examples include: where a general permit requires the submission of a permit application as the notice of intent to be covered by the permit; where the owner or operator authorized by a general permit requests to be excluded from the coverage of the general permit by applying for a permit (*see* *40 CFR 122.28(b)(2)(iii)* for EPA issued general permits); and where the Director requires an owner or operator authorized by a general permit to apply for an individual permit (*see* *40 CFR 122.28(b)(2)(ii)* for EPA issued general permits).

b. *Group applications.* Today's rule also promulgates requirements for group applications for storm water discharges associated with industrial activity. These applications provide participants of groups with sufficiently similar storm water discharges an alternative mechanism for applying for permit coverage.

The group application requirements are primarily intended to provide information for developing industry specific general permits. (Group applications can also be used to issue individual permits in authorized NPDES States without general permit authority or where otherwise appropriate). As such, group application requirements correlate well with the Tier III permitting activities identified in the long-term permitting Strategy.

c. *Case-by-case requirements.* *40 CFR 122.21(a)* excludes persons covered by general permits from requirements to submit individual permit applications. Further, the general permit regulations at *40 CFR 122.28* do not address the issue of how a potential permittee is to apply to be covered under a general permit. Rather, conditions for notification of intent (NOI) to be covered by the general permit are established in the permits on a case-by-case basis, and operate in lieu of permit application requirements. Requirements for submitting NOIs to be covered by a general permit can range from full applications (this would be Form 1 and Form 2F for most discharges composed entirely of storm water discharges associated with industrial activity), to no notice. EPA recommends that the NOI requirements established in a general permit for storm water discharges associated with industrial activity be commensurate with the needs of the permit writer in establishing the permit and the permit program. The baseline general permit described in Tier I is intended to support the development of controls for storm water discharges associated with industrial activity that can be supported by the limited resources of the permitting Agency. In this regard, the burdens of receiving and reviewing NOI's from the large number of facilities covered by the permit should also be considered when developing NOI requirements. In addition, NOI requirements should be developed in conjunction with permit conditions establishing reporting requirements during the term of the permit.

NOI requirements in general permits can establish a mechanism which can be used to establish a clear accounting of the number of permittees covered by the general permit, the nature of operations at the facility generating the discharge, their identity and location. The NOI can be used as an initial screening tool to determine discharges where individual permits are appropriate. Also, the NOI can be used to identify classes of discharges appropriate for more specific general permits, as well as provide information needed to notify such dischargers of the issuance of a more specific general permit. In addition, the NOI can provide for the identification of the permittee to provide a basis for enforcement and compliance monitoring strategies. EPA will further address this issue in the context of specific general permits it plans to issue in the near future.

Today's rule requires that individual permit applications for storm water discharges associated with industrial activity be submitted within one year from the date of publication of this notice. EPA is considering issuing general permits for the majority of storm water discharges associated with industrial activity in those States and territories that do not have authorized State NPDES programs (MA, ME, NH, FL, LA, TX, OK, NM, SD, AZ, AK, ID, District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands) before that date to enable industrial dischargers of storm water to ascertain whether they are eligible for coverage under a general permit (and subject to any alternative notification requirements established by the general permit in lieu of the individual permit application requirements of today's rule) or whether they must submit an individual permit application (or participate in a group application) before the regulatory deadlines for submitting these applications passes. Storm water application deadlines are discussed in further detail below.

*E. Storm Water Discharge Sampling*

Storm water discharges are intermittent by their nature, and pollutant concentrations in storm water discharges will be highly variable. Not only will variability arise between given events, but the flow and pollutant concentrations of such discharges will vary with time during an event. This variability raises two technical problems: how best to characterize the discharge associated with a single storm event; and how best to characterize the variability between discharges of different events that may be caused by seasonal changes and changes in material management practices, for example.

Prior to today's rulemaking, *40 CFR 122.21(g)(7)* required that applicants for NPDES permits submit quantitative data based on one grab sample taken every hour of the discharge for the first four hours of discharge. EPA has modified this requirement such that, instead of collecting and analyzing four grab samples individually, applicants for permits addressing storm water discharges associated with industrial activity will provide data as indicators of two sets of conditions: data collected during the first 30 minutes of discharge and flow-weighted average storm event concentrations. Large and medium municipalities will provide data on flow-weighted average storm event concentrations only.

Data describing pollutants in a grab sample taken during the first few minutes of the discharge can often be used as a screen for non-storm water discharges to separate storm sewers because such pollutants may be flushed out of the system during the initial portion of the discharge. In addition, data from the first few minutes of a discharge are useful because much of the traditional structural technology used to control storm water discharges, including detention and retention devices, may only provide controls for the first portion of the discharge, with relatively little or no control for the remainder of the discharge. Data from the first portion of the discharge will give an indication of the potential usefulness of these techniques to reduce pollutants in storm water discharges. Also, such discharges may be primarily responsible for pollutant shocks to the ecosystem in receiving waters.

Studies such as NURP have shown that flow-weighted average concentrations of storm water discharges are useful for estimating pollutant loads and for evaluating certain concentration-based water quality impacts. The use of flow-weighted composite samples are also consistent with comments raised by various industry representatives during previous Agency rulemakings that continuous monitoring of discharges from storm events is necessary to adequately characterize such discharges.

EPA requested comment on the feasibility of the proposed modification of sampling procedures at § 122.21(g)(7) and the ability to characterize pollutants in storm water discharges with an average concentration from the first portion of the discharge compared to collecting and separately analyzing four grab samples. It was proposed that an event composite sample be collected, as well as a grab sample collected during the first 20 minutes of runoff. Comments were solicited as to whether or not this sampling method would provide better definition of the storm load for runoff characterization than would the requirement to collect and separately analyze four grab samples.

Many commenters questioned the ability to obtain a 20 minute sample in the absence of automatic samplers. Some believed that pollutants measured by such a sample can be accounted for in the event composite sample. Others argued that this is an unwarranted sampling effort if municipal storm water management plans are to be geared to achieving annual pollutant load reductions. Many commenters advised that problems accessing sampling stations and mobilizing sampling crews, particularly after working hours, made sampling during the first 20 minutes impractical. These comments were made particularly with respect to municipalities, where the geographical areas could encompass several hundred square miles. Several alternatives were suggested including: the collection of a sample in the first hour, and representative grab sampling in the next three hours, one per hour; or perform time proportioned sampling for up to four hours.

Because of the logistical problems associated with collecting samples during the first few minutes of discharge from municipal systems, EPA will only require such sampling from industrial facilities. Municipal systems will be spread out over many square miles with sampling locations potentially several miles from public works departments or other responsible government agencies. Reaching such locations in order to obtain samples during the first few minutes of a storm event may prove impossible. For essentially the same reasons, the requirement has been modified to encompass the first 30 minutes of the discharge, instead of 20 minutes, for industrial discharges. The rule also clarifies that the sample should be taken during the first 30 minutes or as soon thereafter as practicable. Where appropriate, characterization of this portion of the discharge from selected outfalls or sampling points may be a condition to permits issued to municipalities. With regard to protocols for the collection of sample aliquots for flow-weighted composite samples, § 122.21(g)(7) provides that municipal applicants may collect flow-weighted composite samples using different protocols with respect to the time duration between the collection of

sample aliquots, subject to the approval of the Director or Regional Administrator. In other words, the period may be extended from 15 minutes to 20 or 25 minutes between sample aliquots, or decreased from 15 to 10 or 5 minutes.

Other comments raised issues that apply both to the impact of runoff characterization and the first discharge representation. These primarily pertained to regions that have well defined wet and dry seasons. Comments questioned whether or not it is fair to assume that the initial storm or two of a wet season, which will have very high pollutant concentrations, are actually representative of the runoff concentrations for the area.

In response, EPA believes that it is important to represent the first part of the discharge either separately or as a part of the event composite samples. This loading is made up primarily of the mass of unattached fine particulates and readily soluble surface load that accumulates between storms. This load washes off of the basin's directly connected paved surfaces when the runoff velocities reach the level required for entrainment of the particulate load into the surface flow. It should be noted that for very fine particulates and solubles, this can occur very soon after the storm begins and much sooner than the peak flow. The first few minutes of discharge represents a shock load to the receiving water, in terms of concentration of pollutants, because for many constituents the highest concentrations of the event will occur during this initial period. Due to the need to properly quantify this load, it is not necessary to represent the first discharge from the upper reaches of the outfall's tributary area. In runoff characterization basins, the assumption is that the land use in the basin is homogeneous, or nearly so, and that the first discharge from the lower reaches for all intents and purposes is representative of the entire basin. If a sample is taken during the first 30 minutes of the runoff, it will be composed primarily of first discharge. If the sample is taken at the outfall an hour into the event, it may contain discharge from the remote portions of the basin. It will not be representative of the discharge because it will also contain later washoff from the lower reaches of the basin, resulting in a low estimation of the first discharge load of most constituents. Conversely, larger suspended particulates that normally are not present in first discharge due to inadequate velocities will appear in this later sampling scenario because of the influence of higher runoff rates in the lower basin. Many commonly used management practices are designed based on their ability to treat a volume of water defined by the first discharge phenomenon. It is important to characterize the first discharge load because most management practices effectively treat only, or primarily, this load.

It should be noted that first discharge runoff is sometimes contaminated by non-storm water related pollutants. In many urban catchments, contaminants that result from illicit connections and illegal dumping may be stored in the system until "flushed" during the initial storm period. This does not negate the need for information on the characteristic first discharge load, but does indicate that the first phase field screen results for illicit connections should be used to help define those outfalls where this problem might exist.

Several methods can be used to develop an event average concentration. Either automatic or manual sampling techniques can be used that sample the entire hydrograph, or at least the first four hours of it, that will result in several discrete samples and associated flow rates that represent the various flow regimes of an event. These procedures have the potential for providing either an event average concentration, an event mean concentration, or discrete definition of the washoff process. Automatic sampling procedures are also available that collect a single composite sample, either on a time-proportioned or flow proportioned basis.

When discrete samples are collected, an event average composite sample can be produced by the manual composite of the discrete samples in equal volumes. Laboratory analysis of time proportioned composite samples will directly yield the event average concentration. Mathematical averaging of discrete sample analysis results will yield an event average concentration.

When discrete samples are collected, a flow-weighted composite sample can be produced based on the discharge record. This is done by manually flow proportioning the volumes of the individual samples. Laboratory analysis of flow weighted composite samples will directly yield an event mean concentration. Mathematical integration of the change in concentrations and mass flux of the discharge for discrete sample data can produce an event mean concentration. This procedure was used during the NURP program.

EPA wishes to emphasize that the reason for sampling the type of storm event identified in § 122.21(g)(7) is to provide information that represents local conditions that will be used to create sound storm water management plans. Based on the method to be used to generate system-wide estimates of pollutant loads, either method, discrete or event average concentrations, may be preferable to the other. If simulation models will be used to generate loading estimates, analysis of

discrete samples will be more valuable so that calibration of water quality and hydrology may be performed. On the other hand, simple estimation methods based on event average or event mean concentrations may not justify the additional cost of discrete sample analysis.

EPA believes that the first discharge loading should be represented in the permit application from industrial facilities and, if appropriate, permitting authorities may require the same in the discharge characterization component of permits issued to municipalities. The first discharge load should also be represented as part of an event composite sample. This requirement will assist industries in the development of effective storm water management plans.

EPA requested comments on the appropriateness of the proposed rules and of proposed amendments to the rules regarding discharge sampling. Comments were received which addressed the appropriateness of imposing uniform national guidelines. Several commenters are concerned that uniform national guidelines may not be appropriate due to the geographic variations in meteorology, topography, and pollutant sources. While some assert that a uniform guideline will provide consistency of the sample results, others prefer a program based on regional or State guidelines that more specifically address their situation.

Several commenters, addressing industrial permit application requirements, preferred that the owner/operator be allowed to set an individual sampling protocol with approval of the permit writer. Some commenters were concerned that one event may not be sufficient to characterize runoff from a basin as this may result in gross over-estimation or underestimation of the pollutant loads. Others indicated confusion with regard to sampling procedures, lab analysis procedures, and the purpose of the program.

In response, today's regulations establish certain minimum requirements. Municipalities and industries may vary from these requirements to the extent that their implementation is at least as stringent as outlined in today's rule. EPA views today's rule as a means to provide assurance as to the quality of the data collected; and to this end, it is important that the minimum level of sampling required be well defined.

In response to EPA's proposal that the first discharge be included in "representative" storm sampling, several commenters made their concerns known about the possible equipment necessary to meet this requirement. Several commenters are concerned that in order to get a first discharge sample, automatic sampling equipment will be required. Concerns related to the need for this equipment surfaced in the comments frequently; most advised that the equipment is expensive and that the demand on sampling equipment will be too large for suppliers and manufacturers to meet. Although equipment can be leased, some commenters maintained that not enough rental equipment is available to make this a viable option in many instances.

EPA is not promoting or requiring the use of automated equipment to satisfy the sampling requirements. A community may find that in the long run it would be more convenient to have such equipment since sampling is required not only during preparation of the application, but also may be required during the term of the permit to assure that the program goals are being met. Discharge measurement is necessary in order for the sample data to have any meaning. If unattended automatic sampling is to be performed, then unattended flow measurement will be required too.

EPA realizes that equipment availability is a legitimate concern. However, there is no practical recommendation that can be made relative to the availability of equipment. If automatic sampling equipment is not available, manual sampling is an appropriate alternative.

*F. Storm Water Discharges Associated With Industrial Activity*

1. Permit Applicability

a. *Storm water discharges associated with industrial activity to waters of the United States.* Under today's rule dischargers of storm water associated with industrial activity are required to apply for an NPDES permit. Permits are to be applied for in one of three ways depending on the type of facility: Through the individual permit application process; through the group application process; or through a notice of intent to be covered by general permit.

Storm water discharges associated with the industrial activities identified under § 122.26(b)(14) of today's rule may avail themselves of general permits that EPA intends to propose and promulgate in the near future. The general permit will be available to be promulgated in each non-NPDES State, following State certification, and as a model for use by NPDES States with general permit authority. It is envisioned that these general permits will provide baseline storm water management

practices. For certain categories of industries, specific management practices will be prescribed in addition to the baseline management practices. As information on specific types of industrial activities is developed, other, more industry-specific general permits will be developed.

Today's rule requires facilities with existing NPDES permits for storm water discharges to apply for individual permits under the individual permit application requirements found at 122.26(c) 180 days before their current permit expires. Facilities not eligible for coverage under a general permit are required to file an individual or group permit application in accordance with today's rule. The general permits to be proposed and promulgated will indicate what facilities are eligible for coverage by the general permit.

b. *Storm water discharges through municipal storm sewers.* As discussed above, many operators of storm water discharges associated with industrial activity are not required to apply for an individual permit or participate in a group application under § 122.26(c) of today's rule if covered by a general permit. Under the December 7, 1988, proposal, dischargers through large and medium municipal separate storm sewer systems were not required, as a general rule, to apply for an individual permit or as a group applicant. Today's rule is a departure from that proposal. Today's rule requires all dischargers through municipal separate storm sewer systems to apply for an individual permit, apply as part of a group application, or seek coverage under a promulgated general permit for storm water discharges associated with industrial activity.

Municipal operators of large and medium municipal separate storm sewer systems are responsible for obtaining system-wide or area permits for their system's discharges. These permits are expected to require that controls be placed on storm water discharges associated with industrial activity which discharge through the municipal system. It is anticipated that general or individual permits covering industrial storm water dischargers to these municipal separate storm sewer systems will require industries to comply with the terms of the permit issued to the municipality, as well other terms specific to the permittee.

c. *Storm water discharges through non-municipal storm sewers.* Under today's rulemaking all operators of storm water discharges associated with industrial activity that discharge into a privately or Federally owned storm water conveyance (a storm water conveyance that is not a municipal separate storm sewer) will be required to be covered by an NPDES permit (*e.g.* an individual permit, general permit, or as a co-permittee to a permit issued to the operator of the portion of the system that directly discharges to waters of the United States). This is a departure from the "either/or" approach that EPA requested comments on in the December 7, 1988, notice. The "either/or" approach would have allowed either the system discharges to be covered by a permit issued to the owner/operator of the system segment that discharged to waters of the United States, or by an individual permit issued to each contributor to the non-municipal conveyance.

EPA requested comments on the advantages and disadvantages of retaining the "either/or" approach for non-municipal storm sewers. An abundance of comment was received by EPA on this particular part of the program. A number of industrial commenters and a smaller number of municipalities favored retaining the "either/or" approach as proposed, while most municipal entities, one industry, and one trade association favored requiring permits for each discharger.

Two commenters stated that private owners of conveyances may not have the legal authority to implement controls on discharges through their system and would not want to be held responsible for such controls. EPA agrees that this is a potential problem. Therefore, today's rule will require permit coverage for each storm water discharge associated with industrial activity.

One commenter supported the concept of requiring all the facilities that discharge to a non-municipal conveyance to be co-permittees. EPA agrees that this type of permitting scheme, along with other permit schemes such as area or general permits, is appropriate for discharges from non-municipal sewers, as long as each storm water discharge through the system is associated with industrial activity and thus currently subject to NPDES permit coverage.

One State agency commented that in the interest of uniformity, all industries that discharge to non-municipal conveyances should be required to conform to the application requirements. One industry stated that the rules must provide a way for the last discharger before the waters of the U.S. to require permits for facilities discharging into the upper portions of the system. EPA agrees with these comments. Today's rule provides that each discharger may be covered under individual permits, as co-permittees to a single permit, or by general permit rather than holding the last discharger to the waters of the United States solely responsible.

In response to one commenter, the term "non-municipal" has been clarified to explain that the term refers to non-publicly owned or Federally-owned storm sewer systems.

Some commenters supporting the approach as proposed, noted that industrial storm water dischargers into such systems can take advantage of the group application process. EPA agrees that in appropriate circumstances, such as when industrial facilities discharging storm water to the same system are sufficiently similar, group applications can be used for discharges to non-municipal conveyances. However, EPA believes that it would be inappropriate to approve group applications for those facilities whose only similarity is that they discharge storm water into the same private conveyance system. The efficacy of the group application procedures is predicated on the similarity of operations and other factors. The fact that several industries discharge storm water to the same non-municipal sewer system alone may not make these discharges sufficiently similar for group application approval.

One commenter suggested that EPA has not established any deadlines for submission of permit applications for storm water discharges associated with industrial activity through non-municipal separate storm sewer systems. EPA wants to clarify that industrial storm water dischargers into privately owned or Federally owned storm water conveyances are required to apply for permits in the same time frame as individual or group applicants (or as otherwise provided for in a general permit).

One commenter stated that the operator of the conveyance that accepts discharges into its system has control and police power over those that discharge into the system by virtue of the ability to restrict discharges into the system. This commenter stated that these facilities should be the entity required to obtain the permit in all cases. Assuming that this statement is true in all respects, the larger problem is that one's theoretical ability to restrict discharges is not necessarily tied to the reality of enforcing those restrictions or even detecting problem discharges when they exist. In a similar vein one commenter urged that a private operator will not be in any worse a position than a municipal entity to determine who is the source of pollution up-stream. EPA agrees that from a hydrological standpoint this may be true. However, from the standpoint of detection resources, police powers, enforcement remedies, and other facets of municipal power that may be brought to bear upon problem dischargers, private systems are in a far more precarious position with respect to controlling discharges from other private sources.

In light of the comments received, EPA has decided that the either/or approach as proposed is inappropriate. Operators of non-municipal systems will generally be in a poorer position to gain knowledge of pollutants in storm water discharges and to impose controls on storm water discharges from other facilities than will municipal system operators. In addition, best management practices and other site-specific controls are often most appropriate for reducing pollutants in storm water discharges associated with industrial activity and can often only be effectively addressed in a regulatory scheme that holds each industrial facility operator directly responsible. The either/or approach as proposed is not conducive to establishing these types of practices unless each discharger is discharging under a permit. Also, some non-municipal operators of storm water conveyances, which receive storm water runoff from industrial facilities, may not be generating storm water discharges associated with industrial activity themselves and, therefore, they would otherwise not need to obtain a permit prior to October 1, 1992, unless specifically designated under section 402(p)(2)(E). Accordingly, EPA disagrees with comments that dischargers to non-municipal conveyances should have the flexibility to be covered by their permit or covered by the permit issued to the operator of the outfall to waters to the United States.

2. Scope of "Associated with Industrial Activity"

The September 26, 1984, final regulation divided those discharges that met the regulatory definition of storm water point source into two groups. The term Group I storm water discharges was defined in an attempt to identify those storm water discharges which had a higher potential to contribute significantly to environmental impacts. Group I included those discharges that contained storm water drained from an industrial plant or plant associated areas. Other storm water discharges (such as those from parking lots and administrative buildings) located on lands used for industrial activity were classified as Group II discharges. The regulations defined the term "plant associated areas" by listing several examples of areas that would be associated with industrial activities. However, the resulting definition led to confusion among the regulated community regarding the distinctions between the Group I and Group II classifications.

In amending the CWA in 1987, Congress did not explicitly adopt EPA's regulatory classification of Group I and Group II discharges. Rather, Congress required EPA to address "storm water discharges associated with industrial activity" in the first round of storm water permitting. In light of the adoption of the term "associated with industrial activity" in the CWA, and the

ongoing confusion surrounding the previous regulatory definition, EPA has eliminated the regulatory terms "Group I storm water discharge" and "Group II storm water discharge" pursuant to the December 7, 1987, Court remand and has not revived it. In addition, today's notice promulgates a definition of the term "storm water discharge associated with industrial activity"at § 122.26(b)(14) and clarified the scope of the term.

In describing the scope of the term "associated with industrial activity", several members of Congress explained in the legislative history that the term applied if a discharge was "directly related to manufacturing, processing or raw materials storage areas at an industrial plant." (Vol. 132 Cong. Rec. H10932, HI0936 (daily ed. October 15, 1986); Vol. 133 Cong. Rec. H176 (daily ed. January 8, 1987)). Several commenters cited this language in arguing for a more expansive or less expansive definition of "associated with industrial activity." EPA believes that the legislative history supports the decision to exclude from the definition of industrial activity, at § 122.26(b)(14) of today's rule, those facilities that are generally classified under the Office of Management and Budget Standard Industrial Classifications (SIC) as wholesale, retail, service, or commercial activities.

Two commenters recommended that all commercial enterprises should be required to obtain a permit under this regulation. Another commenter recommended that all the facilities listed in the December 7, 1988, proposal, including those listed in paragraphs (xi) through (xvi) on page 49432 of the December 7, 1988, proposal, should be included. EPA disagrees since the intent of Congress was to establish a phased and tiered approach to storm water permits, and that only those facilities having discharges associated with industrial activity should be included initially. The studies to be conducted pursuant to section 402(p)(5) will examine sources of pollutants associated with commercial, retail, and other light business activity. If appropriate, additional regulations addressing these sources can be developed under section 402(p)(6) of the CWA. As further discussed below, EPA believes that the facilities identified in paragraphs (xi) through (xvi) are more properly characterized as commercial or retail facilities, rather than indutrial facilities.

Today's rule clarifies the regulatory definition of "associated with industrial activity" by adopting the language used in the legislative history and supplementing it with a description of various types of areas that are directly related to an industrial process (*e.g.*, industrial plant yards, immediate access roads and rail lines, drainage ponds, material handling sites, sites used for the application or disposal of process waters, sites used for the storage and maintenance of material handling equipment, and known sites that are presently or have been used in the past for residual treatment, storage or disposal). The agency has also incorporated some of the suggestions offered by the public in comments.

Three commenters suggested that the permit application should focus only on storm water with the potential to come into contact with industrial-related pollutant sources, rather than focusing on how plant areas are utilized. These commenters suggested that facilities that are wholly enclosed or have their operations entirely protected from the elements should not be subject to permit requirements under today's rule. EPA agrees that these comments have merit with regard to certain types of facilities. Today's rule defines the term "storm water discharge associated with industrial activity" to include storm water discharges from facilities identified in today's rule at *40 CFR 122.21(b)(I4)(xi)* (facilities classified as Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, 4221-25) only if:

areas where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery at these facilities are exposed to storm water. Such areas include: material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at 40 CFR 401); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment; storage or disposal; shipping and receiving areas; manufacturing buildings; material storage areas for raw materials, and intermediate and finished products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water.

The critical distinction between the facilities identified at *40 CFR 122.26(b)(14)(xi)* and the facilities identified at *40 CFR 122.26(b)(14)(i)*-(x) is that the former are not classified as having "storm water discharges associated with industrial activity" unless certain materials or activities are exposed to storm water. Storm water discharges from the latter set of facilities are considered to be "associated with industrial activity" regardless of the actual exposure of these same materials or activities to storm water.

EPA believes this distinction is appropriate because, when considered as a class, most of the activity at the facilities in § 122.26(b)(14)(xi) is undertaken in buildings; emissions from stacks will be minimal or non-existent; the use of unhoused manufacturing and heavy industrial equipment will be minimal; outside material storage, disposal or handling generally will not be a part of the manufacturing process; and generating significant dust or particulates would be atypical. As such, these industries are more akin or comparable to businesses, such as retail, commercial, or service industries, which Congress did not contemplate regulating before October 1, 1992, and storm water discharges from these facilities are not "associated with industrial activity." Thus, these industries will be required to obtain a permit under today's rule only when the manufacturing processes undertaken at such facilities would result in storm water contact with industrial materials associated with the facility.

Industrial categories in § 122.26(b)(14)(xi) all tend to engage in production activities in the manner described in the paragraph above. Facilities under SIC 20 process foods including meats, dairy food, fruit, and flour. Facilities classified under SIC 21 make cigarettes, cigars, chewing tobacco and related products. Under SIC 22, facilities produce yarn, etc., and/or dye and finish fabrics. Facilities under SIC 23 are in the business of producing clothing by cutting and sewing purchased woven or knitted textile products. Facilities under SIC 2434 and 25 are establishments engaged in furniture making. SIC 265 and 267 address facilities that manufacture paper board products. Facilities under SIC 27 perform services such as bookbinding, plate making, and printing. Facilities under SIC 283 manufacture pharmaceuticals and facilities under 285 manufacture paints, varnishes, lacquers, enamels, and allied products. Under SIC 30 establishments manufacture products from plastics and rubber. Those facilities under SIC 31 (except 311), 323, 34 (except 3441), 35, 36, and 37 (except 373) manufacture industrial and commercial metal products, machinery, equipment, computers, electrical equipment, and transportation equipment, and glass products made of purchased glass. Facilities under SIC 38 manufacture scientific and electrical instruments and optical equipment. Those under SIC 39 manufacture a variety of items such as jewelry, silverware, musical instruments, dolls, toys, and athletic goods. SIC 4221-25 are warehousing and storage activities.

In contrast, the facilities identified by SIC 24 (except and 2434), 26 (except 265 and 267), 28 (except 283 and 285), 29, 311, 32 (except 323), 33, 3441, 373 when taken as a group, are expected to have one or many of the following activities, processes occurring on-site: storing raw materials, intermediate products, final products, by-products, waste products, or chemicals outside; smelting; refining; producing significant emissions from stacks or air exhaust systems; loading or unloading chemical or hazardous substances; the use of unhoused manufacturing and heavy industrial equipment; and generating significant dust or particulates. Accordingly, these are classes of facilities which can be viewed as generating storm water discharges associated with industrial activity requiring a permit. Establishments identified under SIC 24 (except 2434) are engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials. SIC 26 facilities are paper mills. Under SIC 28, facilities produce basic chemical products by predominantly chemical processes. SIC 29 describes facilities that are engaged in the petroleum industry. Under SIC 311, facilities are engaged in tanning, currying, and finishing hides and skins. Such processes use chemicals such as sulfuric acid and sodium dichromate, and detergents, and a variety of raw and intermediate materials. SIC 32 manufacture glass, clay, stone and concrete products form raw materials in the form quarried and mined stone, clay, and sand. SIC 33 identifies facilities that smelt, refine ferrous and nonferrous metals from ore, pig or scrap, and manufacturing related products. SIC 3441 identifies facilities manufacturing fabricated structural metal. Facilities under SIC 373 engage in ship building and repairing. The permit application requirements for storm water discharges from facilities in these categories are unchanged from the proposal.

Today's rule clarifies that the requirement to apply for a permit applies to storm water discharges from plant areas that are no longer used for industrial activities (if significant materials remain and are exposed to storm water) as well as areas that are currently being used for industrial activities. EPA would also clarify that all discharges from these areas including those that discharge through municipal separate storm sewers are addressed by this rulemaking.

One commenter questioned the use of the word "or" instead of the word "and" to describe storm water "which is located at an industrial plant 'or' directly related to manufacturing, processing, or raw material storage areas at an industrial plant." The comment expressed the concern that discharges from areas not located at an industrial plant would be subject to permitting by this language and questioned whether this was EPA's intent. EPA agrees that this is a potential source of confusion and has modified this language to reflect the conjunctive instead of the alternative. This change has been made to provide consistency in the rule whereby some areas at industrial plants, such as administrative parking lots which do not have storm water discharges commingled with discharges from manufacturing areas, are not included under this rulemaking.

Two commenters wanted clarification of the term "or process water," in the definition of discharge associated with industrial activity at § 122.26(b)(14). This rulemaking replaces this term with the term "process waste water" which is defined at 40 CFR part 401.

One commenter took issue with the decision to include drainage ponds, refuse sites, sites for residual treatment, storage, or disposal, as areas associated with industrial activity, because it was the commenter's view that such areas are unconnected with industrial activity. EPA disagrees with this comment. If refuse and other sites are used in conjunction with manufacturing or the by-products of manufacturing they are clearly associated with industrial activity. As noted above, Congress intended to include discharges directly related to manufacturing and processing at industrial plants. EPA is convinced that wastes, refuse, and residuals are the direct result or consequence of manufacturing and processing and, when located or stored at the plant that produces them, are directly related to manufacturing and processing at that plant. Storm water drainage from such areas, especially those areas exposed to the elements (*e.g.* rainfall) has a high potential for containing pollutants from materials that were used in the manufacturing process at that facility. One commenter supported the inclusion of these areas since many toxins degrade very slowly and the mere passage of time will not eliminate their effects. EPA agrees and finalizes this part of the definition as proposed. One commenter requested clarification of the term "residual" as used in this context. Residual can generally be defined to include material that is remaining subsequent to completion of an industrial process. One commenter noted that the current owner of a facility may not know what areas or sites at a facility were used in this manner in the past. EPA has clarified the definition of discharge associated with industrial activity to include areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. The Agency believes that the current owner will be in a position to establish these facts.

One commenter suggested including material shipping and receiving areas, waste storage and processing areas, manufacturing buildings, storage areas for raw materials, supplies, intermediates, and finished products, and material handling facilities as additional areas "associated with industrial activity." EPA agrees that this would add clarification to the definition, and has incorporated these areas into the definition at § 122.26(b)(14).

One commenter stated that the language "point source located at an industrial plant" would include outfalls located at the facility that are not owned or operated by the facility, but which are municipal storm sewers on easements granted to a municipality for the conveyance of storm water. EPA agrees that if the industry does not operate the point source then that facility is not required to obtain a permit for that discharge. A point source is a conveyance that discharges pollutants into the waters of the United States. If a facility does not operate that point source, then it would be the responsibility of the municipality to cover it under a permit issued to them. However, if contaminated storm water associated with industrial activity were introduced into that conveyance by that facility, the facility would be subject to permit application requirements as is all industrial storm water discharged through municipal sewers.

EPA disagrees with several comments that road drainage or railroad drainage within a facility should not be covered by the definition. Access roads and rail lines (even those not used for loading and unloading) are areas that are likely to accumulate extraneous material from raw materials, intermediate products and finished products that are used or transported within, or to and from, the facility. These areas will also be repositories for pollutants such as oil and grease from machinery or vehicles using these areas. As such they are related to the industrial activity at facilities. However, the language describing these areas of industrial activity has been clarified to include those access roads and rail lines that are "used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility." For the same reasons haul roads (roads dedicated to transportation of industrial products at facilities) and similar extensions are required to be addressed in permit applications. Two industries stated that haul roads and similar extensions should be covered by permits by rule. EPA is not considering the use of a permit by rule mechanism under this regulation, however this issue will be addressed in the section 402(p)(5) reports to Congress and in general permits to be proposed and promulgated in the near future. EPA would note however that facilities with similar operations and storm water concerns that desire to limit administrative burdens associated with permit applications and obtaining permits may want to avail themselves of the group application and/or general permits.

In response to comments, EPA would also like to clarify that it intends the language "immediate access roads" (including haul roads) to refer to roads which are exclusively or primarily dedicated for use by the industrial facility. EPA does not expect facilities to submit permit applications for discharges from public access roads such as state, county, or federal roads such as highways or BLM roads which happen to be used by the facility. Also, some access roads are used to transport bulk samples of

raw materials or products (such as prospecting samples from potential mines) in small-scale prior to industrial production. EPA does not intend to require permit applications for access roads to operations which are not yet industrial activities.

EPA does agree with comments made by several industries that undeveloped areas, or areas that do not encompass those described above, should generally not be addressed in the permit application, or a storm water permit, as long as the storm water discharge from these areas is segregated from the storm water discharge associated with the industrial activity at the facility.

Numerous commenters stated that maintenance facilities, if covered, should not be included in the definition. EPA disagrees with this comment. Maintenance facilities will invariably have points of access and egress, and frequently will have outside areas where parts are stored or disposed of. Such areas are locations where oil, grease, solvents and other materials associated with maintenance activities will accumulate. In response to one commenter, such areas are only regulated in the context of those facilities enumerated in the definition at § 122.26(b)(14), and not similar areas of retail or commercial facilities.

Another commenter requested that "storage areas" be more clearly defined. EPA disagrees that this term needs further clarification in the context of this section of the rule. However, in response to one comment, tank farms at industrial facilities are included. Tank farms are in existence to store products and materials created or used by the facility. Accordingly they are directly related to manufacturing processes.

Regarding storage areas, one commenter stated that the regulations should emphasize that only facilities that are not totally enclosed are required to submit permit applications. EPA does not agree with this interpretation since use of the generic term storage area indicates no exceptions for certain physical characteristics. Thus discharges from enclosed storage areas are also covered by today's rule (except as discussed above). EPA also disagrees with one comment asserting that small outside storage areas of finished products at industrial facilities should be excluded under the definition of associated with industrial activity. EPA believes that such areas are areas associated with industrial activity which Congress intended to be regulated under the CWA. As noted above, the legislative history refers to storage areas, without reference to whether they are covered or uncovered, or of a certain size.

The same language, in the legislative history cited above, was careful to state that the term "associated with industrial activity" does not include storm water "discharges associated with parking lots and administrative and employee buildings." To accommodate legislative intent, segregated storm water discharges from these areas will not be required to obtain a permit prior to October 1, 1992. Many commenters stated that this was an appropriate method in which to limit the scope of "associated with industrial activity." However, if a storm water discharge from a parking lot at an industrial facility is mixed with a storm water discharge "associated with industrial activity," the combined discharge is subject to permit application requirements for storm water discharges associated with industrial activity. EPA disagrees with some commenters who urged that office buildings and administrative parking lots should be covered if they are located at the plant site. EPA agrees with one commenter that inclusion of storm water discharge from these areas would be overstepping Congressional intent unless such are commingled with storm water discharges from the plant site. Several commenters requested that language be incorporated into the rule which establishes that storm water discharges from parking lots and administrative areas not be included in the definition of associated with industrial activity. EPA agrees and has retained language used in the proposal which addresses this distinction.

Storm water discharges from parking lots and administrative buildings along with other discharges from industrial lands that do not meet the regulatory definition of "associated with industrial activity" and that are segregated from such discharges may be required to obtain an NPDES permit prior to October 1, 1992, under certain conditions. For example, large parking facilities, due to their impervious nature may generate large amounts of runoff which may contain significant amounts of oil and grease and heavy metals which may have adverse impacts on receiving waters. The Administrator or NPDES State has the authority under section 402(p)(2)(E) of the amended CWA to require a permit prior to October 1, 1992, by designating storm water discharges such as those from parking lots that are significant contributors of pollutants or contribute to a water quality standard violation. EPA will address storm water discharges from lands used for industrial activity which do not meet the regulatory definition of "associated with industrial activity" in the section 402(p)(5) study to determine the appropriate manner to regulate such discharges.

Several commenters requested clarification that the definition does not include sheet flow or discharged storm water from upstream adjacent facilities that enters the land or comingles with discharge from a facility submitting a permit application. EPA wishes to clarify that operators of facilities are generally responsible for its discharge in its entirety regardless of the initial source of discharge. However, where an upstream source can be identified and permitted, the liability of a downstream facility for other storm water entering that facility may be minimized. Facilities in such circumstances may be required to develop management practices or other run-on/run-off controls, which segregates or otherwise prevents outside runoff from comingling with its storm water discharge. Some commenters expressed concern about other pollutants which may arrive on a facility's premises from rainfall. This comment was made in reference to runoff with a high or low pH. If an applicant has reason to believe that pollutants in its storm water discharge are from such sources, then that needs to be addressed in the permit application and brought to the attention of the permitting authority, which can draft appropriate permit conditions to reflect these circumstances.

EPA requested comments on clarifying the types of facilities that involve industrial activities and generate storm water. EPA preferred basing the clarification, in part, on the use of Standard Industrial Classification (SIC) codes, which have been suggested in comments to prior storm water rulemakings because they are commonly used and accepted and would provide definitions of facilities involved in industrial activity. Several commenters supported the use by EPA of Standard Industrial Classifications for the same reasons identified by EPA as a generally used and understood form of classification. It was also noted that using such a classification would allow targeting for special notification and educational mailings. Three municipalities and three State authorities commented that SICs were appropriate and endorsed their use as a sound basis for determining which industries are covered.

One municipality questioned how SIC classifications will be assigned to particular industries. SICs have descriptions of the type of industrial activity that is engaged in by facilities. Industries will need to assess for themselves whether they are covered by a listed SIC and submit an application accordingly. Another commenter questioned if Federal facilities that do not have an SIC code identification are required to file a permit application. Federal facilities will be required to submit a permit application if they are engaged in an industrial activity that is described under § 122.26(b)(14). The definition of industrial activity incorporates language that requires Federal facilities to submit permit applications in such circumstances. The language has been further clarified to include State and municipal facilities.

EPA requested comments on the scope of the definition (types of facilities addressed) as well as the clarity of regulation. EPA identified the following types of facilities in the proposed regulation as those facilities that would be required to obtain permits for storm water discharges associated with industrial activity:

*(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are also identified under category (xi) of this paragraph).* One commenter (a municipality) agreed with EPA that these industries should be addressed in this rulemaking. No other comments were received on this category. EPA agrees with this comment since these facilities are those that Congress has required EPA to examine and regulate under the CWA with respect to process water discharges. The industries in these categories have generally been identified by EPA as the most significant dischargers of process wastewaters in the country. As such, these facilities are likely to have storm water discharges associated with industrial activity for which permit applications should be required.

One commenter stated that because oil and gas producers are subject to effluent guidelines, EPA is disregarding the intent of Congress to exclude facilities pursuant to section 402(1). EPA disagrees with this comment. EPA is not prohibited from requiring permit applications from industries with storm water discharge associated with industrial activity. EPA is prohibited only from requiring a permit for oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water that is not contaminated by contact with or has not come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations such discharges. In keeping with this requirement, EPA is requiring permit applications from oil and gas exploration, production, processing, or treatment operations, or transmission facilities that fall into a class of dischargers as described in § 122.26(c)(iii).

*(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283 and 285), 29, 311, 32 (except 323), 33, 3411, 373* and *(xi). Facilities classified as Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, 4221-25.* One

large municipality and one industry agreed with EPA that facilities covered by these SICs should be covered by this rulemaking. Many commenters, however, took exception to including all or some of these industries. However as noted elsewhere these facilities are appropriate for permit applications.

One commenter stated that within certain SICs industries, such as textile manufacturers use few chemicals and that there is little chance of pollutants in their storm water discharge. EPA agrees that some industries in this category are less likely than others to have storm water discharges that pose significant risks to receiving water quality. However, there are many other activities that are undertaken at these facilities that may result in polluted storm water. Further, the CWA is clear in its mandate to require permit applications for discharges associated with industrial activity. Excluding any of the facilities under these categories, except where the facility manufacturing plant more closely resembles a commercial or retail outlet would be contrary to Congressional intent.

One State questioned the inclusion of facilities identified in SIC codes 20-39 because of their temporary and transient nature or ownership. Agency disagrees that simply because a facility may transfer ownership that storm water quality concerns should be ignored. If constant ownership was a condition precedent to applying for and obtaining a permit, few if any facilities would be subject to this rulemaking.

One State estimated that the proposed definition would lead to permits for 18,000 facilities in its State. Consequently this commenter recommended that the facilities under SIC 20-39 should be limited to those facilities that have to report under section 313 of title III, Superfund Amendments and Reauthorization Act. However, as noted by another commenter, limiting permit requirements to these facilities would be contrary to Congressional intent. While use of chemicals at a facility may be a source of pollution in storm water discharges, other every day activities at an industrial site and associated pollutants such as oil and grease, also contribute to the discharge of pollutants that are to be addressed by the CWA and these regulations. While the number of permit applications may number in the thousands, EPA intends for group applications and general permits to be employed to reduce the administrative burdens as greatly as possible.

Two commenters felt the permit applications should be limited to all entities under SIC 20-39. EPA disagrees that all the industrial activities that need to be addressed fall within these SICs. Discharges from facilities under paragraphs (i) through (xi) such as POTWs, transportation facilities, and hazardous waste facilities, are of an industrial nature and clearly were intended to be addressed before October 1, 1992.

Two commenters stated that SIC 241 should be excluded in that logging is a transitory operation which may occur on a site for only 2-3 weeks once in a 20-30 year period. It was perceived that delays in obtaining permits for such operations could create problems in harvest schedule and mill demand. This commenter stated that runoff from such operations should be controlled by BMPs in effect for such industries and that such a permit would not be practical and would be cost prohibitive.

EPA agrees with the commenter that this provision needs clarification. The existing regulations at *40 CFR 122.27* currently define the scope of the NPDES program with regard to silvicultural activities. *40 CFR 122.27(b)(1)* defines the term "silvicultural point source" to mean any discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. Section 122.27(b)(1) also excludes certain sources. The definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under NPDES. EPA does not intend to change the scope of *40 CFR 122.27* in this rulemaking. Accordingly, the definition of "storm water discharge associated with industrial activity" does not include sources that may be included under SIC 24, but which are excluded under *40 CFR 122.27*. Further, EPA intends to examine the scope of the NPDES silvicultural regulations at *40 CFR 122.27* as it relates to storm water discharges in the course of two studies of storm water discharges required under section 402(p)(5) of the CWA.

In response to one comment, EPA intends that the list of applicable SICs will define and identify what industrial facilities are required to apply. Facilities that warehouse finished products under the same code at a different facility from the site of manufacturing are not required to file a permit application, unless otherwise covered by this rulemaking.

*(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40*

*CFR 434.11(l) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990 and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations.* Several commenters urged that Congress intended to require permits or permit applications only for the manufacturing sector of the oil and gas industry (or those activities that designated in SIC 20 through 39). EPA disagrees with this argument. The fact that Congress used the language cited above and not the appropriate the SIC definition explicitly does not indicate that a broader definition or less exclusive definition was contemplated. According to these comments, all storm water discharges from oil and gas exploration and production facilities would be exempt from regulation. However, EPA is convinced that a facility that is engaged in finding and extracting crude oil and natural gas from subsurface formations, separating the oil and gas from formation water, and preparing that crude oil for transportation to a refinery for manufacturing and processing into refined products, will have discharges directly relating to the processing or raw material storage at an industrial plant and are therefore discharges associated with industrial activity.

For further clarification EPA is intending to focus only on those facilities that are in SIC 10-14. Furthermore, in response to several comments, this rulemaking will require permit applications for storm water discharges from currently inactive petroleum related facilities within SIC codes 10-14, if discharges from such facilities meet the requirements as described in section VI.F.7.a. and § 122.26(c)(1)(iii). Inactive facilities will have storm water associated with industrial activity irrespective of whether the activity is ongoing. Congress drew no distinction between active and inactive facilities in the statute or in the legislative history.

*(iv) Hazardous waste treatment, storage, or disposal facilities that are operating under interim status or a permit under Subtitle C of the Resource, Conservation and Recovery Act.* One commenter believed that all RCRA and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) facilities should be specifically identified using SIC codes for further clarification. EPA considers this to be unnecessarily redundant, since the RCRA/CERCLA identification is sufficient.

Several industries asserted that storm water discharge from landfills, dumps, and land application sites, properly closed or otherwise subject to corrective or remedial actions under RCRA, should not be included in the definition. One commenter noted that the runoff from these areas is like runoff from undeveloped areas. One commenter also concluded that landfills, dumps, and land application sites should also be excluded if they are properly maintained under RCRA.

One commenter also rejected the idea of requiring permits from all active and inactive landfills and open dumps that have received any industrial wastes, and subtitle C facilities. This commenter felt that these facilities were already adequately covered under RCRA.

Two industry commenters felt that it would be redundant to have hazardous waste facilities regulated by RCRA and the NPDES storm water program. One felt this was especially so if there are current pretreatment standards.

The Agency disagrees that all activities that may contribute to storm water discharges at RCRA subtitle C facilities are being fully controlled and that requiring NPDES permits for storm water discharges at RCRA subtitle C facilities is redundant. First, the vast majority of permitted hazardous waste management facilities are industrial facilities involved in the manufacture or processing of products for distribution in commerce. Their hazardous waste management activities are incidental to the production-related activities. While RCRA subtitle C regulations impose controls in storm water runoff from hazardous waste management units and require cleanup of releases of hazardous wastes, they generally do not control non-systematic spills or process. These releases, from the process itself or the storage of raw materials or finished products are a potential source of storm water contamination. In addition, RCRA subtitle C (except via corrective action authority) does not address management of "non hazardous" industrial wastes, which nevertheless could also potentially contaminate storm water runoff.

Second, at commercial hazardous waste management facilities, the RCRA subtitle C permitting requirements and management standards do not control all releases of potentially toxic materials. For example, some permitted commercial treatment facilities may store and use chemicals in the treatment of RCRA hazardous wastes. Releases of these treatment chemicals from storage areas are a potential source of storm water contamination.

Finally, many RCRA subtitle C facilities have inactive Solid Waste Management Units (SWMU's) on the facility property. These SWMU's may contain areas on the land surface that are contaminated with hazardous constituents. RCRA requires that hazardous waste management facilities must investigate these areas of potential contamination, and then perform corrective action to remediate any SWMU's that are of concern. However, the corrective action process at these facilities will not be completed for a number of years due to the complexity of the cleanup decisions, and due to the fact that many hazardous waste management facilities do not yet have RCRA permits. Until corrective action has been completed at all such subtitle C facilities, SWMU's are a potential source of storm water contamination that should be addressed under the NPDES program. Finally, under section 1004(27) of RCRA, all point source discharges, including those at RCRA regulated facilities, are to be regulated by the NPDES program. Thus, there is no concern of regulatory overlap, and to the extent that the storm water regulations are effectively implemented, it will help address these units in a way that alleviates the need for expensive corrective action in the future.

*(v) Landfills, land application sites, and open dumps that receive or have received industrial wastes and that are subject to regulation under subtitle D of RCRA.* EPA received numerous comments supporting the regulation of municipal landfills which receive industrial waste and are subject to regulation under subtitle D of RCRA. EPA agrees with these comments. These industries have significant potential for storm water discharges that can adversely affect receiving water.

Two States argued that landfills should be addressed under the non-point source program. EPA disagrees that the non-point source program is sufficient for addressing these facilities. Further, addressing a class of facilities under the non-point source program does not exempt storm water discharges from these facilities from regulation under NPDES. The CWA requires EPA to promulgate regulations for controlling point source discharges of storm water from industrial facilities. Point sources from landfills consisting of storm water are such discharges requiring an NPDES permit. Several commenters argued that these discharges are adequately addressed by RCRA and that regulating them under this storm water rule would be redundant. However, as discussed above, RCRA expressly does not regulate point source discharges subject to NPDES permits. Given the nature of these facilities and of the material stored or disposed, EPA believes storm water permits are necessary. Similarly EPA rejects the comment that storm water discharges from these facilities are already adequately regulated by State authority. Congress has mandated that storm water discharges associated with industrial activity have an NPDES permit.

One commenter wanted EPA to define by size what landfills are covered. In response, it is the intent of these regulations to require permit applications from all landfills that receive industrial waste. Storm water discharges from such facilities are addressed because of the nature of the material with which the storm water comes in contact. The size of facility will not dictate what type of waste is exposed to the elements.

One commenter requested that the definition of industrial wastes be clarified. For the purpose of this rule, industrial waste consists of materials delivered to the landfill for disposal and whose origin is any of the facilities described under § 122.26(b)(14) of this regulation.

*(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093.* One commenter suggested that the recycling of materials such as paper, glass, plastics, etc., should not be classified as an industrial activity. EPA disagrees that such facilities should be excluded on that basis. These facilities may be considered industrial, as are facilities that manufacture such products absent recycling.

Other facilities exhibit traits that indicate industrial activity. In junkyards, the condition of materials and junked vehicles and the activities occurring on the yard frequently result in significant losses of fluids, which are sources of toxic metals, oil and grease and polychlorinated aromatic hydrocarbons. Weathering of plated and non-plated metal surfaces may result in contributions of toxic metals to storm water. Clearly such facilities cannot be classified as commercial or retail.

One municipality felt that "significant recycling" should be defined or clarified. EPA agrees that the proposed language is ambiguous. It has been clarified to require permit applications from facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093. These SIC codes describe facilities engaged in dismantling, breaking up, sorting, and wholesale distribution of motor vehicles and parts and a variety of other materials. The Agency believes these SIC codes clarify the term significant recycling.

One municipality stated that regulation of these facilities under NPDES would be duplicative if they are publicly owned facilities. One State expressed the view that automobile junkyards, salvage yards could not legitimately be considered industrial activity. As noted above, EPA disagrees with these comments. Facilities that are actively engaged in the storage and recycling of products including metals, oil, rubber, and synthetics are in the business of storing and recycling materials associated with or once used in industrial activity. These activities are not commercial or retail because they are engaged in the dismantling of motors for distribution in wholesale or retail, and the assembling, breaking up, sorting, and wholesale distribution of scrap and waste materials, which EPA views as industrial activity. Further, being a publicly owned facility does not confer non-industrial status.

*(vii) Steam electric power generating facilities, including coal handling sites, and onsite and offsite ancillary transformer storage areas.* Most of the comments were against requiring permit applications for onsite and offsite ancillary transformer facilities. One commenter stated that these transformers did not leak in storage and if there were leakage problems in handling transformers, such leaks were subject to Federal and State spill clean-up procedures. The same commenter suggested that if EPA required applications from such facilities that it exclude those that have regular inspections, management practices in place, or those that store 50 transformers at any one time.

EPA agrees that such facilities should not be covered by today's rule. As one commenter noted, the Toxic Substances Control Act (TSCA) addresses pollutants associated with transformers that may enter receiving water through storm water discharges. EPA has examined regulations under TSCA and agrees that regulation of storm water discharges from these facilities should be the subject of the studies being performed under section 402(p)(5), rather than regulations established by today's rule. Under TSCA, transformers are required to be stored in a manner that prevents rain water from reaching the stored PCBs or PCB items. *40 CFR 761.65(b)(1)(i)*. EPA considers transformer storage to be more akin to retail or other light commercial activities, where items are inventoried in buildings for prolonged periods for use or sale at some point in the future, and where there is no ongoing manufacturing or other industrial activity within the structure.

One commenter stated that this category of industries should be loosened so that all steam electric facilities are addressed -- oil fired and nuclear. EPA believes that the language as proposed broadly defines the type of industrial activity addressed without specifying each mode of steam electric production. One commenter noted that the EPA has no authority under the CWA ( *Train v. CPIR, Inc., 426 U.S. 1 (1976)* to regulate the discharge of source, special nuclear and by-product materials which are regulated under the Atomic Energy Act. EPA agrees permit applications may not address those aspects of such facilities, however the facility in its entirety may not necessarily be exempt. A permit application will be appropriate for discharges from non-exempt categories.

*(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, material handling facilities, equipment cleaning operations or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, or which are identified in another subcategory of facilities under EPA's definition of storm water discharges associated with industrial activity.* One commenter requested clarification of the terms "vehicle maintenance." Vehicle maintenance refers to the rehabilitation, mechanical repairing, painting, fueling, and lubricating of instrumentalities of transportation located at the described facilities. EPA is declining to write this definition into the regulation however since "vehicle maintenance" should not cause confusion as a descriptive term. One commenter wanted railroad tracks where rail cars are set aside for minor repairs excluded from regulation. In response, if the activity involves any of the above activities then a permit application is required. Train yards where repairs are undertaken are associated with industrial activity. Train yards generally have trains which, in and of themselves, can be classified as heavy industrial equipment. Trains, concentrated in train yards, are diesel fueled, lubricated, and repaired in volumes that connote industrial activity, rather than retail or commercial activity.

One commenter argued that if gasoline stations are not considered for permitting, then all transportation facilities should be exempt. EPA disagrees with the thrust of this comment. Transportation facilities such as bus depots, train yards, taxi stations, and airports are generally larger than individual repair shops, and generally engage in heavier more expansive forms of industrial activity. In keeping with Congressional intent to cover all industrial facilities, permit applications from such facilities are appropriate. In contrast, EPA views gas stations as retail commercial facilities not covered by this regulation. It should be noted that SIC classifies gas stations as retail.

*(ix) POTW lands used for land application treatment technology/sludge disposal, handling or processing areas, and chemical handling and storage areas.* One commenter wanted more clarification of the term POTW lands. Another commenter requested clarification of the terms sludge disposal, sludge handling areas, and sludge processing areas. One State recommended that a broader term than POTW should be used. EPA notes that on May 2, 1989, it promulgated NPDES Sewage Sludge Permit Regulations; State Sludge Management Program Requirements at 40 CFR part 501. This regulation identified those facilities that are subject to section 405(f) of the CWA as "treatment works treating domestic sewage."

In response to the above comments, EPA has decided to use this language to define what facilities are required to apply for a storm water permit. Under this rulemaking "treatment works treating domestic sewage," or any other sewage sludge or wastewater treatment device or system used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge, with a design flow of 1.0 mgd or more, or facilities required to have an approved pretreatment program under 40 CFR part 403, will be required to apply for a storm water permit. However, permit applications will not be required to address land where sludge is beneficially reused such as farm lands and home gardens or lands used for sludge management that are not physically located within the confines (offsite facility) of the facility or where sludge is beneficially reused in compliance with section 405 of the Clean Water Act (proposed rules were published on February 6, 1989, at *54 FR 5746).* EPA believes that such activity is not "industrial" since it is agricultural or domestic application (non-industrial) unconnected to the facility generating the material.

EPA received many comments on the necessity and appropriateness of requiring permit applications for storm water discharges from POTW lands. It was anticipated by numerous commenters that the above cited sludge regulations would adequately address storm water discharges from lands where sludge is applied. However, the sewage sludge regulations do not directly address NPDES permit requirements for storm water discharges from POTW lands and related areas to the extent required by today's rulemaking; the regulations cover only permits for use or disposal of sludge. Also, the regulations proposed on February 4, 1989, cover primarily the technical standards for the composition of sewage sludge which is to be used or disposed. They do not include detailed permitting requirements for discharges of storm water from lands where sludge has been applied to the land. To that extent, EPA is not persuaded by these commenters that POTWs and POTW lands should be excluded from these storm water permit application requirements.

Two commenters noted that some States already regulate sludge use or disposal activities substantially and that EPA should refrain from further regulation. EPA disagrees that this is a basis for excluding facilities from Federal requirements. Notwithstanding regulations in existence under State law, EPA is required by the CWA to promulgate regulations for permit application for storm water associated with industrial activity. Under the NPDES program, States are able to promulgate more rigorous requirements. However a minimum level of control is required under Federal law. One commenter also indicated that a State's sludge land application sites must follow a well defined plan to ensure there is no sludge related runoff. Notwithstanding that a State may require storm water controls for sludge land applications, as noted above, EPA is required to promulgate regulations requiring permit applications from appropriate facilities. EPA views facilities such as waste treatment plants that engage in on-site sludge composting, storage of chemicals such as ferric chloride, alum, polymers, and chlorine, and which may experience spills and bubbleovers are suitable candidates for storm water permits. Facilities using such materials are not characteristic of commercial or retail activities. Use and storage of chemicals and the production of material such as sludge, with attendant heavy metals and organics, is activity that is industrial in nature. The size and scope of activities at the facility will determine the extent to which such activities are undertaken and such materials used and produced at the facility. Accordingly, EPA believes limiting the facilities covered under this category to those of 1.0 mgd and those covered under the industrial pretreatment program is appropriate.

To the extent that permit applicants are already required to employ certain management practices regarding storm water, these may be incorporated into permits and permit conditions issued by Federal and State permitting authorities. EPA has selected facilities identified under 40 CFR part 501 (*i.e.* those with a design flow of 1.0 mgd or more or those required to have an approved pretreatment program) since these facilities will have largest contribution of industrial process discharges. Sludge from such facilities will contain higher concentrations of heavy metal and organic pollutants.

One commenter stated that sludge disposal is a public activity that should be addressed in a public facility's storm water management program under a municipal storm water management program. EPA disagrees. Industrial facilities, whether publicly owned or not, are required to apply for and obtain permits when they are designated as industrial activity.

Another comment stated that a permit should not be required for facilities that collect all runoff on site and treat it at the same POTW. EPA believes that a permit application should be required from such facilities. However, the above practice can be incorporated as a permit condition for such a facility. One commenter stated storm water from sludge and chemical handling areas can be routed through the headworks of the POTW. The agency agrees that this may be an appropriate management practice for POTWs as long as other NPDES regulatory requirements are fulfilled with regard to POTWs.

*(x) Construction activities, including clearing, grading and excavation activities except operations that result in the disturbance of less than five acre total land area which are not part of a larger common plan of development or sale.* EPA addresses whether these facilities should be covered by today's rule in section VI.F.8.

The December 7, 1988, proposal also requested comments on including the following other categories of discharges in the definition of industrial activities: (xii) Automotive repair shops classified as Standard Industrial Classification 751 or 753; (xiii) Gasoline service stations classified as Standard Industrial Code 5541; (xiv) Lands other than POTW lands (offsite facilities) used for sludge management; (xv) Lumber and building materials retail facilities classified as Standard Industrial Classification 5211; (xvi) Landfills, land application sites, and open dumps that do not receive industrial wastes and that are subject to regulation under subtitle D of RCRA; (xvii) Facilities classified as Standard Industrial Classification 46 (pipelines, except natural gas), and 492 (gas production and distribution); (xviii) Major electrical powerline corridors.

EPA received numerous comments on whether to require permit applications for these particular facilities. The December 7, 1988, proposal reflected EPA's intent not to require permits for these facilities, but rather to address these facilities in the two studies required by CWA sections 402(p)(5) and (6). After reviewing the comments on this issue, EPA believes that these facilities should be addressed under these sections of the CWA. Most of these facilities are classified as light commercial and retail business establishments, agricultural, facilities where residential or domestic waste is received, or land use activities where there is no manufacturing. It should be noted that although EPA is not requiring the facilities identified as categories (xii) to (xviii), in the December 7, 1988, proposal to apply for a permit application under this rulemaking, such facilities may be designated under section 402(p)(2)(E) of the CWA.

Three commenters recommended that EPA clarify that non-exempt Department of Energy and Department of Defense facilities should be covered by the storm water regulation. The regulation clearly states that Federal Facilities that are engaged in industrial activity (*i.e.* those activities in § 122.26(b)(14)(i)-(xi)) are required to submit permit applications. Those applying for permits covering Federal facilities should consult the Standard Industrial Classifications for further clarification.

One commenter questioned how EPA intended to regulate municipal facilities engaged in industrial activities. Municipal facilities that are engaged in the type of industrial activity described above and which discharge into waters of the United States or municipal separate storm sewer systems are required to apply for permits. These facilities will be covered in the same manner as other industrial facilities. The fact that they are municipally owned does not in any way exclude them from needing permit applications under this rulemaking.

One commenter suggested exempting those facilities that have total annual sales less than five million dollars or occupy less than five acres of land. Another commenter thought that all minor permittees should be exempt. EPA believes that the quality of storm water and the extent to which discharges impact receiving water is not necessarily related to the size of the facility or the dollar value of its business. What is important in this regard, is the extent to which steps are taken at facilities to curb the quantity and type of material that may pollute storm water discharges from these facilities. Therefore EPA has not excluded facilities from permitting on such a basis. This same commenter stated that the proposed rules should not address facilities with multiple functions (industrial and retail). EPA disagrees. If a facility engages in activity that is defined in paragraphs (i) through (xi) above, it is required to apply for a permit regardless of the fact that it also has a retail element. Such facilities need only submit a permit application for the industrial portion of the facility (as long as storm water from the non-industrial portion is segregated, as discussed above). This commenter also felt that more studies needed to be undertaken to determine the best way to regulate industries. EPA agrees that storm water problems need further study and for that reason EPA has devoted substantial manpower and resources to complete comprehensive studies under section 402(p)(5), while also addressing industrial sources that need immediate attention under this rulemaking.

One commenter requested that EPA give examples of storm water discharges from each of the facilities that have been designated for submitting permit applications. Agency believes that this is unnecessary and impractical since every facility,

regardless of the type of industry, will have different terrain, hydrology, weather patterns, management practices and control techniques. However, EPA intends to issue guidance on filing permit applications for storm water discharges from industrial facilities which details how an industry goes about filing an industrial permit and dealing with storm water discharges.

Today's rulemaking for storm water discharges associated with industrial activity at § 122.26(c)(1)(i) includes special conditions for storm water discharges originating from mining operations, oil or gas operations (§ 122.26(c)(1)(iii)), and from the construction operations listed above (§ 122.26(c)(1)(ii)). These requirements are discussed in more detail in section VI.F.7 and section VI.F.9 of today's notice.

3. Individual Application Requirements

Today's rule establishes individual and group permit application requirements for storm water discharges associated with industrial activity. These requirements will address facilities precluded from coverage under the general permits to be proposed and promulgated by EPA in the near future. EPA considers it necessary to obtain the information required in individual permit applications from certain facilities because of the nature of their industrial activity and because of existing institutional mechanisms for issuing and tracking NPDES permits. Furthermore, some States will not have general permitting authority. Facilities located in such States will be required to submit individual applications or participate in a group application. The following response to comments received on these requirements pertains to these facilities.

Under the September 26, 1984, regulation operators of Group I storm water discharges were required to submit NPDES Form 1 and Form 2C permit applications. In response to post-regulation comments received on that rule, EPA proposed new permit application requirements (March 7, 1985, *(50 FR 9362)* and August 12, 1985, *(50 FR 32548))* which would have decreased the analytical sampling requirements of the Form 2C and provided procedures for group applications. Passage of the WQA in 1987 gave the EPA additional time to consider the appropriate permit application requirements for storm water discharges. On December 7, 1988, application requirements were proposed and numerous comments were received. Based upon these comments, modifications and refinements have been made to the industrial storm water permit application.

Some commenters expressed the view that the permit application requirements are too burdensome, require too much paperwork, are of dubious utility, and focus too greatly on the collection of quantitative data. EPA disagrees. In comparison to prior approaches for permitting storm water discharges and other existing permitting programs, EPA has streamlined the permit application process, limited the quantitative data requirements, and required narrative information that will be used to determine permit conditions that relate to the quality of storm water discharge. To the extent that EPA needs non-quantitative information to develop appropriate permit conditions, EPA disagrees with the view of some commenters that the information required is excessive. In response to comments on earlier rulemakings and a comment received on the December 7, 1988, proposal (stressing that the emphasis should be on site management, rather than monitoring, sampling, and reporting) EPA has shifted the emphasis of the permit application requirements for storm water discharges associated with industrial activity from the existing requirements for collection of quantitative data (sampling data) in Form 2C towards collection of less quantitative data supplemented by additional information needed for evaluation of the nature of the storm water discharges.

The permit application requirements proposed for storm water discharges reduce the amount of quantitative data required in the permit application and exempt discharges which contain entirely storm water (*i.e.* contain no other discharge that, without the storm water component, would require an NPDES permit), from certain reporting requirements of Form 2C. The proposed modifications also would exempt applicants for discharges which contain entirely storm water from several non-quantitative information collection provisions currently required in the Form 2C. The proposed modifications would rely more on descriptive information for assessing impacts of the storm water discharge. One commenter proposed that information that the applicant has submitted for other permits be incorporated by reference into the storm water permit application. EPA disagrees that incorporation by reference is appropriate. The permitting authority will need to have this information readily available for evaluating permit application and permit conditions. Furthermore, EPA feels that the applicant is in the best position to provide the information and verify its accuracy. However, if the applicant has such information and it accurately reflects current circumstances, then the applicant can rely on the information for meeting the information requirements of the application. Another commenter suggested that EPA should only require the information in § 122.26(c)(1) (A) and (B) (*i.e.*, the requirement for a topographic map indicating drainage areas and estimate of impervious areas and material management practices). As explained in greater detail below, EPA is convinced that some quantitative data and the other narrative requirements are necessary for developing appropriate permit conditions.

Form 2F addressing permit applications for storm water discharges associated with industrial activity is included in today's final rule. A complete permit application for discharges composed entirely of storm water, will be comprised of Form 2F and Form 1. Operators of discharges which are composed of both storm water and non-storm water will submit, where required, a Form 1, an entire Form 2C (or Form 2D) and Form 2F when applying. In this case, the applicant will provide quantitative data describing the discharge during a storm event in Form 2F and quantitative data describing the discharge during non-storm events in Form 2C. Non-quantitative information reported in the Form 2C will not have to be reported again in the Form 2F.

Under today's rule, Form 2F for storm water discharges associated with industrial activity would not require the submittal of all of the quantitative information required in Form 2C, but would require that quantitative data be submitted for:

-- Any pollutant limited in an effluent guideline for an industrial applicant's subcategory;

-- Any pollutant listed in the facility's NPDES permit for its process wastewater;

-- Oil and grease, TSS, COD, pH, BOD5, total phosphorus, total Kjeldahl nitrogen; nitrate plus nitrite nitrogen; and

-- Any information on the discharge required under 40 CFR 122.2l(g)(7) (iii) and (iv).

In order to characterize the discharge(s) sampled, applicants need to submit information regarding the storm event(s) that generated the sampled discharge, including the date(s) the sample was taken, flow measurements or estimates of the duration of the storm event(s) sampled, rainfall measurements or estimates from the storm event(s) which generated the sampled runoff, and the duration between the storm event sampled and the end of the previous storm event. Information regarding the storm event(s) sampled is necessary to evaluate whether the discharge(s) sampled was generally representative of other discharges expected to occur during storm events and to characterize the amount and nature of runoff discharges from the site.

One commenter stated that the quantitative information should be limited to those pollutants that are expected to be known to the applicant. EPA believes this would be inappropriate since there will be no way of determining initially whether these pollutants are present despite the expectations of the applicant. Once the data is provided, permits can be drafted which address specific pollutants. This rulemaking requires that the applicant test for oil and grease, COD, pH, BOD5, TSS, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen and total phosphorus. Oil and grease and TSS are a common component of storm water and can have serious impacts on receiving waters. Oxygen demand (COD and BOD5) will help the permitting authority evaluate the oxygen depletion potential of the discharge. BOD5 is the most commonly used indicator of potential oxygen demand. COD is considered a more inclusive indicator of oxygen demand, especially where metals interfere with the BOD5 test. The pH will provide the permitting authority with important information on the potential availability of metals to the receiving flora, fauna and sediment. Total Kjeldahl nitrogen, nitrate plus nitrite nitrogen and total phosphorus are measures of nutrients which can impact water quality. Because this data is useful in developing appropriate permit conditions, EPA disagrees with the argument made by one commenter that quantitative data requirements should be a permit condition and not part of the application process.

In the proposed rule, the Agency used total nitrogen as a parameter. This has been changed to total Kjeldahl nitrogen and nitrate plus nitrite nitrogen for clarity.

Today's rule defines sampling at industrial sites in terms of sampling for those parameters that have effluent limits in existing NPDES permits, as well as for any other conventional or nonconventional parameter that might be expected to be found at the outfall. Comments on the appropriateness of the defined parameters were solicited by the proposal. Numerous commenters maintained that either the parameter list be made industry specific, or that pollutant categories not detected in the initial screen be exempted from further testing. Some suggested that only conventional pollutants, inorganics, and metals be sampled unless reason for others is found.

In terms of specific water quality parameters, it was recommended that surfactants not be tested for unless foam is visible. One commenter also suggested that fecal coliform sampling is inappropriate for industrial permits applications. One commenter favored testing for TOC instead of VOC. In response, VOC has been eliminated from the list of parameters because it will not yield specific usable data. VOC is not specifically required in any sampling in today's rule, except where priority pollutant scans are required.

Some recommended that procedures be modified to facilitate quicker, less expensive lab analyses. Concern was also raised that industry might be required to collect its own rainfall data if there is no nearby observation station. Some commenters stated that EPA should not allow automatic sampling for either biological or oil and grease sampling due to the potential for contamination in sampling equipment.

In response, EPA believes that the sampling requirements for industry in today's rule are reasonable and not burdensome. These requirements address parameters that have effluent limits in existing NPDES permits, as well as for any other conventional or nonconventional parameter that might be expected to be found at the applicants outfall. Under this procedure both industry-specific and site-specific contaminants are already identified in the existing permit. Whether all these parameters need to be made a part of any discharge characterization plans, under the terms of the permit, will be a case-by-case determination for the permitting authority. EPA maintains that the test for surfactants (if in effluent guidelines or in the facility's NPDES permit for process water) is justifiable even when a foam is not obvious at the outfall. The presence of detergents in storm water may be indicated by foam, but the absence of foam does not indicate that detergents are not present.

EPA requested comments on fecal coliform as a parameter. Fecal coliform was included on the list as an indicator of the presence of sanitary sewage. In large concentrations, fecal coliform may be an effective indicator of sanitary sewage as opposed to other animal wastes. EPA believes that sanitary cross connections will also be found at industrial facilities. Furthermore, the test for fecal coliform is an inexpensive test and its inclusion or exclusion should make little impact financially on the individual application costs. Sampling for volatile organic carbon shall be accomplished when required, as it is an appropriate indicator of industrial solvents and organic wastes.

In response to comments, EPA acknowledges that there are certain pollutants that are capable of leaving residues in automatic sampling devices that will potentially contaminate subsequent samples. In these cases, such as for biological monitoring, if such a problem is perceived to exist and it is expected that the contaminant will render the subsequent samples unusable, manual grab samples may be needed. This would include grab samples for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform, and fecal streptococcus. EPA is not disallowing the use of automatic sampling because of possible contamination, as this type of sampling may be the best method for obtaining the necessary samples from a selected storm events.

In addition to the conventional pollutants listed above, this final rule requires applicants, when appropriate, to sample other pollutants based on a consideration of site-specific factors. These parameters account for pollutants associated with materials used for production and maintenance, finished products, waste products and non-process materials such as fertilizers and pesticides that may be present at a facility. Applicants must sample for any pollutant limited in an effluent guideline applicable to the facility or limited in the facility's NPDES permit. These pollutants will generally be associated with the facility's manufacturing process or wastes. Other process and non-process related pollutants, will be addressed by complying with the requirements of *40 CFR 122.21(g)(7) (iii)* and (iv).

Section 122.21(g)(7)(iii) requires applicants to indicate whether they know or have reason to believe that any pollutant listed in Table IV (conventional and nonconventional pollutants) of appendix D to 40 CFR part 122 is discharged. If such a pollutant is either directly limited or indirectly limited by the terms of the applicant's existing NPDES permit through limitations on an indicator parameter, the applicant must report quantitative data. For pollutants that are not contained in an effluent limitations guideline, the applicant must either report quantitative data or describe the reasons the pollutant is expected to be discharged. With regard to pollutants listed in Table II (organic pollutants) or Table III (metals, cyanide and total phenol) of appendix D, the applicant must indicate whether they know or have reason to believe such pollutants are discharged from each outfall and, if they are discharged in amounts greater than 10 parts per billion (ppb), the applicant must report quantitative data. An applicant qualifying as a small business under *40 CFR 122.21(g)(8)*, (*e.g.*, coal mines with a probable total annual production of less than 100,000 tons per year or, for all other applicants, gross total annual sales averaging less than $100,000 per year (in second quarter 1980 dollars)), is not required to analyze for pollutants listed in Table II of appendix D (the organic toxic pollutants).

Section 122.21(g)(7)(iv) requires applicants to indicate whether they know or have reason to believe that any pollutant in Table V of appendix D to 40 CFR part 122 (certain hazardous substances) is discharged. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged and report any existing quantitative data it has for the pollutant.

When collecting data for permit applications, applicants may make use of 40 CFR 122.2l(g)(7), which provides that "when an applicant has two or more outfalls with substantially identical effluents, the Director may allow the applicant to test only one outfall and report that the quantitative data also applies to the substantially identical outfalls." Where the facility has availed itself of this provision, an explanation of why the untested outfalls are "substantially identical" to tested outfalls must be provided in the application. Where the amount of flow associated with the outfalls with substantially identical effluent differs, measurements or estimates of the total flow of each of the outfalls must be provided. Several commenters stated that the time and expense associated with sampling and analysis would be saved if the applicant was able to pick substantially identical outfalls without prior approval of the permitting authority. EPA disagrees that this would be an appropriate devolution of authority to the permit applicant. The permitting authority needs to ensure that these outfalls have been grouped according to appropriate criteria (for example do the outfalls serve similar drainage areas at the facility). Furthermore, EPA is not requiring that the permit applicant engage in sampling to demonstrate that the outfalls are indeed substantially identical, because that would of course defeat the purpose of § 122.21(g)(7). The procedure for establishing identical outfalls is not that onerous and provides a means for industry to save substantially on time and resources for sampling.

EPA proposed and requested comment on a requirement that the facility must sample a storm event that is typical for the area in terms of duration and severity. The storm event must be greater than 0.1 inches and must be at least 96 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. In general, variance of the parameters (such as the duration of the event and the total rainfall of the event) should not exceed 50 percent from the parameters of the average rainfall event in that area. EPA also requested comments on addressing snow melt events under this definition.

Commenters stated that: median or average rainfall is not an acceptable approach; the minimum depth and duration of rainfall must be specified; the allowable 50% variation is questionable; the total depth of the storm is irrelevant; and the storm should be viewed based on the average intensity of the storm. One commenter suggested that using the median rainfall event would be a better approach than the average rainfall event.

Others insisted that "representative" or typical storms do not exist in semi-arid climates and that representative rainfall must be site-specific (regional) and seasonal. Several commenters contended that the requirement for 96 dry hours between events is not acceptable, with 48 and 72 hours identified as possible alternatives.

One commenter believed that a typical standard design storm, such as the 1-year, 24-hour, or 10-year, 1-hour, would be preferable. Another commenter felt that the storm event should be based on the rainfall required to generate a minimum discharge level. One commenter questioned whether the storm is to be sampled at all sites simultaneously.

To clarify its decision on what storm event should be sampled, EPA notes that its selection of the storm event considers both regional and seasonal variation of precipitation. This is evidenced in the rule with regard to sites in the municipal application (three events sampled), and in the requirements for industrial group applications (a minimum of two applicants, or one applicant in groups of less than 10, to be represented in each precipitation zone (*see* section VI.F.4 below).

The definition of a 0.1 inch minimum was determined by NURP and other studies to be the minimum rainfall depth capable of producing the rainfall/runoff characteristics necessary to generate a sufficient volume of runoff for meaningful sample analysis. EPA believes by requiring the average storm to be used as the basis for sampling that depth, duration, and therefore average rainfall intensity are being regionally defined. The Agency has also added the option of using the median rainfall event instead of the average. The potential for monitoring events that may not meet this specification should be minimized by allowing the proposed 50 percent variation in rainfall depth and/or duration from event statistics. However, the 50 percent variation need only be met when possible. Further, there is flexibility in the rule where the Director may allow or establish site specific requirements such as the minimum duration between the previous measurable storm event and the storm event sampled, the amount of precipitation from the storm event to be sampled, and the form of precipitation sampled (snowmelt or rainfall). If data is obtained from a rain event that does not meet the criteria above, the Director has the discretion to accept the data as valid.

The December 7, 1988, proposal called for a 96-hour period between events of measurable rainfall, here defined as 0.1 inch, which provided a four day minimum for the accumulation of pollutants on the surface of the outfalls' tributary areas. The key word in the definition is "measurable", which means that the 96-hour period did not necessarily have to be dry, only that no cleansing rainfall (*i.e.* 0.1 inch rain event) has occurred. However, after reviewing comments on this issue EPA has decided to

change the period to 72 hours. Many commenters indicated that 96 hours is too restrictive and that securing a sample under such circumstances would be unnecessarily difficult. EPA agrees that the quality or representativeness of the sample would not be adversely affected by this change.

EPA does not agree with comments that the requirement of a particular "design" storm would be appropriate. Many commenters have expressed concern that they might sample an event not meeting the requirements for industrial group applications as defined. Because there is no way to know with sufficient certainty beforehand that an upcoming event will approximate a one-year, twenty-four hour storm, many events would be unnecessarily sampled before this event is realized.

EPA does not intend that a municipality or industry be required to sample all required outfalls for a single storm. This would represent a unmanageable investment in equipment and manpower. In some areas, it may be necessary to sample multiple sites for a single event due to the irregularity of rainfall, but not all sites.

EPA described parameters for selecting storm events for sampling of municipal and industrial outfalls in the December 7, 1988, proposal. EPA has received several comments regarding the problems that rainfall measurement in general presents. A recurring comment relative to reporting rainfall, and in verifying that the storm itself is representative, deals with the spatial distribution of rainfall. The rainfall measured at an airport does not always represent rainfall at the site, particularly in summer months when thunderstorms are prevalent. One commenter stated that it would be easier to base the selected storm on either a minimum discharge, or on a discharge duration other than on the total precipitation, because these parameters are easily measured at the site and are not dependent on the airport gauges receiving the same rainfall as the site. A few commenters questioned how to determine typical storm characteristics. One commenter advised that NOAA rainfall reporting stations provide data that represent only daily rainfall totals, not storm event data. One commenter pointed out that the time frame of the sampling requirement does not consider that a particular region may be in the midst of a multi-year drought cycle, and that what little rainfall occurs may have uncharacteristically high levels of pollutants.

The type of rain event sampled is an important parameter in any attempt to characterize system-wide loads based on the sampling results. Rainfall gauges that report only event total depth will provide the information necessary to characterize most events, provided that a reasonable estimate of the event duration can be made. If simulation models are to be used in estimating system-wide loads, rainfall measurement based on time and depth of rainfall will be needed. If the recording stations are not believed to accurately reflect this distribution, then the data will need to be collected by the applicant at a location central to the tributary area of the outfall.

The rainfall data collected by NOAA are in most cases available in the form of hourly rainfall depths. This information can be analyzed to develop characteristic storm depths and durations. In some cases, this information has already been analyzed for many long term reporting stations by various municipalities, states, and universities. The results of these investigations should be available to the applicants.

EPA realizes that prolonged rainless periods occur for both semi-arid areas and areas experiencing droughts and that the first storm after a prolonged dry period may well not be representative of "normal" runoff conditions. In order for the appropriate system-wide characterization of loads to be made, data must be collected. With regard to the municipal permit application, today's rule states that runoff characterization data will be collected during three events at from five to ten sites. The rule gives the Director the flexibility of modifying these requirements.

EPA has defined the parameters for selecting the storm event to be sampled such that at the discretion of the Director, seasonal, including winter, sampling might be required. EPA has received several comments regarding the problems that snowmelt sampling may present. Several commenters are opposed to monitoring of snowmelt events. The reasons cited include equipment problems and the unreasonableness of expecting this sampling, because of temperatures and the time required for personnel to be waiting for events. A few comments addressed the issues of snow pack depth, ambient temperature, and solar radiation levels, and that the snow pack may filter suspended solids or refreeze such that final melting is uncharacteristically over-polluted relative to normal conditions. Another commenter contended that it is impossible to manage the melting process and therefore unreasonable to expect controls to be implemented relative to snowmelt. In essence, it is contended that there is no first discharge unless the snow pack depth is low and melts quickly.

A few commenters favor monitoring snowmelt, for precisely the same reason that most oppose it: that the runoff from snowmelt is the most polluted runoff generated in some areas on an annual basis. Where this is the case, sampling snowmelt

should be undertaken in order to accurately assess impacts to receiving streams. EPA is confident that in areas where automated sampling cannot be relied upon, grab sampling can probably be performed because the nature of the snowmelt process tends to make the timing of samples less of a problem when compared to typical rainfall events. EPA disagrees that management practices, either at industrial facilities or with regard to municipalities, cannot address snowmelt. Some areas may need to reassess their salt application procedures. In addition retention and detention devices may address snowmelt, as well as erosion controls at construction sites. Thus, obtaining samples of snowmelt is appropriate to allow development of such permit conditions.

Today's rule also modifies the Form 2C requirements by exempting applicants from the requirements at § 122.21(g)(2) (line drawings), (g)(4) (intermittent flows), (g)(7) (i), (ii), and (v) (various sampling requirements to characterize discharges) if the discharge covered by the application is composed entirely of storm water. Permit applications for discharges containing storm water associated with industrial activity would require applicants to provide other non-quantitative information which will aid permit writers to identify which storm water discharges are associated with industrial activity and to characterize the nature of the discharge.

Numerous comments were received regarding the requirement to submit a topographic map and site drainage map. Many of these comments offered alternatives to EPA's proposal. Two commenters suggested that a simple sketch of the site would be sufficient. Two commenters stated that one or the other should be adequate. One commenter believed that the drainage map was a good idea, but that the topographic map should be optional. Several commenters submitted that a topographic map was sufficient and that only SPCC plans or SARA submittals should supplement that. Another commenter argued that information relating to the location of the nearest surface water or drinking wells would be sufficient. Other commenters believed that a drainage map alone would indicate all relevant site specific information. Numerous commenters expressed concern that the drainage area map would be too detailed and that one which depicts the general direction of flow should be sufficient. Clarification was requested on whether the final rule would require the location of any drinking water wells. One commenter stated that a U.S.G.S. 7.5 quadrangle map will not illustrate drainage systems in all cases, and that therefore the requirement should be optional.

Several commenters agreed with EPA's proposal. One commenter maintained that drainage maps should be required from developments greater than three acres and from all individual applicants. Several commenters agreed with EPA's proposal that both maps should be provided, with arrows indicating site drainage and entering and leaving points. It was advised that drainage maps are useful in locating sources of storm water contamination, and it is useful to identify areas and activities which require source controls or remedial action. One commenter recommended that the map should extend far enough offsite to demonstrate how the privately owned system connects to the publicly owned system.

After considering the merits of all the comments and the reasons supporting EPA's proposal, EPA is convinced that a topographic map and a site drainage map are necessary components of the industrial application. Existing permit application regulations at *40 CFR 122.21(f)(7)* require all permit applicants to submit as part of Form 1 a topographic map extending one mile beyond the property boundaries of the source depicting: the facility and each intake and discharge structure; each hazardous waste treatment, storage, or disposal facility; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in the map area in public records or otherwise known to the applicant within one-quarter mile of the facility property boundary. (*See* *47 FR 15304,* April 8, 1982.) However, as indicated by the comments the information provided under § 122.21(f)(7) is generally not sufficient by itself for evaluating the nature of storm water discharges associated with industrial activity.

As stated in comments, a drainage map can provide more important site specific information for evaluating the nature of the storm water discharge in comparison to existing requirements, which require a larger map with only general information. The volume of a storm water discharge and the pollutants associated with it will depend on the configuration and activities occurring at the industrial site. One commenter suggested that it would be appropriate to submit an aerial photograph of the site with all the topographic and drainage information superimposed on the photograph. EPA agrees that this may be an appropriate method of providing this information. EPA is not requiring a specific format for submitting this information.

EPA is also requiring that a narrative description be submitted to accompany the drainage map. The narrative will provide a description of on-site features including: existing structures (buildings which cover materials and other material covers; dikes; diversion ditches, etc.) and non-structural controls (employee training, visual inspections, preventive maintenance, and

housekeeping measures) that are used to prevent or minimize the potential for release of toxic and hazardous pollutants; a description of significant materials that are currently or in the past have been treated, stored or disposed outside; and the method of treatment, storage or disposal used. The narrative will also include: a description of activities at materials loading and unloading areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; a description of the soil; and a description of the areas which are predominately responsible for first flush runoff. This requirement is unchanged from the proposal.

Some commenters believed that information on pesticides, herbicides, and fertilizers and similar products is irrelevant, incidental to the facility's production activities, and should not be addressed by this rulemaking. EPA disagrees. As these materials are applied outside and hence subject to storm events, they are significant sources of pollutants in storm water discharges whether applied in residential or industrial settings. By providing this information in the permit application the permit writer will be able to determine whether such activity is associated with industrial activity and the subject of appropriate permit conditions. Nominal or incidental application of these materials at industrial facilities and non-detects in sampling of storm water discharges for the permit application will result, in most cases, in these materials not being addressed specifically in storm water permits.

Today's rule also requires that permit applicants for storm water discharges associated with industrial activity certify that all of the outfalls covered in the permit application have been tested or evaluated for non-storm water discharges which are not covered by an NPDES permit. (The applicant need not test for nonstorm water if the certification of the plant storm water discharges can be evaluated through the use of schematics or other adequate method). Section 405 of the WQA added section 402(p)(3)(B)(ii) to the CWA to require that permits for municipal separate storm sewers effectively prohibit non-storm water discharges to the storm sewer system. As discussed in part VI.F.7.b of today's preamble, untreated non-storm water discharges to storm sewers can create severe, wide-spread contamination problems and removing such discharges presents opportunities for dramatic improvements in the quality of such discharges. Although section 402(p)(3)(B)(ii) specifically addresses municipal separate storm sewers, EPA believes that illicit non-storm water discharges are as likely to be mixed with storm water at a facility that discharges directly to the waters of the United States as it is at a facility that discharges to a municipal storm sewer. Accordingly, EPA feels that it is appropriate to consider potential non-storm water discharges in permit applications for storm water discharges associated with industrial activity. The certification requirement would not apply to outfalls where storm water is intentionally mixed with process waste water streams which are already identified in and covered by a permit.

This rulemaking requires applicants for individual permits to submit known information regarding the history of significant spills at the facility. Several commenters indicated that the extent to which this information is required should be modified. One commenter stated that the requirement should be limited to those spills that resulted in a complaint or enforcement action. EPA disagrees. EPA believes that significant spills at a facility should generally include releases of oil or hazardous substances in excess of reportable quantities under section 311 of the Clean Water Act (*see* 40 CFR 110.10 and *40 CFR 117.21*) or section 102 of CERCLA (*see 40 CFR 302.4*). Such a requirement is consistent with these regulations and the perception that such spills are significant enough to mandate the reporting of their occurrence. Some commenters stated that industries have already submitted this information in other contexts and should not be required to have to do it again. For the same reason another commenter felt that submittal of this information represents a waste of manpower and resources. EPA disagrees that requiring this information is unduly burdensome. If this information has already been provided for another purpose it follows that it is readily available to the industrial applicant. Thus, the burden of providing this information cannot be considered undue. Furthermore, the permit authority will need to have this available in order to determine which drainage areas are likely to generate storm water discharges associated with industrial activity, evaluate pollutants of concern, and develop appropriate permit conditions. However, to keep this information requirement within reasonable limits and limited to information already available to individual facilities, EPA has declined to expand the reporting requirements to spills of other materials, such as food as one commenter has suggested. However, EPA has decided to add raw materials used in food processing or production to the list of significant materials. Materials such as these may find their way into storm water discharges in such quantities that serious water quality impacts occur. These materials may find there way into storm water from transportation vehicles carrying materials into the facility, loading docks, processing areas, storage areas, and disposal sites.

One commenter urged that any information requested should be limited to a period of three years, which is the general NPDES records retention requirement under *40 CFR 122.21(p)* and *40 CFR 112.7(d)(8)*. EPA agrees with this comment and has limited

historical information requirements to the 3 years prior to the date the application is submitted. In this manner this regulation will be consistent with records keeping practices under the NPDES and Oil Spill Prevention programs, except sludge programs.

The December 7, 1988, proposal required the applicant to submit a description of each past or present area used for outdoor storage or disposal of significant materials. One commenter felt that the definition of significant material was too imprecise. EPA disagrees that the language should be made more precise by delineating every conceivable material that may add pollutants to storm water. Rather the definition is broad, to encourage permit applicants to list those materials that have the potential to cause water quality impacts. Stating what materials are addressed in meticulous detail may result in potentially harmful materials remaining unconsidered in permits. However, EPA has decided to add "fertilizers, pesticides, and raw materials used in the production or processing of food" to the definition in response to the comment of one State authority that such materials need to be accounted for due to their potential danger to storm water discharge quality. This same commenter recommended that "hazardous chemicals" should be added. EPA agrees, and will delineate those chemicals as "hazardous substances" which are designated under section 101(14) of CERCLA. Further clarification has been added by requiring the listing of any chemical the facility is required to report pursuant to section 313 of title III of SARA.

Another commenter felt that EPA should not require information of past storage of significant materials. EPA agrees that this proposed requirement is overbroad and has limited the time frame to those materials that were stored in areas 3 years or fewer from the date of the permit application. The 3-year limit is consistent with other Agency reporting requirements as discussed above.

One commenter questioned EPA's proposal not to provide for a waiver from the requirement to submit quantitative data if the applicant can demonstrate that it is unnecessary for permit issuance. Another commenter said that a waiver is inappropriate. EPA believes relevant quantitative data are essential to the process, but in this rulemaking the number of pollutants that must be sampled and analyzed is reduced compared to previous regulations. The proposed requirements for quantitative data are limited to pollutants that are appropriate for given site-specific operations, thereby making a waiver unnecessary.

Although the concept of a waiver is attractive because of the perceived potential reduction in burdens for applicants, EPA believes that because the storm water discharge testing requirements have already been streamlined, a waiver would not in practice provide significant reductions in burden for either applicants or permit issuing authorities. Requirements to provide and verify data demonstrating that a waiver is appropriate for a storm water discharge may prove to be more of a burden to the applicant and the permitting authorities. Establishing such a waiver procedure would be administratively complex and time-consuming for both EPA and the applicants, without any justifiable benefit. Therefore, this rulemaking does not include a waiver provision.

In response to one commenter, EPA wishes to emphasize that if a facility has zero storm water discharge because it is discharging to a detention pond only, a permit application is not required. Only those discharges to the waters of the United States or municipal systems need submit notifications, individual or group permit applications, or notices of intent where applicable. However, if the detention pond overflows or the discharger anticipates that it may overflow, then a permit application should be submitted.

Two commenters agreed with EPA's proposed requirement to have a description of past and present material management practices and controls. EPA believes that this is important information directly relating to the quality of storm water that can be expected at a particular facility and this requirement is retained in today's rule. However, as with other historical information requirements, EPA is limiting past practices to those that occurred within three years of the date that the application is submitted. One commenter argued that past practices should not be considered unless there is evidence that past practices cause current storm water quality problems. EPA anticipates that the information submitted by the applicant will be used to make this determination and that appropriate permit conditions can be developed accordingly.

One commenter requested clarification on the certification requirement that the data and information in the application is true and complete to the best of the certifying officer's knowledge. This is a fundamental and integral part of all NPDES permit applications. It essentially requires the signatory to assure the permit writer, based upon his or her personal knowledge, that the information has been submitted without a negligent, reckless, or purposeful misrepresentation. EPA intends to interpret this requirement in the same manner for storm water applications as other applications.

4. Group Applications

Today's final rule provides some industries with the option of participating in a group application, in lieu of submitting individual permits. There are several reasons for the group application. First, the group application procedure provides adequate information for issuing permits for certain classes of storm water discharges associated with industrial activity. Second, numerous commenters supported the concept of the group application as a way to reduce the costs and administrative burdens associated with storm water permit applications. Third, group applications will reduce the burden on the regulated community by requiring the submission of quantitative data from only selected members of the group. Fourth, the group application process will reduce the burden on the permit issuing authority by consolidating information for reviewing permit applications and for developing general permits suited to certain industrial groups. Where general permits are not appropriate or cannot be issued, a group application can be used to develop model individual permits, which can significantly reduce the burden of preparing individual permits.

As noted above in today's preamble, EPA intends to promulgate a general permit that will cover many types of industrial activity. Industrial dischargers eligible for such permits will generally be required to seek coverage by submittal of a notice of intent. Facilities that are ineligible for coverage under the general permit will be required to submit an individual permit application or submit a group application. The group application process promulgated today will serve as an important component to implement Tier III of EPA's industrial storm water permitting strategy discussed above. The general permit which EPA intends to promulgate in the near future shall set forth what types of facilities are eligible for coverage.

Some commenters criticized the group application procedure as an abdication of EPA's responsibility to effectively deal with pollutants in storm water discharges. One commenter stated that every facility subject to these regulations should be required to submit quantitative data. In response EPA believes, as do numerous commenters, that the group application procedure is a legitimate and effective way of dealing with a large volume of currently uncontrolled discharges. The only difference between the group application procedure and issuing individual permits based on individual applications is that the quantitative data requirements from individual facilities will be less if certain procedures are followed. EPA is convinced that marked improvements in the process of issuing permits will be achieved when these procedures are followed. Where the storm water discharge from a particular facility is identified as posing a special environmental risk, it can be required to submit individual applications and therefore separate quantitative data. It should also be noted that submittal of a group application does not exempt a facility from submitting quantitative data on its storm water discharge during the term of the permit.

The final rule refines and clarifies some of the requirements of the group application approach set forth in the December 7, 1988 proposal. Several commenters requested that EPA add a provision which would allow a facility that becomes subject to the regulations to "add on" to a group application after that group application has already been submitted. One commenter indicated that some trade associations are prohibited from engaging in an activity which would not apply to all its members, and that an "add on" provision was needed in the event such a prohibition was invoked. Another commenter noted that where a group is particularly large, for example one that consists of several thousand members, that it would be a logistical feat to ensure that all facilities eligible as members of the group are properly identified and listed on the application within the 120 day deadline for submitting part 1A of the application.

EPA believes that a group applicant should have a limited ability to add facilities to the group after part 1A has been submitted and that a provision which allows a group or group representative an unbridled ability to "add on" is impractical for a number of reasons. First, 10% of the facilities must submit quantitative data. Adding facilities after the group has been formed and approved would change the number of facilities that have to submit quantitative data on behalf of the group. This would result in an unwarranted administrative burden on the reviewing authority, which is in the position of having to examine the quantitative data and determine the appropriateness of group members (and those that are required to submit quantitative data) within 2 months of receiving part 1 of the group application. Further, during the permit application process permitting authorities will be developing permit conditions for an identified and pre-determined group of facilities. Allowing potentially significant numbers of permit applicants to suddenly inject themselves into a group application could unnecessarily hamper or disrupt the timely development of general and model permits. In addition, if a facility were "added on" the number of facilities having to submit quantitative data may drop below 10%. Thus the facility desiring to "add on" may be put in the position of having to submit the quantitative data themselves, which would clearly defeat the purpose of being a part of the group application.

Nevertheless, EPA has added a provision to 122.26(e) which enables facilities to add on to a group application at the discretion of the EPA's Office of Water Enforcement and Permits, and upon a showing of good cause by the group applicant. For the

reasons noted above, EPA anticipates this provision will be invoked only in limited cases where good cause is shown. Facilities not properly identified in the group application, and which cannot meet the good cause test will be required to submit individual permit applications. EPA will advise such facilities within 30 days of receiving the request as to whether the facility may add on.

However, the "add on" facility must meet the following requirements: The application for the additional facility is made within 15 months of the final rule; and the addition of the facility does not reduce the percentage of the facilities that are required to submit quantitative data to below 10% unless there are over 100 facilities that are submitting quantitative data. Approval to become part of a group application is obtained from the group or the trade association and is certified by a representative of the group; approval for adding on to a group is obtained from the Office of Water Enforcement and Permits.

Several commenters stated that the application requirements for groups are so burdensome that the advantages of the process are undermined. These concerns are addressed in greater detail below. Among the requirements which commenters objected are the requirements to list every group member's company by name and address. EPA is convinced that a condition precedent to approving a group application is at least identifying the members of the group. Without such information it would be impossible to determine if all the facilities are sufficiently similar. EPA disagrees that industries will be dissuaded from using the group application process because the advantages of the process are undermined. Although commenters perceived many burdens associated with individual permit applications, by far the most significant burden identified by the comments is the requirement for obtaining and submitting quantitative data. The group application significantly reduces this burden by requiring only 10% of the facilities to submit quantitative data if the number in the group is over 100. If the number in the group is over 1000, then only 100 of the facilities need submit quantitative information. If group applicants develop cost sharing procedures to reduce the financial and administrative burdens of submitting quantitative data, it is evident that utilizing the group application could save industries as much as 90% on the most economically burdensome aspect of the application.

Several commenters perceived that the group application procedure did not offer them significant savings because under the proposal their particular industry would only be required to test for COD, BOD5, pH, TSS, oil and grease, nitrogen, and phosphorous. These commenters stated that sampling for these pollutants is not particularly expensive. EPA believes that even if a group is required only to submit minimal quantitative data on particular pollutants, substantial savings can accrue to a particular industry if the group has many members. This is particularly true when the number of outfalls to be sampled, the information on storm events, and flow measurements are factored into the cost analysis. An additional benefit for members of the group as well as for permit issuing agencies is that the process of developing a permit, including drafting and responding to public comments on the permit, is consolidated by the group application process. Accordingly, it is less resource intensive for the group to work with permit issuance authorities to develop well founded permit conditions.

One commenter raised a concern about the situation where one of the facilities that is designated for submitting quantitative data drops out of the group. If this happened, then another facility would have to submit quantitative data. In response, EPA notes that one approach would be for the group to have one or two more facilities submit quantitative data than needed to avoid problems from such a departure or to account for new additions to the group. Certainly this issue goes directly to the facility selection process which is a critical component of the group application; the facilities need to be carefully selected and reviewed by the group to prevent such difficulties.

Several comments indicated a confusion over what facilities are eligible to take advantage of the group application procedure. Any industry or facility that is required to submit a storm water permit application under these regulations is eligible to participate in a group application. However, whether a facility can obtain a storm water permit under a group application procedure will depend upon whether that facility is a member of the same effluent guideline subcategory, or is sufficiently similar to other members of the group to be appropriate for a general permit or individual permit issued pursuant to the group application. Accordingly, group applications are not limited to national trade associations. The agency believes that the language in § 122.26(c)(2) adequately addresses these concerns. The process does not prohibit a particular company with multiple facilities from filing a group application as long as those facilities are sufficiently similar.

One commenter expressed concern that a single company would not be able to take advantage of the group application benefits unless the company had more than ten facilities. Under such circumstances the company would have to become integrated with a larger group of facilities owned by other companies in order to take advantage of the benefits afforded by the group application procedure. In response, the Agency is providing for a group application of between four and ten members, however

at least half the facilities must submit data. One commenter stated that the number of facilities required to submit quantitative data should be determined on a case by case basis. EPA believes that 10 percent for groups with over ten members will be easiest to implement for both industry and EPA, and will ensure that adequate representative quantitative data are obtained so that meaningful determinations of facility similarity can be made and appropriate permit conditions in general or model permits can be developed.

Another commenter suggested that one facility with a multitude of storm water discharge points should be able to use the group permit application to reduce the amount of quantitative data that it is required to submit. This is an accurate observation but only to the extent that the facility combines with several other facilities to form a group, in which case only 10% of the facilities need submit quantitative data. The group application procedure in today's rule is designed for use by multiple facilities only. However, if an individual facility has 10 outfalls with ten substantially identical effluents the discharger may petition the Director to sample only one of the outfalls, with that data applying to the remaining outfalls. See § 122.21(g)(7). Thus, existing authority already allows for a "group-like" process for sampling a subset of storm water outfalls at a single facility.

Concern was expressed that the spill reporting requirement from each facility in part 1B would preclude any group from demonstrating that the facilities sampled are "representative," because the incidence of past spills is very site-specific. EPA notes that since it has dropped the part 1B requirements for other reasons discussed below, this comment is now moot.

Numerous commenters noted that if a facility is part of a group application and is subsequently rejected as a group applicant, such an entity would not have a full year to submit an individual permit application. EPA agrees that this is a significant concern. Accordingly, those facilities that apply as a member of a group application will be afforded a full year from the time they are notified of their rejection as a member of the group to file an individual application. EPA notes that it intends to act on group application requests within 60 days of receipt; thus this approach will only provide facilities that are rejected from a group application a short extension of the deadline for other individual applications.

One commenter complained that the cost of defending a group's choice of representative facilities may exceed the cost of submitting an individual permit application, thereby reducing the incentive to apply as group. The agency anticipates that the selection process will be one open to negotiation between the affected parties and one that will end in a mutually satisfactory group of facilities. It is the intent of EPA to reduce the costs of submitting a permit application as much as possible, while providing adequate information to support permitting activities.

Another commenter argued that the use of model permits will create a disincentive for participating in a group because model permits may be used by the permit issuing authority to issue individual permits for discharges from similar facilities that did not participate in the group application. EPA does not agree. The benefit of applying as a group applicant is to take advantage of reduced representative quantitative data requirements. This incentive will exist regardless of whether or how model permits are used. Further, technology transfer can occur during the development of permits based on individual applications as well as those based on group applications.

One commenter suggested moving some of the facility specific information requirements of part 1 of the group application to part 2 of the group application in order to provide more incentive to apply as a group. EPA has considered this and believes such a change would be inappropriate. Part 1 information will be used to make an informed decision about whether individual facilities are appropriate as group members and appropriate for submitting representative quantitative data. Furthermore, information burdens from providing site specific factors in part 1 is relatively minimal, and the information requirements in the proposed part 1B application have been eliminated.

One commenter suggested that trade associations develop model permits since they have the most knowledge about the characteristics of the industries they represent. As noted above, EPA expects that the industries and trade associations will have input, through the permit application process, as to how permit conditions for storm water discharges are developed. While the applicant can submit proposed permit conditions with any type of application, EPA however cannot delegate the drafting of model permits to the permittees. EPA is developing and publishing guidance in conjunction with this rulemaking for developing permit conditions.

One commenter suggested that new dischargers should be able to take advantage of general permits developed pursuant to group applications. As with other general permits, EPA anticipates that such discharges will be able to fall within the scope of a general permit based on a group application where appropriate.

One commenter stated that the group application does not benefit municipalities since there is no requirement for industrial discharges through municipal sewers to apply for a permit. As noted in a previous discussion, industrial discharges through municipal sewers must be covered by an NPDES permit. Such facilities may avail themselves of the group application procedure. Also, municipalities are not precluded from developing a group application procedure under their management plan for industries that discharge into their municipal system, in order to streamline developing controls for such industries.

One industry wanted clarification that facilities located within a municipality would be eligible to participate in a group application. All industrial activities required to submit an individual permit are entitled to submit as part of group application, except those with existing NPDES permits covering storm water. Those facilities that discharge through a municipal separate storm sewer systems required to submit an individual application (because they do not fall within a general permit) are not precluded from using the group application procedure if appropriate.

Other municipalities expressed confusion over the industrial group application concept. The following responds to these comments. First, municipalities are not eligible for participation in a group application because the group application process is designed for industrial activities. Sampling requirements for municipal permit applications are already limited to a small subset of the outfalls from the system, as discussed below. Furthermore, permits for municipal separate storm sewer systems will be issued on a system-wide or jurisdiction-wide basis, rather than individually for each outfall. Thus, today's regulation already incorporates a "grouplike" permit application process for municipalities. Furthermore, it is highly unlikely that various municipal storm sewer systems would be "substantially similar" enough to justify group treatment in the same way as industrial facilities. In response to another comment, this regulation does not directly give the municipality enforcement power over members of an industrial group who may be discharging through its system. Only the permitting authority and private citizens and organizations (including the municipality acting in such a capacity) will have enforcement power over members of the group once permits are issued to those members.

One commenter believed that the States with authorized NPDES programs rather than EPA should establish permit terms for permits based on group applications. In response to this comment, EPA wishes to clarify its role in the group application process. Group applications will be submitted to EPA headquarters where they will be reviewed and summarized. The summaries of the group application will be distributed to authorized NPDES States. EPA wishes to emphasize that NPDES States are not bound by draft model permits developed by EPA. States may adopt model permits for use in their particular area, making adjustments for local water quality standards and other regional characteristics. Where general permit coverage is believed to be inappropriate, facilities may be required to apply for individual permits. One commenter objected to the group application procedure because it is not consistent with existing Federal permitting procedures, which will lead to confusion in the regulated community. The agency disagrees with this assessment. The group application is a departure from established NPDES program procedures. However, the comments, when viewed in their entirety, reflect widespread support from the regulated community for a group application procedure. Further, the comments reflect that those affected by this rulemaking understand the components of the group application and the procedures under which permits will be obtained pursuant to the group application.

One commenter expressed concern regarding how BAT limits for groups of similar industries will be developed. Technology based limits will be developed based on the information received from the group applicants. If the group applicants possess similar characteristics in terms of their discharge, BAT/BCT limitations and controls will be developed accordingly for those members of the group. If the discharge characteristics are not similar then applying industries are not appropriate for the group.

One commenter has suggested that the proposed group application is too complex with regard to the part 1A, part 1B, and part 2 group application requirements and that EPA should repropose these provisions. As discussed below, EPA has simplified the industrial group application requirements by eliminating the part 1B application. Thus, reproposal is unnecessary.

One commenter criticized the group application concept as not achieving any type of reduction in administrative burden for NPDES States. EPA disagrees with this assessment. If industries take advantage of the group application procedure, EPA will have an opportunity to review information describing a large number of dischargers in an organized manner. EPA will perform much of the initial review and analysis of the group application, and provide NPDES States with summaries of the applications thereby reducing the burden on the States. Furthermore, the procedure encourages a potentially large number of facilities to be covered by a general permit, which will clearly reduce the administrative burden of issuing individual permits.

The final rule establishes a regulatory procedure whereby a representative entity, such as a trade association, may submit a group application to the Office of Water Enforcement and Permits (OWEP) at EPA headquarters, in which quantitative data from certain representative members of a group of industrial facilities is supplied. Information received in the group application will be used by EPA headquarters to develop models for individual permits or general permits. These model permits are not issued permits, but rather they will be used by EPA Regions and the NPDES States to issue individual or general permits for participating facilities in the State. In developing such permits, the Region or NPDES State will, where necessary, adapt the model permits to take into account the hydrological conditions and receiving water quality in their area. One commenter expressed the view that having this procedure managed by EPA headquarters would cause delays and it should be delegated to the States and Regions. EPA disagrees that delay will ensue using this procedure. Furthermore, consistency in development of model and general permits can be achieved if application review is coordinated at EPA headquarters.

*a. Facilities Covered.* Under this rule the group application is submitted for only the facilities specifically listed in the application and not necessarily for an entire industry. The facilities in the group application selected to do sampling must be representative of the group, not necessarily of the industry.

Facilities that are sufficiently similar to those covered in a general permit (issued pursuant to a group application) that commence discharging after the general permit has been issued, must refer to the provisions of that general permit to determine if they are eligible for coverage. Facilities that have already been issued an individual permit for storm water discharges will not be eligible for participation in a group application. Several commenters believed that this restriction is inequitable since they have experienced the administrative burden of submitting a permit application. EPA disagrees. Industries that have already obtained a permit for storm water discharges have developed a storm water management program, engaged in the collection of quantitative data, and possess familiarity and experience with submitting storm water permit applications. The Agency sees no point to instituting an entirely new permit application process for facilities that have storm water permits issued individually. It makes little sense for these industries to be involved with submitting another permit application before their current permit expires.

As noted above, once a general permit has been issued to a group of dischargers, a new facility may request that they be covered by the general permit. The permitting authority can then examine the request in light of the general permit applicability requirements and determine whether the facility is suitable or not.

*b. Scope of Group Applications.* Numerous comments were received on how facilities should be evaluated as members of a group application. Several commenters stated that effluent limitation guideline subcategories are not relevant to pollutants found in storm water, but rather to the facility's everyday activities, and therefore similarity should be based on each facility's discharge or the similarity of pollutants expected to be found in a facility's discharge. Other commenters felt that similarity of operations at facilities should be the criteria. Others, believed that an examination of the facility's impact on storm water quality should be the applied criteria. Other commenters suggested that EPA provide more guidance as to how broadly groups can be defined and that a failure to do so would discourage facilities from going to the trouble and expense of entering into the group application process. Some commenters were concerned that facilities would be rejected as a group because of variations in processes and process wastewater characteristics.

EPA does not agree that effluent limitation guideline subcategories are inappropriate as a method for determining group applications. EPA guideline subcategories are functional classifications, breaking down facilities into groups, for purposes of setting effluent limitations guidelines. The use of EPA subcategories will save time for both applicants and permitting authorities in determining whether a particular group is appropriate for a group application. Furthermore, EPA believes that this method of grouping provides adequate guidance for determining what facilities are grouped together. Establishing groups on the extent to which a facility's discharge affects storm water quality would not provide applicants with sufficient guidance as to the appropriateness of individual industries for group applications and would not provide information needed to draft appropriate model permit conditions for potentially different types of industries, industrial processes, and material management practices.

However, EPA recognizes that the subcategory designations may not always be available or an effective methodology for grouping applicants. Also, there are situations where processes that are subject to different subcategories are combined. EPA agrees that the group application option should be flexible enough to allow groups to be created where subcategories are too rigid or otherwise inappropriate for developing group applications or where facilities are integrated or overlap into other

subcategories. For these reasons, this rulemaking does not limit the submission to EPA subcategories alone, but rather allows groups to be formed where facilities are similar enough to be appropriate for general permit coverage.

In determining whether a group is appropriate for general permit coverage, EPA intends that the group applicant use the factors set forth in *40 CFR 122.28(a)(2)(ii)*, the current regulations governing general permits, as a guide. If facilities all involve the same or similar types of operations, discharge the same types of wastes, have the same effluent limitation and same or similar monitoring requirements, where applicable, they would probably be appropriate for a group application. To that extent, facilities that attempt to form groups where the constituent makeup of its process wastewater is dissimilar may run the risk of not being accepted for purposes of a group application.

Some commenters expressed the view that categories formed using general permit factors are too broad or that the language is too vague. One commenter expressed the view that the standard is too subjective and that permit writers will be evaluating the similarity of discharge too subjectively, while other commenters felt that the criteria should be broad and flexible. Other commenters stated that the effluent guideline subcategory or general permit coverage factors are not related to storm water discharges, because much of the criteria are based upon what is occurring inside the plant, rather than activities outside of the plant. EPA believes that these criteria are reasonable for defining the scope of a group application. EPA disagrees that the procedure, which is adequate for the issuance of general permits, is inadequate for the development of a group application. EPA believes that the activities inside a facility will generally correspond to activities outside of the plant that are exposed to storm events, including stack emissions, material storage, and waste products. Furthermore, if facilities are able to demonstrate their storm water discharge has similar characteristics, that is one element in the analysis needed for establishing that the group is appropriate. EPA disagrees that the criteria are too vague. If facilities are concerned that general permit criteria is insufficient guidance, then subcategories under 40 CFR subchapter N should be used. EPA believes that the program will function best if flexibility for creating groups is maintained.

If a NPDES approved State feels that a tighter grouping of applicants is appropriate individual permit applications can be requested from those permit applicants. One commenter indicated that it was not clear whether the group application procedure could be used for all NPDES requirements. EPA would clarify that the group application is designed only to cover storm water discharges from the industrial facilities identified in § 122.26(b)(14).

As noted above, EPA wishes to clarify that facilities with existing individual NPDES permits for storm water are not eligible to participate in the group application process. From an administrative standpoint EPA is not prepared to create an entirely different mechanism for permitting industries which already have such permits.

*c. Group Application Requirements.* The group application, as proposed, included the following requirements in three separate parts. Part 1A of a group application included: (A) Identification of the participants in the group application by name and location; (B) a narrative description summarizing the industrial activities of participants; (C) a list of significant materials stored outside by participants; and (D) identification of 10 percent of the dischargers participating in the group application for submitting quantitative data. A proposed part 1B of the group application included the following information from each participant in the group application: (A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) and related information; (B) an estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall and a narrative description of significant materials; (C) a certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested for the presence of non-storm water discharges; (D) existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility; (E) a narrative description of industrial activities at the facility that are different from or that are in addition to the activities described under part 1A; and (F) a list of all constituents that are addressed in a NPDES permit issued to the facility for any of non-storm water discharge. Part 2 of a group application required quantitative data from 10 percent of the facilities identified.

Some commenters felt that spill histories, drainage maps, material management practices, and information on significant materials stored outside are too burdensome or meaningless for evaluating similarity of discharges among group applicants. Several commenters stated that such requirements where the group may consist of several thousand facilities were impractical and would not assist EPA in developing model permits. Many commenters insisted that the requirements imposed in part 1B would effectively discourage use of the group application procedure. EPA agrees in large part with these comments. After reevaluating the components of part 1B, and the entire rationale for instituting the group application procedure, EPA has

decided to excise part 1B from the requirements, and rely on part 1A and part 2 for developing appropriate permit condition. Where appropriate, EPA may require facilities to submit the information, formerly in part 1B, during the term of the permit. In other cases, EPA will establish which facilities must submit individual permit applications where more site specific permits are appropriate.

Under the revised part 1 and part 2, EPA will receive information pertaining to the types of industrial activity engaged in by the group, materials used by the facilities, and representative quantitative data. EPA can use such information to develop management practices that address pollutants in storm water discharges from such facilities. For most facilities, general good housekeeping or management practices will eliminate pollutants in storm water. Such requirements can be further refined by determining the nature of a group's industrial activity and by obtaining information on material used at the facility and representative quantitative data from a percentage of the facilities. Thus, EPA is confident that model permits and general permits can be developed from the information to be submitted under part 1 and part 2.

One commenter felt that more guidance on what makes a facility representative for sampling as part of a group is needed. In response, the Agency believes the rule as currently drafted provides adequate notice.

Another commenter asked how much sampling needed to be done and how much monitoring will transpire over the life of the permit for members of a group. This will vary from permit to permit and will be determined in permit proceedings. This rulemaking only covers the quantitative data that is to be submitted in the context of the group permit application.

One commenter indicated that because of the amount of diversity in the operations of a particular industry, obtaining a sample that could be considered representative would be extremely difficult. EPA recognizes that obtaining representative quantitative data through the group application process will prove to be difficult; however, EPA has sought to minimize these perceived problems. Under the group application concept, industries must be sufficiently similar to qualify. Industries which have significantly different operations from the rest of the group that affects the quality of their storm water discharge may be required to obtain an individual permit. Use of the nine precipitation zones will enable the data in the permit application to be more easily analyzed and patterns observed on the basis of hydrology and other regional factors. How EPA will evaluate the representativeness of the sample is discussed below.

Several commenters asked why the precipitation zone of group members is relevant to the application. The need to identify precipitation zones arises because the amount of rainfall is likely to have a significant impact on the quality of the receiving water. According to an EPA study (Methodology for Analysis of Detention Basins for Control of Urban Runoff Quality; Office of Water, Nonpoint Source Branch, Sept. 1986) the United States can be divided into nine general precipitation zones. These zones are characterized by differences in precipitation volume, precipitation intensity, precipitation duration, and precipitation intervals. Industrial facilities that seek general permits via the group application option may show significantly different loading rates as a result of these regional precipitation differences. As an example, precipitation in Seattle, Washington, located in Zone 7, approaches the mean annual storm intensity of .024 inches/hour with a mean annual storm duration of 20 hours for that Zone. In contrast, precipitation in Atlanta, Georgia, located in Zone 3 approaches the mean annual storm intensity of .102 inches/hour and a mean storm duration of 6.2 hours for that Zone. Atlanta, receives on the average four times more precipitation per hour with storms lasting one-third as long. As a result of these differences, if identical facilities within a group application were situated in each of these areas, their storm water discharges would likely exhibit different pollutant characteristics. Accordingly, data should be submitted from facilities in each zone.

One commenter felt that the EPA should abandon or modify its rainfall zone concept, because storm water quality will depend more on what materials are used at the facility than rainfall. EPA disagrees. Because storm water loading rates may differ significantly as a result of regional precipitation differences, it is necessary that for each precipitation zone containing representatives of a group application, the group must provide samples from some of those representatives. In comments to previous rulemakings it was argued that the amount of rainfall will affect the degree of impact a storm water discharge may have on the receiving stream.

One commenter stated that the precipitation zones illustrated in appendix E of the proposed rulemaking do not adequately reflect regional differences in precipitation and that in some cases the zones cut through cities where there are concentrations of industries without differences in their precipitation patterns. The rainfall zone map is a general guide to determining what areas of the country need to be addressed when determining representative rainfall events and quantitative data. When dealing with

rainfall on a national scale, it is near impossible to make generalized statements with a great deal of accuracy. In the case of rainfall zones, rainfall patterns may be similar for facilities in close proximity to each other but none the less in different rainfall zones. In response, EPA has created these zones to reflect regional rainfall patterns as accurately as possible. Because of the variable nature of rainfall such circumstances are sure to arise. However, in order to obtain a degree of representativeness EPA is convinced that the use of these rainfall zones as described is appropriate for the submittal of group applications and the quantitative data therein.

The second and third requirements of part 1 of the group application instruct the applicant to describe the industrial activity (processes) and the significant materials used by the group. For the significant materials listed, the applicant is to discuss the materials management practices employed by members of the group. For example, the applicant should identify whether such materials are commonly covered, contained, or enclosed, and whether storm water runoff from materials storage areas is collected in settling ponds prior to discharge or diverted away from such areas to minimize the likelihood of contamination. Also, the approximate percentage of facilities in the group with no practices in place to minimize materials stored outside is to be identified.

EPA considers that the processes and materials used at a particular facility may have a bearing on the quality of the storm water. Thus, if there are different processes and materials used by members of the group, the application must identify those facilities utilizing the different processes and materials, with an explanation as to why these facilities should still be considered similar.

One commenter felt that a facility should be able to describe in its permit application the possibility of individual materials entering receiving waters. EPA supports the applicant adding site specific information which will assist the permit writer making an informed decision about the nature of the facility, the quality of its storm water discharge, and appropriate permit conditions.

The fourth element of part 1 of the group application is a commitment to submit quantitative data from ten percent of the facilities listed. EPA proposed that there must be a minimum of ten and a maximum of one hundred facilities within a group that submit data. Comments reflected some dissatisfaction with this requirement. Some commenters asserted that ten percent was too high a number and would discourage group applications, while one commenter suggested a lesser percentage would be appropriate where the group can certify that facilities are representative. One commenter suggested that EPA have the discretion to allow for a smaller percentage. Several commenters argued that EPA should be satisfied with fewer than ten percent because EPA often relies on data from less than ten percent of the plants in a subcategory when promulgating effuent guidelines and that EPA should rely on data collection goals with affected groups as was done in the 1985 storm water proposal. Other commenters pointed out that an anomalous situation could arise where the group was small and facilities were scattered throughout the precipitation zones. For example, if a group consisted of 20 members where a minimum of ten facilities had to submit samples, and two or more members were in each precipitation zone; a total of 18 facilities (90% of the group) would have to submit quantitative data. EPA believes that there must be a sufficient number of facilities submitting data for any patterns and trends to be detectable. However, in light of these comments EPA has decided to modify the language in § 122.26(c) to allow 1 discharger in each precipitation zone to submit quantitative data where 10 or fewer of the group members are located in a particular precipitation zone. EPA believes, however, that one hundred facilities would in most cases be sufficient to characterize the nature of the runoff and thus 100 should remain the maximum. If the data are insufficient, EPA has the authority to request more sampling under section 308 of the CWA.

One commenter suggested that the ten facility cutoff was unreasonable, and that instead of cutting off the group at ten, allow a smaller number in the group and allow the facilities to sample ten percent of their outfalls instead. EPA agrees, in part, and will allow groups of between four and ten to submit a group application. However, the ten percent rule would not be effective in such cases. Therefore, at least half the facilities in a group of four to ten will be required to provide quantitative data from at least one outfall, with each precipitation zone represented by at least one facility.

For any group application, in addition to selecting a sufficient number of facilities from each precipitation zone, facilities selected to do the sampling should be representative of the group as a whole in terms of those characteristics identifying the group which were described in the narrative, i.e., number and range of facilities, types of processes used, and any other relevant factors. If there is some variation in the processes used by the group (40 percent of the group of food processors are canners and 60 percent are canners and freezers, for example), the different processes are to be represented. Also, samples are to be

provided from facilities utilizing the materials management practices identified, including those facilities which use no materials management practices. The representation of these different factors, to the extent feasible, is to be roughly equivalent to their proportion in the group.

EPA wishes to emphasize that the provision that ten percent of the facilities need to submit quantitative data only applies to the permit application process. The general or individual permit itself may require quantitative data from each facility.

*Submittal of Part 2 of the Group Application.* As with part 1, part 2 of the Group Application would be submitted to the Office of Water Enforcement and Permits, in Washington, DC. If the information is incomplete, or simply is found to be an inadequate basis for establishing model permit limits, EPA has the authority under section 308 of the Clean Water Act to require that more information be submitted, which may include sampling from facilities that were part of the group application but did not provide data with the initial submission. If the group application is used by a Region or NPDES State to issue a general permit, the general permit should specify procedures for additional coverage under the permit.

If a part 2 is unacceptable or insufficient, EPA has the option to request additional information or to require that the facilities that participated in the group application submit complete individual applications (e.g. facilities that have submitted Form 1 with the group application may be required to submit Form 2F, or facilities which have submitted complete Form 1 and Form 2F information in the group application generally would not have to submit additional information).

Once the group applications are reviewed and accepted, EPA will use the information to establish draft permit terms and conditions for models for individual and general permits. NPDES approved States and EPA regional offices will continue to be the permit-issuing authority for storm water discharges. The NPDES approved States accepting the group application approach and the EPA Regions may then take the model permits and adapt them for their particular area, making adjustments for local water quality standards and other localized characteristics, and making determinations as to the need for an individual storm water permit where general permit coverage is felt to be inappropriate. Permits would be proposed by the Region or NPDES approved State in accordance with current regulations for public comment before becoming final. In NPDES States without general permit authority, or where an individual permit is deemed appropriate, the model permit can serve as the basis for issuing an individual permit.

The group application is an NPDES permit application just like any other and, as such, would be handled through normal permitting procedures, subject to the regulatory provisions applicable to permit issuance. Incomplete or otherwise inadequate submissions would be handled in the same manner as any other inadequate permit application. The permit issuing authority would retain the right to require submission of Form 1, Form 2C and Form 2F from any individual discharger it designates.

Some commenters offered other procedures for developing a group application procedure; however, these were frequently entirely different approaches or so novel that a reproposal would be required. One commenter suggested that those industries that are identified as being likely to pollute should be required to submit quantitative data. Numerous commenters contended that a generic approach for meeting the required information requirements for group applications would allow EPA to develop adequate general permits. EPA does not view these approaches as appropriate.

5. Group Application: Applicability in NPDES States

Many commenters expressed concern about how the group application procedure will work within the framework of an NPDES approved State. The relationship between EPA and the States that are authorized to administer the NPDES program, including implementation of the storm water program, is a complicated aspect of this rulemaking. Approved States (there are 38 States and one territory so approved) must have requirements that are at least as stringent as the Federal program; they may be more stringent if they choose. Authority to issue general permits is optional with NPDES States.

EPA has determined that ten percent of the facilities must provide quantitative data in the permit application as noted above. Furthermore, these applications are submitted to EPA headquarters. Consequently States, whether NPDES approved or not, are not in a position to reject or modify this requirement. Such States may determine the amount of sampling to be done pursuant to permit conditions. If they choose to issue general permits they may include such authority in their NPDES program and, upon approval of the program by EPA, may then issue general permits. Within the context of the NPDES provisions of the CWA, if States do not have general permitting authority, then general permits are not available in those States.

In response to one comment, EPA does not have authority to issue general or individual permits to facilities in NPDES approved states. Today's rule provides a means for affected industries to be covered by general permits developed via the group application procedure as well as from general permits developed independently of the group application process. Accordingly, today's rule anticipates that most NPDES States will seek general permit issuance authority to implement the storm water program in the most efficient and economical way. Without general permit issuance authority NPDES States will be required to issue individual permits covering storm water discharges to potentially thousands of industrial facilities.

One commenter recommended that States with approved NPDES programs should be involved in determining what industries are representative for submitting quantitative data. EPA recognizes that States will have an interest in this determination and may possess insight as to the appropriateness of using some facilities. However, EPA may be managing hundreds of group applications and approving or disapproving them as expeditiously as possible. EPA believes that involving the States in this already administratively complex and time consuming undertaking would be counterproductive. In any event, NPDES approved States are not bound by the determinations of EPA as to the appropriateness of groups or the issuance of permits based on model permits or individual permits. However, States will be encouraged to use model permits that are developed by EPA. EPA will endeavor to design general and model permits that are effective while also adaptable to the concerns of different States. Again, States are able to develop more stringent standards where they deem it to be appropriate. There are currently seventeen States that have authority to issue general permits: Arkansas, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, New Jersey, North Dakota, Oregon, Rhode Island, Utah, Washington, West Virginia and Wisconsin. As suggested in the comments, EPA is encouraging more States to develop general permit issuing authority in order to facilitate the permitting process.

One commenter advised that the rules should state that a NPDES approved State may accept a group application or require additional information. EPA has decided not to explicitly state this in the rule. However, this comment does raise some points that need to be addressed. Because the group application option is a modification of existing NPDES permit application requirements, the State is free to adopt this option, but is not required to. If the State chooses to adopt the group application and it does not have general permit authority, the group application can be used to issue individual permits. If an approved NPDES State chooses to not issue permits based on the group application, facilities that discharge storm water associated with industrial activity that are located in that State must submit individual applications to the State permitting authority. Before submitting a group application, facilities should ascertain from the State permitting authority whether that State intends to issue permits based upon a group application approved by EPA for the purpose of developing general permits. For facilities that discharge storm water associated with industrial activity which are named in a group application, the Director may require an individual facility to submit an individual application where he or she determines that general permit coverage would be inappropriate for the particular facility.

One commenter stressed that EPA should streamline the procedure for States desiring to obtain general permit coverage. EPA has, over the last year, streamlined this procedure and encourages States to take advantage of this procedure. EPA recommends that States consider obtaining general permit authority as a means to efficiently issue permits for storm water discharges. These States should contact the Office of Water Enforcement and Permits at EPA Headquarters as soon as possible.

6. Group Application: Procedural Concerns

One commenter claimed that the proposed group application process and procedures violated federal law. This commenter claimed that EPA was abrogating its responsibility by allowing a trade association to design a data collection plan in lieu of completing an NPDES application form designed by EPA, thus violating the Federal Advisory Committee Act. The commenter stated that EPA would be improperly influenced by special interests if trade associations were able to design their own storm water data gathering plans. The commenter further asserted that any decisions by EPA on the content of specific group applications would be rulemakings and thus subject to the provisions of the Administrative Procedure Act.

EPA disagrees with the comment that the group application violates the Federal Advisory Committee Act (FACA). FACA governs only those groups that are established or "utilized" by an agency for the purpose of obtaining "advice" or "recommendations." The group application option does not solicit or involve any "advice" or "recommendations." It simply allows submission of data by certain members of a group in accordance with specific regulatory criteria for determining which facilities are "representative" of a group. As such, the group application is merely a submission in accordance and in

compliance with specific regulatory requirements and does not contain discretionary uncircumscribed "advice" or "recommendations" as to which facilities are representative of a group.

Thus, the determination of which facilities should submit testing data in accordance with regulatory criteria is little different from many other regulatory requirements where an applicant must submit information in accordance with certain criteria. For example, under *40 CFR 122.21* all outfalls must be tested except where two or more have "substantially identical" effluents. Similarly, quantitative data for certain pollutants are to be provided where the applicant knows or "has reason to believe" such pollutants are discharged. Both of these provisions allow the applicant to exercise discretion in making certain judgments but such action is circumscribed by regulatory standards. EPA further has authority to require these facilities to submit individual applications. In none of these instances are "recommendations" or "advice" involved. EPA also notes that it is questionable whether, in providing for group applications, it is "soliciting" advice or recommendations from groups or that such groups are being "utilized" by EPA as a "preferred source" of advice. See *48 FR 19324* (April 28, 1983). Furthermore, this data collection effort may be supplemented by EPA if, after review of the data, EPA determines additional data is necessary for permit issuance. Other information gathering may act as a check on the group applications received.

EPA also does not agree with this commenter's claim that the group application scheme represents an impermissible delegation of the Administrator's function in violation of the CWA regarding data gathering. The Administrator has the broadest discretion in determining what information is needed for permit development as well as the manner in which such information will be collected. The CWA does not require every discharger required to obtain a permit to file an application. Nor does the CWA require that the Administrator obtain data on which a permit is to be based through a formal application process (see *40 CFR 122.21*). For years "applications" have not been required from dischargers covered by general permits. EPA currently obtains much information beyond that provided in applications pursuant to section 308 of the CWA. This is especially true with respect to general permit and effluent limitations guidelines development. The group application option is simply another means of data gathering. The Administrator may always collect more data should he determine it necessary upon review of a groups' data submission. And, he may obtain such additional data by whatever means permissible under the Statute that he deems appropriate. Thus, it can hardly be said that by this initial data gathering effort the Administrator has delegated his data gathering responsibilities. In addition, since groups are required to select "representative" facilities, etc., in accordance with specific regulatory requirements established by the Administrator and because EPA will scrutinize part 1 of the group applications and either accept or reject the group as appropriate for a group application, no impermissible delegation has occurred. EPA will make an independent determination of the acceptability of a group application in view of the information required to be submitted by the group applicant, other information available to EPA (such as information on industrial subcategories obtained in developing effluent limitations guidelines as well as individual storm water applications received as a result of today's rule) and any further information EPA may request to supplement part 1 pursuant to section 308 of the CWA. Moreover, any concerns that a general permit may be based upon biased data can be dealt with in the public permit issuance process.

Finally, EPA also does not agree that the group application option violates the Administrative Procedures Act. Again, the group application scheme is simply a data gathering device. EPA could very well have determined to gather data informally via specific requests pursuant to section 308 of the CWA. In fact, general permit and effluent limitations guideline development proceed along these lines. It would make little sense if the latter informal data gathering process were somehow illegal simply because it is set forth in a rule that allows applicants some relief upon certain showings. In this respect, several of EPA's existing regulations similarly allow an applicant to be relieved from certain data submission requirements upon appropriate demonstrations. For example, testing for certain pollutants and or certain outfalls may be waived under certain circumstances. Most importantly, the operative action of concern that impacts on the public is individual or general permit issuance based upon data obtained. As previously stated, ample opportunity for public participation is provided in the permit issuance proceeding.

7. Permit Applicability and Applications for Oil and Gas and Mining Operations

Oil, gas and mining facilities are among those industrial sites that are likely to discharge storm water runoff that is contaminated by process wastes, toxic pollutants, hazardous substances, or oil and grease. Such contamination can include disturbed soils and process wastes containing heavy metals or suspended or dissolved solids, salts, surfactants, or solvents used or produced in oil and gas operations. Because they have the potential for serious water quality impacts, Congress recognized,

throughout the development of the storm water provisions of the Water Quality Act of 1987, the need to control storm water discharges from oil, gas, and mining operations, as well as those associated with other industrial activities.

However, Congress also recognized that there are numerous situations in the mining and oil and gas industries where storm water is channeled around plants and operations through a series of ditches and other structural devices in order to prevent pollution of the storm water by harmful contaminants. From the standpoint of resource drain on both EPA as the permitting agency and potential permit applicants, the conclusion was that operators that use good management practices and make expenditures to prevent contamination must not be burdened with the requirement to obtain a permit. Hence, section 402(1)(2) creates a statutory exemption from storm water permitting requirements for uncontaminated runoff from these facilities.

To implement section 402(1)(2), EPA intends to require permits for contaminated storm water discharges from oil, gas and mining operations. Storm water discharges that are not contaminated by contact with any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations will not be required to obtain a storm water discharge permit.

The regulated discharge associated with industrial activity is the discharge from any conveyance used for collecting and conveying storm water located at an industrial plant or directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Industrial plants include facilities classified as Standard Industrial Classifications (SIC) 10 through 14 (the mining industry), including oil and gas exploration, production, processing, and treatment operations, as well as transmission facilities. See *40 CFR 122.26(b)(14)(iii)*. This also includes plant areas that are no longer used for such activities, as well as areas that are currently being used for industrial processes.

*a. Oil and Gas Operations.* In determining whether storm water discharges from oil and gas facilities are "contaminated", the legislative history reflects that the EPA should consider whether oil, grease, or hazardous materials are present in storm water runoff from the sites described above in excess of reportable quantities (RQs) under section 311 of the Clean Water Act or section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). [Vol. 132 Cong. Rec. H10574 (daily ed. October 15, 1986) Conference Report].

Many of the comments received by EPA regarding this exemption focused on the concern that EPA's test for requiring a permit is and would subject an unnecessarily large number of oil and gas facilities to permit application requirements. Specific comments made in support of this concern are addressed below.

A primary issue raised by commenters centered on how to determine when a storm water discharge from an oil or gas facility is "contaminated", and therefore subject to the permitting program under section 402 of the CWA. Many of the comments received from industry representatives objected to the Agency's intent as expressed in the proposal to use past discharges as a trigger for submitting permit applications.

The proposed rule provided that the notification requirements for releases in excess of RQs established under the CWA and CERCLA would serve as a basis for triggering the submittal of permit applications for storm water discharges from oil and gas facilities. As described in the proposal, oil and gas operations that have been required to notify authorities of the release of either oil or a hazardous substance via a storm water route would be required to submit a permit application. In other words, any facility required to provide notification of the release of an RQ of oil or a hazardous substance in storm water in the past would be required to apply for a storm water permit under the current rule. In addition, any facility required to provide notification regarding a release occurring from the effective date of today's rule forward would be required to apply for a storm water permit.

Commenters maintained that the use of historical discharges to require permit applications is inconsistent with the language and intent of section 402(1)(2) of the CWA, and relevant legislative history, both of which focus on present contamination. Requiring storm water permits based solely on the occurrence of past contaminated discharges, even where no present contamination is evident, would go beyond the statutory requirement that EPA not issue a permit absent a finding present contamination. Commenters also noted that the proposal did not take into account the fact that past problems leading to such releases may have been corrected, and that requiring an NPDES permit may no longer be necessary. The result of such a requirement, commenters maintained, would be an excessive number of unnecessary permit applications being submitted, at significant cost and minimal benefit to both regulated facilities and regulating authorities.

Commenters also indicated that using the release of reportable quantities of oil, grease or hazardous substances as a permit trigger would identify discharges of an isolated nature, rather than the continuous discharges, which should be the focus of the NPDES permit program under section 402. Such an approach, commenters maintained, is inconsistent with existing regulations under section 311 of the CWA, and would result in permit applications from facilities that are more appropriately regulated under section 311.

Despite these criticisms, many commenters recognized that the Agency is left with the task of determining when discharges from oil and gas facilities are contaminated, in order to regulate them under section 402(1)(2). It was suggested by numerous commenters that the EPA adopt an approach similar to that used under section 311 of the CWA for Spill Prevention Control and Countermeasure (SPCC) Plans. Under SPCC, facilities that are likely to discharge oil into waters of the United States are required to maintain a SPCC plan. In the event the facility has a spill of 1,000 gallons or 2 or more reportable quantities of oil in a 12 month period, the facility is required to submit its SPCC plan to the Agency. The triggering events proposed by the commenters for storm water permits for oil and gas operations are six reportable sheens or discharges of hazardous substances (other than oil) in excess of section 311 or section 102 reportable quantities via a storm water point source route over any thirty-six month period. It was suggested that if this threshold is reached, an operator would then file a permit application (or join a group application) based upon the presumption that its current storm water discharges are contaminated.

In response to these comments, the Agency believes that past releases that are reportable quantities can be a valid indicator of the potential for present contamination of discharges. The legislative history as cited above supports this conclusion. EPA would note that the existence of a RQ release would serve only as a triggering mechanism for a permit application. Under the proposed rule, evidence of past contamination would merely require submission of a permit application and would not be used as conclusive evidence of current contamination. The determination as to whether a permit would be actually required due to current contaminated discharge would be made by the permitting authority after reviewing the permit application. The fact of a past RQ release does not necessarily imply a conclusive finding of contamination, only that sufficient potential for contamination exists to warrant a permit application or the collection of other further information. Today's rule does not change the proposed approach in this respect. Thus, EPA does not believe that today's rule exceeds the authority of section 402(1)(2).

EPA believes that there is no legal impediment to using past RQ discharges as a trigger for requiring a storm water permit application. EPA notes that, as mentioned above, even those commenters who objected to the proposed test on legal authority grounds merely offered an alternate test that requires more releases to have occurred within a shorter period of time before a permit application is required.

Therefore, the only disagreement that remains is over what constitutes a reasonable test that will identify facilities with the potential for storm water contamination. EPA notes that neither the statute nor the legislative history provides any guidance on this question. Furthermore, EPA disagrees with the commenters who suggested that 6 releases in the past 3 years or 2 releases in the past year are necessarily more valid measures of the potential for current contamination than EPA's proposed test. There is no statistical or other basis for preferring one test to the other. However, EPA does agree with those commenters that suggest that a single release in the distant past may not accurately reflect current conditions and the current potential for contamination.

EPA has therefore amended today's rule to provide that only oil and gas facilities which have had a release of an RQ of oil or hazardous substances in storm water in the past three years will be required to submit a permit application. EPA believes that limiting the permit trigger to events of the past three years will address commenters' concerns regarding the use of "stale history" in determining whether an application is required. EPA notes that the three year cutoff is consistent with the requirement for industrial facilities to report significant leaks or spills at the facility in their storm water permit applications. See *40 CFR 122.26(c)(1)(i)(D)*.

Commenters asserted that EPA and the States must have some reasonable basis for concluding that a storm water discharge is contaminated before requiring permit applications or permits. Commenters believed that § 122.26(c)(1)(iii)(B) as proposed implied that the Agency's authority in this respect is unrestricted. In response, EPA may collect such data by whatever appropriate means the statute allows, in order to obtain information that a permit is required. Usually, the most practical tool for doing so is the permit application itself. However, if necessary to supplement the information made available to the Agency, EPA has broad authority to obtain information necessary to determine whether or not a permit is required, under section 308 of the Clean Water Act. Given the plain language of the CWA and the Congressional intent as manifested in the legislative

history, the Agency is convinced that the approach described above is appropriate. Yet, as further discussed below, EPA has also deleted as redundant § 122.26(c)(1)(iii)(B).

Regarding the types of facilities included in the storm water regulation, a number of commenters suggested that the Agency has misconstrued the meaning of facilities "associated with industrial activity", and has proposed an overly broad definition of such facilities in the oil and gas industry. Specifically, commenters suggested that only the manufacturing sector of the oil and gas industry should be subject to storm water permit application requirements, and that exploration and production activities, gas stations, terminals, and bulk plants should all be exempted from storm water permitting requirements. Commenters maintain that this broad interpretation would subject many oil and gas facilities to the storm water permit requirements, when these were not intended by Congress to be so regulated. As a second point related to this issue, some commenters felt that transmission facilities were not intended to be regulated under the storm water provisions, and should be exempted from permit requirements. This would be consistent, it was argued, with legislative history which concluded that transmission facilities do not significantly contribute to the contamination of water.

The Agency disagrees that these facilities do not fall under the storm water permitting requirements as envisioned by Congress. SIC 13, which is relied upon by EPA to identify these oil and gas operations, describes oil and gas extraction industries as including facilities related to crude oil and natural gas, natural gas liquids, drilling oil and gas wells, oil and gas exploration and field services. Moreover, legislative history as it applies to industrial activities, and thus to oil and gas (mining) operations, expressly includes exploration, production, processing, transmission, and treatment operations within the purview of storm water permitting requirements and exemptions. EPA's intent is for storm water permit requirements (and the exemption at hand) to apply to the activities listed above (exploration, production, processing, treatment, and transmission) as they relate to the categories listed in SIC 13.

Commenters requested clarification from the Agency that storm water discharges from oil and gas facilities require a permit or the filing of a permit application only when they are contaminated at the point of discharge into waters of the United States. Commenters noted that large amounts of potentially contaminated stormwater may not enter waters of the United States, or may enter at a point once the discharge is no longer "contaminated". In these cases, it should be clear that no permit or permit application is required.

EPA agrees that oil and gas exploration, production, processing, or treatment operations or transmission facilities must only obtain a storm water permit when a discharge to waters of the U.S. (including those discharges through municipal separate storm sewers) is contaminated. A permit application will be required when any discharge in the past three years or henceforth meets the test discussed above.

Under the proposed rule, the Agency stated at §122.26(c)(1)(iii)(B) that the Director may require on a case-by-case basis the operator of an existing or new storm water discharge from an oil or gas exploration, production, processing, or treatment operation, or transmission facility to submit an individual permit application. The Agency has removed this section since CWA section 402(1)(2), as codified in 122.26(c)(1)(iii)(A), adequately addresses every situation where a permit should be required for these facilities.

*b. Use of Reportable Quantities to Determine if a Storm Water Discharge from an Oil or Gas Operation is Contaminated.* Section 311(b)(5) of the CWA requires reporting of certain discharges of oil or a hazardous substance into waters of the United States (see *44 FR 50766* (August 29, 1979)). Section 304(b)(4) of the Act requires that notification levels for oil and hazardous substances be set at quantities which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public or private property, shorelines and beaches. Facilities which discharge oil or a hazardous substance in quantities equal to or in excess of an RQ, with certain exceptions, are required to notify the National Response Center (NRC).

Section 102 of CERCLA extended the reporting requirement for releases equal to or exceeding an RQ of a hazardous substance by adding chemicals to the list of hazardous substances, and by extending the reporting requirement (with certain exceptions) to any releases to the environment, not just those to waters of the United States.

Pursuant to section 311 of the CWA, EPA determined reportable quantities for discharges by correlating aquatic animal toxicity ranges with 5 reporting quantities, i.e., 1-, 10-, 100-, 1000-, and 5000- pounds per 24 hour period levels. Reportable

quantity adjustments made under CERCLA rely on a different methodology. The strategy for adjusting reportable quantities begins with an evaluation of the intrinsic physical, chemical, and toxicological properties of each designated hazardous substance. The intrinsic properties examined, called "primary criteria," are aquatic toxicity, mammalian toxicity (oral, dermal, and inhalation), ignitability, reactivity, and chronic toxicity. In addition, substances that were identified as potential carcinogens have been evaluated for their relative activity as potential carcinogens. Each intrinsic property is ranked on a five-tier scale, associating a specific range of values on each scale with a particular reportable quantity value. After the primary criteria reportable quantities are assigned, the hazardous substances are further evaluated for their susceptibility to certain extrinsic degradation processes (secondary criteria). Secondary criteria consider whether a substance degrades relatively rapidly to a less harmful compound, and can be used to raise the primary criteria reportable quantity one level.

Also pursuant to section 311, EPA has developed a reportable quantity for oil and associated reporting requirements at 40 CFR part 110. These requirements, known as the oil sheen regulation, define the RQ for oil to be the amount of oil that violates applicable water quality standards or causes a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or causes a sludge or emulsion to be deposited.

Reportable quantities developed under the CWA and CERCLA were not developed as effluent guideline limitations which establish allowable limits for pollutant discharges to surface waters. Rather, a major purpose of the notification requirements is to alert government officials to releases of hazardous substances that may require rapid response to protect public health, welfare, and the environment. Notification based on reportable quantities serves as a trigger for informing the government of a release so that the need for response can be evaluated and any necessary response undertaken in a timely fashion. The reportable quantities do not themselves represent any determination that releases of a particular quantity are actually harmful to public health, welfare, or the environment.

EPA requested comment on the use of RQs for determining contamination in discharges from oil and gas facilities. As noted above numerous commenters supported the concept of using reportable quantities under certain circumstances. Comments on the measurement of oil sheens for the purpose of triggering a permit application were divided. Some commented that it is much too stringent because the amount of oil creating a sheen may be a relatively small amount. Others viewed the test as a quick, easy, practical method that has been effective in the past.

In relying on the reporting requirements associated with releases in excess of RQs for oil or hazardous substances to trigger the submittal of permit applications for oil and gas operations, the Agency believes that the use of the reporting requirements for oil will be particularly useful. The Agency believes that the release of oil to a storm water discharge in amounts that cause an oil sheen is a good indicator of the potential for water quality impacts from storm water releases from oil and gas operations. In addition, given the extremely high number of such operations (the Agency estimates that there are over 750,000 oil wells alone in the United States), relying on the oil sheen test to determine if storm water discharges from such sites are "contaminated" will be a far easier test for operators to determine whether to file a storm water permit application than a test based on sampling. The detection of a sheen does not require sophisticated instrumentation since a sheen is easily perceived by visual observation. EPA agrees with those comments calling the oil sheen test an appropriate measure for triggering a storm water permit application. In adopting this approach, EPA recognizes, as pointed out by many commenters that an oil sheen can be created with a relatively small amount of oil.

One commenter suggested that contamination must be caused by contact with on-site material before being subject to permit application requirements. The Agency agrees with this comment. Those facilities that have had releases in excess of reportable quantities will generally have contamination from contact with on-site material as described in the CWA. Thus, use of the RQ test is an appropriate trigger. As discussed above, determination of whether contamination is present to warrant issuance of a permit will be made in the context of the permit proceeding.

One commenter believed that the use of RQs is inappropriate because "the statute intended to exempt only oil and gas runoff that is not contaminated at all." The Agency wishes to clarify that reportable quantities are being used to determine what facilities need to file permit applications and to describe what is meant by the term "contaminated." The Director may require a permit for any discharges of storm water runoff contaminated by contact with any overburden, raw material, intermediate product, finished product, by product or waste product at the site of such operations. The use of RQs is solely a mechanism for identifying the facilities most likely to need a storm water permit consistent with the legislative history of section 402(l)(2).

*c. Mining Operations.* The December 7, 1988 proposal would establish background levels as the standard used to define when a storm water discharge from a mining operation is contaminated. When a storm water discharge from a mining site was found to contain pollutants at levels that exceed background levels, the owner or operator of the site was required to submit a permit application for that operation. The proposal was founded upon language in the legislative history stating that the determination of whether storm water is contaminated by contact with overburden, raw material, intermediate product, finished product, byproduct, or waste products "shall take into consideration whether these materials are present in such stormwater runoff . . . above natural background levels". [Vol. 132 Cong. Rec. H10574 (daily ed. Oct. 15, 1986) Conference Report].

Comments received on this component of the rule suggested that background levels of pollutants would be very difficult to calculate due to the complex topography frequently encountered in alpine mining regions. For example, if a mine is located in a mountain valley surrounded on all sides by hills, the site will have innumerable slopes feeding flow towards it. Under such circumstances, determining how the background level is set would prove impractical. Commenters indicated that it is very difficult to measure or determine background levels at sites where mining has occurred for prolonged periods. In many instances, data on original background levels may not be available due to long-term site activity. As a result, any background level established will vary based on the type and level of previous activity. In addition, mining sites typically have background levels that are naturally distinct from the surrounding areas. This is due to the geologic characteristics that makes them valuable as mining sites to begin with. This also makes it difficult to establish accurate background levels.

Because of these concerns EPA has decided to drop the use of background levels as a measure for determining whether a permit application is required. Accordingly, a permit application will be required when discharges of storm water runoff from mining operations come into contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site. Similar to the RQ test for oil and gas operations, EPA intends to use the "contact" test solely as a permit application trigger. The determination of whether a mining operation's runoff is contaminated will be made in the context of the permit issuance proceedings.

If the owner or operator determines that no storm water runoff comes into contact with overburden, raw material, intermediate product, finished product, byproduct, or waste products, then there is no obligation to file a permit application. This framework is consistent with the statutory provisions of section 402(1)(2) and is intended to encourage each mining site to adopt the best possible management controls to prevent such contact.

Several commenters stated that EPA's use of total pollutant loadings for determining permit applicability is not consistent with the general framework of the NPDES program. Their concern is that such evaluation criteria depart from how the NPDES program has been administered in the past, based on concentration limits. In addition, commenters requested that EPA clarify that information on mass loading will be used for determining the need for a permit only. Since the analysis of natural background levels as a basis for a permit application has been dropped from this rulemaking, these issues are moot.

Commenters noted that the proposed rule did not specify what impact this rulemaking has on the storm water exemptions in *40 CFR 440.131*. The commenters recommended not changing any of these provisions. Some commenters indicated that mining facilities that have NPDES permits should not be subject to additional permitting under the storm water rule. EPA does not intend that today's rule have any effect on the conditional exemptions in *40 CFR 440.131*. Where a facility has an overflow or excess discharge of process-related effluent due to stormwater runoff, the conditional exemptions in *40 CFR 440.131* remain available.

Several commenters note that the term overburden, as used in the context of the proposed storm water rule, is not defined and recommended that this term should be defined to delineate the scope of the regulation. EPA agrees that the term overburden should be defined to help properly define the scope the storm water rule. In today's rule, the term overburden has been clarified to mean any material of any nature overlying a mineral deposit that is removed to gain access to that deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations. This definition is patterned after the overburden definition in SMCRA, and is designed to exclude undisturbed lands from permit coverage as industrial activity. However, the definition provided in this regulation may be revised at a later date, to achieve consistency with the promulgation of RCRA Subtitle D mining waste regulations in the future.

Numerous commenters raised issues pertaining to the inclusion of inactive mining areas as subject to the stormwater rule. Some commenters indicated that including inactive mine operations in the rule would create an unreasonable hardship on the

industry. EPA has included inactive mining areas in today's rule because some mining sites represent a significant source of contaminated stormwater runoff. EPA has clarified that inactive mining sites are those that are no longer being actively mined, but which have an identifiable owner/operator. The rule also clarifies that active and inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities required for the sole purpose of maintaining the mining claim are undertaken. The Agency would clarify that claims on land where there has been past extraction, beneficiation, or processing of mining materials, but there is currently no active mining are considered inactive sites. However, in such cases the exclusion discussed above for uncontaminated discharges will still apply.

EPA's definition of active and inactive mining operations also excludes those areas which have been reclaimed under SMCRA or, for non-coal mining operations, under similar applicable State or Federal laws. EPA believes that, as a general matter, areas which have undergone reclamation pursuant to such laws have concluded all industrial activity in such a way as to minimize contact with overburden, mine products, etc. EPA and NPDES States, of course, retain the authority to designate particular reclaimed areas for permit coverage under section 402(p)(2)(E).

The proposed rule had included an exemption for areas which have been reclaimed under SMCRA, although the language of the proposed rule inadvertently identified the wrong universe of coal mining areas. The final rule language has been revised to clarify that areas which have been reclaimed under SMCRA (and thus are no longer subject to 40 CFR part 434 subpart E) are not subject to today's rule. Today's rule thus is consistent with the coal mining effluent guideline in its treatment of areas reclaimed under SMCRA.

In response to comments, EPA has also expanded this concept to exclude from coverage as industrial activity non-coal mines which are released from similar State or Federal reclamation requirements on or after the effective date of this rule. EPA believes it is appropriate, however, to require permit coverage for contaminated runoff from inactive non-coal mines which may have been subject to reclamation regulations, but which have been released from those requirements prior to today's rule. EPA does not have sufficient evidence to suggest that each State's previous reclamation rules and/or Federal requirements, if applicable, were necessarily effective in controlling future storm water contamination.

## Dates

DATES: This final rule becomes effective December 17, 1990. In accordance with 40 CFR 23.2, this rule shall be considered final for purposes of judicial review on November 30, 1990, at 1 p.m. eastern daylight time. The public record is located at EPA Headquarters, EPA Public Information Reference Unit, room 2402, 401 M Street SW., Washington DC 20460. A reasonable fee may be charged for copying.

## Contacts

FOR FURTHER INFORMATION CONTACT: For further information on the rule contact: Thomas J. Seaton, Kevin Weiss, or Michael Mitchell Office of Water Enforcement and Permits (EN-336), United States Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-9518.

# ATTACHMENT NO. 7

# *Cal Gov Code § 17552*

Deering's California Codes are current with all legislation of the 2017 Regular Session (Chapters 1-859).

***Deering's California Codes Annotated > GOVERNMENT CODE > Title 2 Government of the State of California > Division 4 Fiscal Affairs > Part 7 State-Mandated Local Costs > Chapter 4 Identification and Payment of Costs Mandated by the State > Article 1 Commission Procedure***

## § 17552. Exclusivity of procedure provided by chapter

This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by *Section 6 of Article XIIIB of the California Constitution.*

## History

Added Stats 1984 ch 1459 § 1. Amended Stats 1986 ch 879 § 3.



End of Document

# ATTACHMENT NO. 8

# *Cal Gov Code § 17556*

Deering's California Codes are current with all legislation of the 2017 Regular Session (Chapters 1-859).

***Deering's California Codes Annotated > GOVERNMENT CODE > Title 2 Government of the State of California > Division 4 Fiscal Affairs > Part 7 State-Mandated Local Costs > Chapter 4 Identification and Payment of Costs Mandated by the State > Article 1 Commission Procedure***

## § 17556. Criteria for not finding costs mandated by state

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

**(a)** The claim is submitted by a local agency or school district that requests or previously requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this subdivision. This subdivision applies regardless of whether the resolution from the governing body or a letter from a delegated representative of the governing body was adopted or sent prior to or after the date on which the statute or executive order was enacted or issued.

**(b)** The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.

**(c)** The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

**(d)** The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

**(e)** The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. This subdivision applies regardless of whether a statute, executive order, or appropriation in the Budget Act or other bill that either provides for offsetting savings that result in no net costs or provides for additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

**(f)** The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

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

## History

Added Stats 1984 ch 1459 § 1. Amended Stats 1986 ch 879 § 4; *Stats 1989 ch 589 § 1*; *Stats 2004 ch 895 § 14 (AB 2855)*; *Stats 2005 ch 72 § 7 (AB 138)*, effective July 19, 2005; *Stats 2006 ch 538 § 279 (SB 1852)*, effective January 1, 2007; *Stats 2010 ch 719 § 31 (SB 856)*, effective October 19, 2010.

# ATTACHMENT NO. 9

# *Cal Gov Code § 17565*

Deering's California Codes are current with all legislation of the 2017 Regular Session (Chapters 1-859).

***Deering's California Codes Annotated > GOVERNMENT CODE > Title 2 Government of the State of California > Division 4 Fiscal Affairs > Part 7 State-Mandated Local Costs > Chapter 4 Identification and Payment of Costs Mandated by the State > Article 1 Commission Procedure***

## § 17565. Reimbursement for subsequently mandated costs

If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate.

## History

Added Stats 1986 ch 879 § 10.

# ATTACHMENT NO. 10

# *Askins v. Ohio Dep't of Agric.*

United States Court of Appeals for the Sixth Circuit

October 6, 2015, Argued; January 6, 2016, Decided; January 6, 2016, Filed

File Name: 16a0005p.06

No. 15-3147

**Reporter**
809 F.3d 868 *; 2016 U.S. App. LEXIS 57 **; 46 ELR 20010; 81 ERC (BNA) 2009

LARRY ASKINS; VICKIE ASKINS, Plaintiffs-Appellants, v. OHIO DEPARTMENT OF AGRICULTURE; OHIO ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants-Appellees.

**Prior History:** **[**1]** Appeal from the United States District Court for the Northern District of Ohio at Toledo. No. 3:14-cv-01699—David A. Katz, District Judge.

*Askins v. Ohio Dep't of Agric., 2015 U.S. Dist. LEXIS 174067 (N.D. Ohio, Jan. 27, 2015)*

## Core Terms

regulators, citizen suit, state-NPDES, notification, pollution, citizen-suit, violations, requirements, conditions, permits, withdraw, non-discretionary, provisions, administering, Rights, suits

## Case Summary

**Overview**

HOLDINGS: [1]-The notification requirement at issue was enacted pursuant to *33 U.S.C.S. § 1314*, which was not enumerated as requiring compliance for purposes of the citizen-suit provision; [2]-The Clean Water Act did not prescribe the notification requirement as a "condition" of a permit, it only demanded conditions for approving the entire state program; [3]-There was no private cause of action against regulators for violating procedural regulations; [4]-Congress did not intend to give citizens greater and faster enforcement authority against a state than the Environmental Protection Agency; [5]-Because the landowners did not identify any non-discretionary duty the Environmental Protection Agency failed to perform, there was no cause of action under the Clean Water Act.

**Outcome**
Judgment affirmed.

**Counsel:** ARGUED: Steve J. Edwards, Grove City, Ohio, for Appellants. Kelly D. McCloud, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Ohio Appellees.

Peter Krzywicki, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellee.

ON BRIEF: Steve J. Edwards, Grove City, Ohio, for Appellants.

Kelly D. McCloud, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Ohio Appellees.

Peter Krzywicki, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellee.

**Judges:** Before: COLE, Chief Judge; DAUGHTREY and DONALD, Circuit Judges.

**Opinion by:** COLE

## Opinion

**[*871]** COLE, Chief Judge. Plaintiffs-Appellants Larry and Vickie Askins filed a citizen suit alleging that Defendants-Appellees U.S. Environmental Protection Agency ("U.S. EPA"), Ohio Environmental Protection Agency ("Ohio EPA"), and Ohio Department of Agriculture ("ODA")

(collectively, "Defendants") violated the Clean Water Act's agency permitting procedures. The district court held that the Clean Water Act does not permit suits against regulators for regulatory functions and dismissed for lack of **[**2]** subject-matter jurisdiction. We affirm.

## I. BACKGROUND

The U.S. EPA, Ohio EPA, and ODA work together to abate pollution in Ohio. Pursuant to federal and state laws, each entity exercises authority over different types of pollution from specific sources. At issue in this case is the authority to control water pollution caused by certain animal feeding operations, which is governed by the Clean Water Act, *33 U.S.C. § 1251 et seq.*

### A. The Clean Water Act

The Clean Water Act grants the U.S. EPA express rights and responsibilities to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," but preserves states' "primary responsibilities and rights" to abate pollution. *33 U.S.C. § 1251(a)-(b)*. The Clean Water Act requires certain animal feeding operations to obtain a permit under the national pollutant discharge elimination system ("NPDES") prior to discharging any pollutant into navigable waters. *33 U.S.C. §§ 1311(a)*, *1342(a)*. The U.S. EPA may approve a state to administer a state-NPDES program, but the U.S. EPA retains authority to supervise it and withdraw approval. *33 U.S.C. § 1342(b)-(c)*; *40 C.F.R. § 123.24*. Once approved, a state must seek permission from the U.S. EPA before it can transfer all or part of the state-NPDES program to another state agency. *40 C.F.R. § 123.62(c)*.

### B. Ohio's [**3] NPDES Program

In 1974, the U.S. EPA approved the Ohio EPA to administer the state-NPDES program. In 2001, the Ohio legislature authorized ODA to submit an application to the U.S. EPA to take over the part of the state-NPDES program that regulates animal feeding operations. S.B. 141, 2000 Leg., 123rd Gen. Assemb. (Ohio 2001) (codified at *Ohio Rev. Code § 903.08(A)* (eff. Mar. 15, 2001)). The legislation also amended Ohio's NPDES laws to reflect the transfer, which were to go into effect after ODA received the U.S. EPA's approval. ODA submitted its application to the U.S. EPA in 2006. After a series of amendments to the federal and Ohio NPDES laws, ODA submitted its revised application to the U.S. EPA on July 8, 2015, while this appeal was pending.

### [*872] C. Litigation Commences

The Askinses allege that the Ohio EPA transferred its authority to administer part of the state-NPDES program to ODA when the legislation became effective in 2001. In August 2014, after several administrative appeals challenging specific NPDES permits to animal feeding operations, the Askinses filed suit in the Northern District of Ohio under the Clean Water Act's citizen-suit provision. They alleged that the following conduct violated the Clean Water Act **[**4]** : (1) the Ohio EPA failed to inform the U.S. EPA that it transferred authority over part of the state- NPDES Program to ODA until five years after it had done so; (2) ODA administered part of the state-NPDES Program without approval from the U.S. EPA; (3) the U.S. EPA permitted Ohio EPA to transfer part of the state-NPDES program without its approval; and (4) the U.S. EPA allowed ODA to administer part of the state-NPDES program without its approval.

The district court dismissed all of the claims, holding that the Askinses failed to establish a private cause of action under the Clean Water Act, that the U.S. EPA did not fail to perform a non-discretionary duty under the Clean Water Act, and that Defendants did not violate the Clean Water Act. *See Askins v. Ohio Dep't of Agriculture, No. 14-CV-1699, 2015 U.S. Dist. LEXIS 174067 (N.D. Ohio Jan. 27, 2015)*. The Askinses appealed, arguing that if the Clean Water Act does not permit this suit, "a state agency can run amok and not one citizen in Ohio can stop the resulting chaos."

## II. ANALYSIS

### A. Standard of Review

When a trial court's ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court's **[**5]** factual findings, unless they are clearly erroneous, and review the district court's application of the law to the facts *de novo*. *RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1135 (6th Cir. 1996)*. However, it is not necessary for us to reach the factual disputes and merits of the Askinses' claims, as the district court did. Accordingly, we review *de novo* the district court's dismissal under *Fed. R. Civ. P. 12(b)(1)* for lack of subject-matter jurisdiction and construe the facts in a light most favorable to the Askinses. *See id. at 1134-35*; *Jones v. City of Lakeland, Tenn., 224 F.3d 518, 520 (6th Cir. 2000)*.

### B. Claims Against the Ohio EPA and ODA

In their first and second claims, the Askinses allege that the Ohio EPA and ODA violated the Clean Water Act. The Clean Water Act permits citizen suits "against any person (including . . . any other governmental . . . agency to the extent permitted by the *eleventh amendment to the Constitution*) who is alleged to be in violation of an effluent standard or limitation," relevantly defined here as "a permit or condition thereof issued under [the NPDES program]." *33 U.S.C. § 1365(a)(1), (f)(6)*.

States may request permission from the U.S. EPA to administer a state-NPDES program after the U.S. EPA promulgates certain guidelines that govern monitoring, reporting, enforcement, funding, personnel, and manpower. *See 33 U.S.C. §§ 1342(b), 1314(i)(2)*. Under this authority, the U.S. EPA enacted a regulation that requires **[**6]** a state to notify the U.S. EPA if it intends to transfer authority over part of the state-NPDES program to a different agency. *40 C.F.R. § 123.62(c)* ("notification requirement"). The new **[*873]** agency may not administer any part of the state-NPDES program without the U.S. EPA's prior approval. *Id.* The Askinses argue that compliance with this notification requirement is "part of every NPDES permit issued by Ohio." Therefore, they argue, Ohio EPA and ODA are in violation of "a condition" of every NPDES permit issued because they failed to obtain the U.S. EPA's approval prior to the transfer. As explained more fully below, this argument fails because (1) violation of the notification requirement is not actionable in a citizen suit; (2) the notification requirement is not a "condition" of a permit; and (3) there is no private cause of action against regulators for violating procedural regulations. Each of these reasons deprives us of jurisdiction over the Askinses' first and second claims.

*1. Violation of the notification requirement is not actionable in a citizen suit*

The Askinses allege that Ohio EPA and ODA's failure to notify the U.S. EPA prior to transferring part of the state-NPDES program is a violation of a **[**7]** permit. However, a state is not required to comply with the notification requirement to avoid a citizen suit: "[c]ompliance with a permit issued pursuant to [the NPDES program] shall be deemed compliance, for purposes of [citizen suits], with *§§ 1311*, *1312*, *1316*, *1317*, and *1343* [defining water standards]." *33 U.S.C. § 1342(k)*. Therefore, it is axiomatic that violation of a provision other than *§§ 1311*, *1312*, *1316*, *1317*, or *1343* cannot invoke the Clean Water Act's citizen-suit provision. *See id.; City of Cleveland v. Ohio, 508 F.3d 827, 847 (6th Cir. 2007)* (the canon *expressio unius est exclusio alterius* "justif[ies] the inference that [associated] items not mentioned were excluded by deliberate choice, not inadvertence" and "reading the regulation expansively would impermissibly create *de facto* a new regulation under the guise of interpreting a regulation." (citations and internal quotation marks omitted)).

The notification requirement at issue here was enacted pursuant to *§ 1314*, which is not enumerated as requiring compliance for purposes of the citizen-suit provision. *See 33 U.S.C. § 1342(k)*; *40 C.F.R. § 123.62(c)* (enacting the notification requirement, which the Askinses argue was pursuant to *33 U.S.C. § 1314(i)(2)*). Accordingly, the Clean Water Act does not permit a citizen suit for violating that regulation.

*2. The notification requirement is not a "condition" of a permit*

The Clean Water Act **[**8]** requires the U.S. EPA to prescribe "conditions" for permits that will also be applicable to state permit programs. *33 U.S.C. § 1342(a)(2)-(3)*. The Askinses allege that the notification requirement, enacted under *33 U.S.C. § 1314(i)(2)*, is a "condition" of a permit. However, this interpretation requires us to ignore language in the statute and accept an internal contradiction.

First, the Askinses' argument ignores some of the words in the statute, which is contrary to the canons of statuary construction. *See Bennett v. Spear, 520 U.S. 154, 173, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)* ("It is the cardinal principle of statutory construction that it is our duty to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." (citations omitted)). For example, the U.S. EPA is required to enact conditions that "assure compliance with the requirements of *paragraph (1)*," which permits the U.S. EPA to issue a NPDES permit "upon condition that such discharge will meet . . . all applicable requirements under *§§ 1311*, *1312*, *1316*, *1317*, *1318*, and *1343*." *33 U.S.C. §1342(a)(1)-(2)*. **[*874]** *Section 1314* is not enumerated as requiring "conditions." Further, the NPDES provision references *§ 1314(i)(2)* as a *timing* mechanism, triggering *when* states may begin applying to administer a state-NPDES program, rather than a substantive requirement, as the Askinses argue. *See 33 U.S.C. § 1342(b)* ("At **[**9]** *any time after* the promulgation of the guidelines required by *[§ 1314(i)(2)]* . . . each State desiring to administer its own permit program . . . may submit to the [U.S. EPA an application]." (emphasis added)).

Second, the Askinses' argument fails to distinguish between the Clean Water Act's separate requirements for NPDES *programs* versus NPDES *permits*. References to *§ 1314* in the NPDES provision refer to the U.S. EPA's approval of a "state

permit *program*," not the state's approval of individual *permits*. *See* 33 U.S.C. § 1342(c)(1)-(2). The notification requirement, 40 C.F.R. §123.62(c), falls under regulations entitled "*Program* Approval, Revision, and Withdrawal," 40 C.F.R. Pt. 123, Subpt. D, §§ 123.61-64. (emphasis added). On the other hand, provisions referencing the *permit itself* identify discharge restrictions, none of which appear in § 1314, which is at issue here. *See, e.g.*, 33 U.S.C. § 1342(a)(1), (b)(1)(A), (b)(2). Indeed, the thirteen uses of the word "condition" in the NPDES provision relate to the *permit* itself, not the NPDES *program* as a whole. *See* 33 U.S.C. § 1342(a)(1)-(3) and (5), (b)(1)(C)(i) and (iii), (b)(8), (d)(2), (h). More telling of this distinction, the U.S. EPA enacted regulations entitled "Permit Conditions," which refer to the terms of the *permit* itself, rather than the *program* that administers them. *Compare* 40 C.F.R. Pt. 122, Subpt. C, §§ 122.41-50 (entitled "Permit Conditions"), *with* Pt. 123, Subpt. D, §§ 123.61-64 (entitled **[**10]** "Program Approval, Revision, and Withdrawal").

Third, the Askinses' broad reading of the notification requirement as a "condition" of a permit contradicts NPDES requirements. For example, state and federal permit "conditions" must be the same, *see* 33 U.S.C. § 1342(a)(3), but the U.S. EPA would not seek to transfer a state-NPDES program from one state agency to another, nor could it seek transfer approval from itself. Also, a state-NPDES program is required to have the authority to terminate the permits it issues *for cause* for violating a "condition" of the permit, 33 U.S.C. § 1342(b)(1)(C)(i), which, under the Askinses' reading, would mean a state may terminate a permit for cause for its *own* violation of permitting regulations. Finally, a condition is "[s]omething demanded or required as a prerequisite to the granting or performance of something else; a provision, a stipulation." *OED Online* "condition, n." (Oxford Univ. Press 2015). However, the U.S. EPA does not demand any prerequisites from the state for each *individual permit* the state issues, it only demands conditions for approving the entire state *program*. *See* 33 U.S.C. § 1342.

Accordingly, the Clean Water Act does not prescribe the notification requirement as a "condition" of a permit.

*3. There is no private **[**11]** cause of action against regulators for violating procedural regulations*

The Askinses argue that a citizen may sue a regulator for failing to follow purely procedural regulations. However, the cases they cite do not support their argument, which is also refuted by other provisions in the Clean Water Act, similar cases, and legislative history.

In *Decker v. Northwest Environmental Defense Center*, citizens invoked the Clean Water Act's citizen-suit provision against the state of Oregon, among other defendants, **[*875]** as a *polluter*—not a regulator. 133 S. Ct. 1326, 1333, 185 L. Ed. 2d 447 (2013). Indeed, there was no mention of the state of Oregon as a regulator. *See generally*, *id*. Likewise, polluters, not regulators, were sued in Ecological Rights Foundation v. Pacific Lumber Co. Ecological Rights, 230 F.3d 1141 (9th Cir. 2000). Notably, no regulators were named as a defendant in *Ecological Rights Foundation*. In dicta, the Ninth Circuit stated "the Clean Water Act allows citizen suits based on violations of any conditions of a NPDES permit, even those which are purely procedural," citing the citizen-suit provision and 33 U.S.C. § 1318. *Id. at 1151*. To the extent this suggests a citizen may sue for procedural violations under § 1318, it is not persuasive because the Clean Water Act does not require compliance with § 1318, or other procedural provisions, to avoid a citizen suit. **[**12]** *See* 33 U.S.C. § 1365(f) (permitting citizens to sue for violations of §§ 1311, 1312, 1316, 1317, 1341, 1342, 1345(d)); 33 U.S.C. § 1342(k) ("Compliance with a permit . . . shall be deemed compliance, for purposes of [a citizen suit], with §§ 1311, 1312, 1316, 1317, and 1343."). In any event, the Askinses allege a violation of § 1314, which discusses procedural regulations for states, not § 1318, which discusses procedural regulations for *owners* of pollutant sources. At best, *Decker* and *Ecological Rights Foundation* suggest that a citizen may sue for procedural violations *only if* the violations result in water pollution without a NPDES permit. Here, the Askinses do not allege that the Ohio EPA or ODA themselves polluted the water.

We must respect the limited nature of citizen suits under the Clean Water Act. If Congress intended the citizen suit to be all encompassing, it would have permitted suit for all violations of the Clean Water Act, rather than specifying limited circumstances. *See* 33 U.S.C. § 1365(a)(1)(A) (permitting a citizen suit against persons "alleged to be in violation of an effluent standard or limitation"); *see also* Bennett, 520 U.S. at 173 (requiring courts to "give effect . . . to every clause and word of a statute"); City of Cleveland, 508 F.3d at 847 (*expressio unius est exclusio alterius*). Congress also would not have limited venue to "action[s] respecting a **[**13]** violation *by a discharge source* of an effluent standard or limitation . . . in the judicial district in which such *source* is located." 33 U.S.C. § 1365(c)(1) (emphasis added). Instead, the U.S. EPA and states were meant to be the primary enforcers of the Clean Water Act: "[t]he [Senate] Committee [on Public Works] intends the great volume of enforcement actions [to] be brought by the State." Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) (quoting S. Rep. No. 92-414, p. 64 (1971)); *see also* Sierra Club v. Hamilton Cty. Bd. of Cty.

*Comm'rs, 504 F.3d 634, 637, 642, n.5 (6th Cir. 2007)*; *33 U.S.C. §§ 1251*, *1319*. The citizen suit serves only as a backup, "permitting citizens to *abate pollution* when the government cannot or will not command compliance." *Gwaltney, 484 U.S. at 62* (emphasis added) (citing legislative history). Citizen suits are "meant to supplement rather than to supplant governmental action [therefore] citizen suits must fulfill several procedural prerequisites." *Hamilton Cty. Bd. of Cty. Comm'rs, 504 F.3d at 637* (quoting *Gwaltney, 484 U.S. at 60*).

Paradoxically, the Askinses' expansive reading of the citizen-suit provision would grant citizens *greater* enforcement authority than the U.S. EPA. For example, the sixty-days' notice period required for a citizen suit, *33 U.S.C. § 1365(b)*, is shorter than the ninety-days' cure period to which a state is entitled before the U.S. EPA can **[*876]** proceed against it, *§ 1342(c)(3)*. Further, in a citizen suit, the district court may enter an order to enforce **[**14]** the effluent standard or limitation violated and award civil penalties and costs. *See 33 U.S.C. § 1365(a)*, *(d)*. However, the U.S. EPA cannot obtain these remedies against a state, and is limited to withdrawing approval of the state-NPDES program. *See 33 U.S.C. § 1342(c)(3)*; *40 C.F.R. § 123.63*. Congress did not intend to give citizens greater and faster enforcement authority against a state than the U.S. EPA.

Other cases construing nearly identical environmental citizen-suit provisions have reached a similar conclusion—that a regulator's failure to follow procedural regulations is not grounds for a citizen suit. For example, in *Sierra Club v. Korleski*, we held that the *Clean Air Act's* identical citizen-suit provision did not permit suits against regulators because of the citizen suit's potential penalties, shortened notice periods, different language referring to polluters versus deficient regulators, and relationship to the agency-enforcement provisions. *681 F.3d 342, 348-50 (6th Cir. 2012)*. In reaching that conclusion, we adopted the Supreme Court's reasoning in *Bennett v. Spear*, construing an almost identical citizen-suit provision in the *Endangered Species Act*. *520 U.S. at 173*. The Court in *Bennett* also found that citizen suits for regulatory functions under the first prong of the citizen-suit provision would render **[**15]** superfluous the other prong, which permitted suits against the federal government as a regulator only for failing to perform non-discretionary regulatory acts or duties. *Id.*

For similar reasons, the Clean Water Act does not permit citizen suits against regulators. As discussed above, the citizen-suit provision provides greater penalties and faster enforcement than the agency-enforcement provisions. *Compare 33 U.S.C. § 1365(a)*, *(b)*, *(d)*, *with § 1342(c)(3)*. In addition, the agency-enforcement provision distinguishes a "permit violation" from a state's failure to properly regulate the state-NPDES program. For example, the Clean Water Act uses the term "violate" or "violation" to refer to polluters who do not comply with a discharge limitation. *See 33 U.S.C. §§ 1365(a)*, *1342(h)*, *1342(k)*, *1319(a)(1)*, *1319(a)(3)*. However, regulators who fail to follow regulatory procedures are described as "not administering a program . . . in accordance with requirements," *33 U.S.C. § 1342(c)(3)*, or failing to "enforce such permit conditions or limitations effectively," *§ 1319(a)(2)*. Finally, the ability to sue regulators for regulatory failures under the first prong of the citizen-suit provision, *33 U.S.C. § 1365(a)(1)*, would render superfluous the second prong, *§ 1365(a)(2)*, which permits suits against the U.S. EPA only for non-discretionary regulatory failures. **[**16]**

Accordingly, the Clean Water Act does not permit citizen suits against regulators, who are not polluters, for procedural violations.

* * *

Because violation of the notification requirement is not actionable in a citizen suit, the Clean Water Act does not prescribe the notification requirement as a "condition" of a permit, and the Clean Water Act does not permit citizen suits against regulators for procedural violations, this court lacks jurisdiction over the Askinses' first and second claims against the Ohio EPA and ODA.

### C. Claims Against the U.S. EPA

In their third and fourth claims, the Askinses allege the U.S. EPA violated the Clean Water Act. The Clean Water Act permits suits against the U.S. EPA as a regulator only if it fails to perform **[*877]** a non-discretionary duty. *33 U.S.C. § 1365(a)(2)*; *see also Dep't of Energy v. Ohio, 503 U.S. 607, 615, 112 S. Ct. 1627, 118 L. Ed. 2d 255 (1992)* (reciting that any waiver of the United States's sovereign immunity must be unequivocal and must be narrowly construed). Here, the Askinses allege the U.S. EPA was required to "conduct a hearing whenever a State is not administering a program in accordance with [NPDES program rules under] *33 U.S.C. § 1342(b)*."

However, the Clean Water Act does not require the U.S. EPA to conduct a hearing if a state fails to administer properly a **[**17]** state-NPDES program:

> Whenever [the U.S. EPA] determines after public hearing that a State is not administering a [state-NPDES] program approved . . . in accordance with requirements of this section, [after notice and time to cure, the U.S. EPA] shall withdraw approval of such program. [The U.S. EPA] shall not withdraw approval of any such

> program unless [it] shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

*33 U.S.C. § 1342(c)(3)*. While the Clean Water Act *does* require the U.S. EPA to withdraw approval of a state-NPDES program after a hearing, notice, and time to cure, it does *not* require the U.S. EPA to hold a hearing in the first place. *See id.* Accordingly, the non-discretionary action does not kick in until *after* the hearing, but the hearing itself is discretionary. *See id.*

Here, the U.S. EPA did not hold a hearing regarding whether Ohio EPA or ODA were not meeting the requirements of the state-NPDES program, nor was it required to. Because the Askinses have not identified any non-discretionary duty the U.S. EPA failed to perform, there is no cause of action under the Clean Water Act. Accordingly, we lack jurisdiction over the Askinses' third and fourth claims **[**18]** against the U.S. EPA.

## III. CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal for lack of subject-matter jurisdiction. Because the Clean Water Act prohibits this suit, we need not address the merits of the Askinses' claims, *i.e.*, whether Defendants actually violated the Clean Water Act.

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# ATTACHMENT NO. 11

# *Save Our Bays & Beaches v. City & County Honolulu*

United States District Court for the District of Hawaii

July 27, 1994, Decided ; July 27, 1994, FILED

CV. NO. 92-00263 DAE

**Reporter**
904 F. Supp. 1098 *; 1994 U.S. Dist. LEXIS 20459 **; 26 ELR 20595

SAVE OUR BAYS AND BEACHES, a Hawaii non-profit corporation, sometimes doing business as SOBB; HAWAII'S THOUSAND FRIENDS, a Hawaii non-profit corporation; SIERRA CLUB, a California non-profit corporation; and SURFRIDER FOUNDATION, a California non-profit corporation, Plaintiffs, vs. CITY AND COUNTY HONOLULU, a Hawaii municipal corporation, Defendant.

## Core Terms

violations, Plant, bypass, plaintiffs', monitoring, Permits, effluent limitation, requirements, water quality standards, water quality, effluent, citizen suit, secondary, Counts, permit condition, dischargers, filter, summary judgment, mootness, enforcement action, notice, administrative order, limitations, pollution, noncompliance, comparable, conditions, City's, fail to report, summary judgment motion

## Case Summary

### Procedural Posture

Plaintiff environmentalists brought an enforcement action against defendant city for alleged violations of § 505 of the Clean Water Act, codified at *33 U.S.C.S. § 1365*. The environmentalists filed motions for summary judgment, and the city filed cross-motions to dismiss or for summary judgments as to certain counts of the complaints.

### Overview

The environmentalists argued that the city repeatedly violated various conditions of the National Pollution Discharge Elimination System (NPDES) permits that regulated the discharge of treated water from two water treatment plants. The court held (1) as citizens, the environmentalists had no standing under *§ 1365* to enforce receiving water quality permit conditions that had not been translated into end-of-the-pipe effluent limitations; (2) the environmentalists had standing to enforce violations of maintenance and operations standards contained in the permits because they established that there was a significant risk of future violations at the water treatment plant; (3) the city's record of post-complaint compliance did not moot the environmentalists' claims for civil penalties; (4) the environmentalists' claim for injunctive relief was not moot because the risk of future violations at the treatment plant was still present; and (5) the environmentalists' suit was not pre-empted by the Environmental Protection Agency's (EPA) threatened enforcement in the event of future noncompliance because the EPA was not actually enforcing the permits.

### Outcome

The court granted in part and denied in part the city's motions to dismiss and for summary judgment, and granted in part and denied in part the environmentalists' motions for summary judgment.

**Counsel: [**1]** For SAVE OUR BAYS AND BEACHES, a Hawaii non-profit corporation dba SOBB, HAWAII'S THOUSAND FRIENDS, a Hawaii non-profit corporation, SIERRA CLUB, a California non-profit corporation, SURFRIDER FOUNDATION, a California non-profit corporation, plaintiffs: Denise E. Antolini, Paul P. Spaulding, III, Sierra Club Legal Defense Fund, Inc., Honolulu, HI.

For CITY AND COUNTY OF HONOLULU, a Hawaii municipal corporation, defendant: Milton S. Tani, Corporation Counsel, City & County of Honolulu, Honolulu, HI. Cheryl K. Okuma-Sepe, Deputy Corporation Counsel, City and County of Honolulu, Honolulu, Hi.

**Judges:** DAVID ALAN EZRA, UNITED STATES DISTRICT JUDGE

**Opinion by:** DAVID ALAN EZRA

## Opinion

**[*1103]** *ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT*

The court heard the parties' cross motions for summary judgment on April 25, 1994. Paul "Skip" Spaulding, Esq., and M. Casey Jarman, Esq., appeared on behalf of the plaintiffs; Cheryl Okuma-Sepe, Esq., appeared on behalf of the defendant. After full consideration of the motions and of the supporting and opposing memoranda, and after hearing oral argument from counsel, the court GRANTS IN PART and DENIES IN PART the defendant's motions, and GRANTS IN PART and DENIES IN PART the plaintiffs' motions.

*SUMMARY OF HOLDING*

This is a citizens' enforcement action brought under Section 505 of the Clean Water Act, *33 U.S.C. § 1365*. In a complaint filed May 5, 1992, plaintiffs claimed that the City has repeatedly violated various conditions of the NPDES permits which regulate the discharge of treated water from the Kailua and Kaneohe Water Treatment Plants.

Counts One and Eight allege violations of secondary treatment levels as described **[**2]** in the Permits; Counts Two and Nine relate to alleged violations of receiving water quality standards articulated in the Permits; Counts Three and Ten concern alleged violations of bypass requirements; Counts Four and Eleven assert that the City repeatedly failed to report numerous noncompliance events; Counts Five and Twelve allege that defendant failed to monitor water quality and effluent flow as required by the Permits; Counts Six and Thirteen concern alleged violations of maintenance and operations standards contained in the Permits. Plaintiffs now move for summary judgment as to Counts One, Two, Three, Four, Five, Eight, Nine, Ten, Eleven, and Twelve; defendant has filed cross motions to dismiss or for summary judgment as to Counts Two, Three, Four, Nine, Ten, and Eleven. Defendant has also moved this court to reconsider its earlier denial of summary judgment as to Counts Six and Thirteen.

As to Counts One and Eight, the court GRANTS the plaintiffs' motion for summary judgment as to 11,095 secondary treatment violations. With respect to the City's mootness **[*1104]** defense, the court finds that, despite recent improvements made by the City, the Kailua and Kaneohe Plants are susceptible **[**3]** to ongoing violations. Moreover, the court finds that DOH had no authority to issue to the Kaneohe Plant an interim permit and consent order which established secondary treatment levels below the statutory minimum; Kaneohe's failure to meet statutory treatment levels results in enforceable violations. *See* Part III, *infra.*

As to Counts Two and Nine, the court GRANTS the defendant's motion to dismiss based on lack of standing. This court is bound by the recent holding of the Ninth Circuit Court of Appeals in *Northwest Environmental Associates v. City of Portland, 11 F.3d 900, 1993 U.S. App. LEXIS 32023 (9th Cir. 1993)*: citizens have no standing to enforce receiving water quality permit conditions which have not been translated into end-of-the-pipe effluent limitations. The court DENIES the plaintiffs' motion for summary judgment on these counts. *See* Part I, *infra.*

As to Counts Three and Ten, the court GRANTS the plaintiffs' motion for summary judgment as to 406 bypass violations. The court finds no merit to the defendant's contention that, because both federal and state governments are already actively enforcing these Permits, the plaintiffs' **[**4]** suit should be pre-empted. First, the court concludes that EPA has merely threatened enforcement in the event of future noncompliance; it is not actually enforcing the Kailua and Kaneohe Permits. Moreover, the court holds that Hawaii's statutes and regulations fail to require DOH to provide the public with notice and an opportunity to be heard concerning proposed settlements with water pollution violators. Hence, any enforcement undertaken by the State of Hawaii would not pre-empt this citizen suit. Accordingly, the court DENIES defendant's motion to dismiss or for summary judgment on these grounds. *See* Part IV, *infra.*

As to Counts Four and Eleven, the court GRANTS the plaintiffs' motion for summary judgment as to 75 failures to report bypass incidents, 1,088 failures to report failures to monitor water quality, and 18 failures to report failures to monitor effluent flow. However, the court DENIES the plaintiffs' motion and GRANTS the defendant's motion to dismiss based on lack of standing as to the failures to report violations of receiving water quality permit conditions. *See* Part VI, *infra.*

As to Counts Five and Twelve, the court GRANTS the plaintiffs' motion for **[**5]** summary judgment as to 1,110 failures to monitor. Defendant has advanced no credible defenses for its monitoring failures, although its excuses will be considered at the penalty phase of this proceeding. *See* Part

V, *infra*.

As to Counts Six and Thirteen, the court DENIES the defendant's Motion for Reconsideration of this court's October 27, 1992 Order concerning maintenance and operations conditions. Inasmuch as defendant's motion is based on its interpretation of the breadth of the *NWEA* holding, the court finds that interpretation erroneous, and accordingly stands by its earlier decision to deny summary judgment on these counts. *See* Part II, *infra*.

The court hereby finds that a grand total of 13,792 violations were committed by the City. The court reserves ruling on the proper penalties to be affixed.

*BACKGROUND*

This is a citizens' enforcement action brought under Section 505 of the Clean Water Act, *33 U.S.C. § 1365* ("the Act") The Act aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *33 U.S.C. § 1251(a)*. In furtherance of this goal, the Act prohibits the discharge of all "pollutants" [1] from a "point **[**6]** source" [2] into navigable waters of the United States, unless the discharger complies with various enumerated sections of the Act. *33 U.S.C. § 1311(a)*. The Act specifically requires that all "publicly owned treatment **[*1105]** works" ("POTWs") in the United States meet effluent limitations based upon "secondary treatment" standards by July 1, 1988. *33 U.S.C. § 1311(i)(1)*. Secondary treatment is generally defined as removal of eighty-five percent of the organic materials and suspended solids in the wastewater leaving the plant. *40 C.F.R. § 133.102*.

Plaintiffs are four non-profit organizations dedicated to preserving Hawaii's environment ("plaintiffs"). Defendant is the City and County of Honolulu ("City" or "defendant"), **[**7]** owner and operator of water treatment plants on the Island of Oahu. Plaintiffs' claims concern the City's Kailua and Kaneohe Wastewater Treatment Plants, which together serve the main population centers on the windward side of Oahu, from Lanikai to Heeia Pond. Plaintiffs allege that the City has failed to comply with various requirements of the Act and of the permits which regulate the plants' discharges.

A. *The Regulatory Scheme*

The primary regulatory mechanism in the Clean Water Act is the National Pollution Discharge Elimination System ("NPDES"). Under this enforcement scheme, either the United States Environmental Protection Agency ("EPA") or a state entity issues NPDES permits to individual dischargers. *33 U.S.C. § 1342*. The state program for issuance of NPDES permits must comply with statutory standards and regulations, must be supervised closely by EPA, and must prescribe effluent standards and limitations no less stringent than those in the Act. *33 U.S.C. § 1342(a)-(d)*.

Each permit issued by a federal or state agency sets forth specific limitations and conditions by which the permit-holder must regulate its discharge of pollutants. Courts have held that a failure to **[**8]** comply with a permit condition amounts to a violation of the Act itself. [3] A critical part of the regulatory scheme is a strict self-reporting system requiring permittees to monitor carefully their permit compliance and to report their own permit violations to the EPA and to the state agency which issued the permits. [4] These self-monitoring reports, known as "Discharge Monitoring Reports" or "DMRs," are public documents and are submitted under penalty of perjury. *40 C.F.R. § 122.41(k)* and *(1)(4)*.

**[**9]** The EPA, a state, or a private citizen can enforce violations of NPDES permits. The citizen suit provision defines exactly how and when citizens may file suit to enforce permit violations. *33 U.S.C. § 1365*. Specifically, *§ 1365(f)(6)* allows citizens to enforce "a permit or condition thereof issued under *section 1342* of this title [the NPDES scheme], which is in effect under this chapter[.]" [5]

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[1] The Clean Water Act defines "pollutants" to include "sewage, garbage, [and] sewage sludge" discharged into water. *33 U.S.C. § 1362(6)*.

[2] A "point source" is "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." *33 U.S.C. § 1362(14)*.

[3] *NRDC v. Vygen Corp., 803 F. Supp. 97, 103 (D. Ohio 1992)* (reporting violations enforceable under the Act); *Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1115 (4th Cir. 1988)*(same); *SPIRG v. P.D. Oil & Chem. Storage, Inc., 627 F. Supp. 1074, 1087-88 (D.N.J. 1986)*; *U.S. v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979)*; *Pymatuning Watershed Citizens for a Hygienic Environment v. Eaton, 506 F. Supp. 902 (W.D. Pa. 1980)*, *aff'd*, *644 F.2d 995 (3rd Cir. 1981)*(holding conditions relating to maintenance to be enforceable).

[4] *See SPIRG v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528, 1531 (D.N.J. 1984)*("in short, a discharger must report its own permit violations should they occur"), *aff'd*, *759 F.2d 1131 (3rd Cir. 1985)*.

[5] Actually, *§ 1365(f)* defines "effluent standard or limitation." *Section 1365(a)(1)(A)* allows a citizen to sue anyone who is alleged to be in violation of "an effluent standard or limitation under this chapter."

The Act imposes strict liability for NPDES violations. The Act does not allow for "de minimus" or "rare" permit violations, and the permit-holder's good faith is not relevant to the issue of liability. [6]

**[**10]** B. *The Permits at Issue*

The State of Hawaii, Department of Health (DOH), has been delegated the responsibility of administering Hawaii's NPDES permit system. *33 U.S.C. § 1342(b)*. Pursuant to this authority, DOH issued NPDES permits for the wastewater plants in Kailua and Kaneohe ("the Plants"), on the Island of Oahu. On February 1, 1982, **[*1106]** DOH issued to the City NPDES permit No. HI 0020141 for the Kailua Plant and NPDES permit No. HI 0020150 for the Kaneohe Plant. These permits were modified on June 5, 1985 and will hereinafter be referred to as the 1985 Kailua Permit and the 1985 Kaneohe Permit.

On July 1, 1988, the secondary treatment requirements of the Act became mandatory and binding on all municipal sewage treatment works, including the Kailua and Kaneohe Plants. As of that date, these statutory requirements superseded any inconsistent provisions in the 1985 Kailua and Kaneohe Permits.

On March 6, 1990, DOH issued to the City NPDES permit No. HI 0020141 for the Kailua Plant ("1990 Kailua Permit") and NPDES Permit No. HI 0020150 for the Kaneohe Plant ("1990 Kaneohe Permit"). On or about December 19, 1990, DOH revised the 1990 Kailua Permit; on or about May 14, 1992, DOH **[**11]** revised the 1990 Kaneohe Permit.

The Kailua Permits authorize the City to discharge properly treated effluent (i.e., in compliance with secondary treatment standards) into the waters of the United States through the Mokapu Ocean Outfall (Serial No. 001) into Kailua Bay and through a second outfall (Serial No. 002) "when in use." The Kaneohe Permits allow the City to discharge properly treated effluent only through the Mokapu outfall. [7]

The Kailua and Kaneohe Permits impose a specific set of effluent limitations and related monitoring requirements, including limitations (measured in terms of both "mass emissions" and "concentrations") on the **[**12]** quantity and quality of effluent. The two primary effluent components measured are Biochemical Oxygen Demand (BOD) [8] and Total Suspended Solids (TSS) [9]. Both Permits require the Plants to remove 85% of both BOD and TSS materials from the effluent before discharging it through the ocean outfall.

The Revised 1990 Permits set the following specific BOD and TSS limitations:

*Go to table1*

**[**13]** In addition to effluent limitations, the Kailua and Kaneohe Permits contain express prohibitions against causing violations of state water quality standards in the receiving waters and against the bypassing of sewage around treatment equipment. The Permits include extensive monitoring requirements for the Plants and the receiving waters, and specific provisions governing the reporting of noncompliance events. Additionally, the Permits expressly require the City to "comply with all conditions of this permit," and remind the City that any noncompliance will constitute a violation of the Clean Water Act and serve as grounds for enforcement.

Plaintiffs claim that the City has repeatedly violated all of the above permit conditions at both the Kailua and Kaneohe Plants. Counts One and Eight allege violations of secondary treatment levels as described in the Permits; Counts Two and Nine relate to alleged violations of receiving water quality **[*1107]** standards articulated in the Permits; Counts Three and Ten concern alleged violations of bypass requirements; Counts Four and Eleven assert that the City repeatedly failed to report numerous noncompliance events; Counts Five and Twelve allege that defendant **[**14]** failed to monitor water quality and effluent flow as required by the Permits; Counts Six and Thirteen concern alleged violations of maintenance and operations standards contained in the Permits. Plaintiffs now move for summary judgment as to Counts One, Two, Three, Four, Five, Eight, Nine, Ten, Eleven, and Twelve; defendant has filed cross motions to dismiss or for summary judgment as to Counts Two, Three, Four, Nine, Ten, and Eleven. Defendant has also moved this court to reconsider its earlier denial of summary judgment as to Counts Six and

[6] *See Sierra Club v. Union Oil Co. of California, 813 F.2d 1480, 1491 (9th Cir. 1987)*(stating that the Act and the regulations promulgated thereunder do not excuse "rare" violations).

[7] The Mokapu Outfall is located at a depth of approximately 100 feet, less than one mile off Mokapu Point at the northern tip of Kailua Bay. The Outfall is designed to carry the combined flows of the Kailua and Kaneohe Plants, as well as much smaller flows from the Ahuimanu and Marine Corps Base Hawaii (formerly known as Kaneohe Marine Corps Air Station) sewage plants.

[8] BOD measures organic substances in sewage that bind and deplete oxygen, and thereby degrade water quality.

[9] Suspended solids are solids contained in the effluent, which may serve as carriers for bacteria and viruses, cause turbidity, and lead to sedimentation of coral reefs.

Thirteen. [10]

**[**15]** *STANDARD OF REVIEW*

I. Dismissal Under *Rule 12(b)(6)*

A motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. A complaint should not be dismissed unless it appears to a certainty that plaintiff can prove no set of facts which would entitle the plaintiff to relief. *Neitzke v. Williams, 490 U.S. 319, 326-27, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989)*; *Fidelity Fin. Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1435 (9th Cir. 1986)*, *cert. denied, 479 U.S. 1064, 93 L. Ed. 2d 998, 107 S. Ct. 949 (1987)*; *Stender v. Lucky Stores, Inc., 766 F. Supp. 830, 831 (N.D. Cal. 1991)*. All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. *Stender, 766 F. Supp. at 831*.

To the extent, however, that "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." *Fed. R. Civ. P. 12(c)*.

II. Summary Judgment

*Rule 56(c)* provides that summary judgment shall be entered when:

> The pleadings, depositions, answers to interrogatories, and admissions on file, **[**16]** together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

*Fed. R. Civ. p. 56(c)*. The moving party has the initial burden of demonstrating for the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)* (citing *Adickes v. S.H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*). However, the moving party need not produce evidence negating the existence of an element for which the opposing party will bear the burden of proof at trial. *Id. at 322*.

Once the movant has met its burden, the opposing party has the affirmative burden of coming forward with specific facts evidencing a need for trial. *Fed. R. Civ. P. 56(e)*. The opposing party cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant's evidence at trial. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)*; *Fed. R. Civ. P. 56(e)*. There is no genuine issue of fact "where the record taken as a whole could not lead a rational **[**17]** trier of fact to find for the nonmoving party." *Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (citation omitted).

At the summary judgment stage, this court may not make credibility determinations or weigh conflicting evidence. *Musick v. Burke, 913 F.2d 1390, 1394 (9th Cir. 1990).* **[*1108]** The standard for determining a motion for summary judgment is the same standard used to determine a motion for directed verdict: does the evidence present a sufficient disagreement to require submission to a jury or is it so one-sided that one party must prevail as a matter of law. *Id.* (citation omitted).

*DISCUSSION*

I. DO PLAINTIFFS HAVE STANDING TO ASSERT A CAUSE OF ACTION FOR WATER QUALITY VIOLATIONS (SECOND AND NINTH CAUSES OF ACTION)?

Every state is required to promulgate water quality standards, which must be accepted by the EPA administrator. *33 U.S.C. § 1313(a)*. If it is determined that water quality cannot be maintained or achieved under the normal effluent limitations, [11] the Act authorizes the imposition of stricter effluent limitations in order to attain and maintain water quality. *33 U.S.C. § 1312*, **[**18]** *33 U.S.C. § 1311(b)(1)(C)* (requiring

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[10] The court notes that, just prior to the hearing date on this motion, plaintiffs filed a supplemental brief indicating the number of violations which the City has allegedly committed since the close of 1993. While the court appreciates plaintiffs' diligence, plaintiffs were not requested to file this supplemental information with the court; the court requested only that plaintiffs submit an update concerning the status of the petition for rehearing in *NWEA*, *infra.* Hence, the plaintiffs' filing of supplemental information relating to the 1994 violations, in the absence of leave from this court, violated Local Rule 220-4 ("Any further or supplemental briefing shall not be submitted without leave of court."). The court will accordingly disregard this information in its analysis of the City's liability.

[11] An effluent limitation is measured at the source of the discharge (treatment plant) before it is released into the ocean. *40 C.F.R. § 122.2*. It is a measurement and restriction of the end-of-the-pipe discharge. A state water quality standard, in contrast, is not a direct measurement of pollutant discharge. It is a measurement of surrounding ocean and is expressed in narrative and numerical form. *See* Hawaii Administrative Rules, Title 11, Department of Health, Chapter 54, Water Quality Standards.

by 1977 any more stringent standard for effluent limitations necessary to meet water quality standards); *40 C.F.R. § 122.44 (d)(1)(iii)*.

The Act also provides an elaborate mechanism for establishing effluent limitations based on water quality standards: if the EPA finds a need to protect water quality in a given area, it will hold a public hearing. The objective of this hearing is to set the correct effluent limitation to achieve the desired water quality, in light of **[**19]** both the economic and social costs attendant thereto and the available technology. *33 U.S.C. § 1312*. Effluent limitations are revised by the EPA after consultation with agencies and interested persons. *33 U.S.C. § 1314*.

The Ninth Circuit has, in the past, recognized that "it is not the water quality standards themselves that are enforceable in *section 1311(b)(1)(C)*, but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards." *Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 850 (9th Cir. 1987)*. In fact, one court has expressly held that "if a state water quality standard has not been incorporated into an NPDES permit through an effluent limitation, it is outside the scope of section 301(b)(1)(C)." *McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182, 1200 (E.D. Cal. 1988)*.

The Permits which DOH issued to the Kailua and Kaneohe Plants contain not only end-of-the-pipe effluent limitations but also receiving water quality limitations. The first issue raised in this summary judgment motion is a question of law: do the plaintiffs, as citizens, have standing to enforce the receiving water **[**20]** quality limitations included in the permit?

This court's analysis is guided primarily by a recent opinion of the Court of Appeals for the Ninth Circuit, *Northwest Environmental Associates v. City of Portland (NWEA), 11 F.3d 900, 1993 U.S. App. LEXIS 32023 (9th Cir. 1993)*. The question addressed by the *NWEA* court was as follows: Are expressly stated permit conditions prohibiting discharges that cause water quality violations enforceable by citizens? *NWEA* at 907. The Ninth Circuit concluded, after an exhaustive review of the legislative history and of the practical realities of enforcing water quality standards, that the 1972 amendments to the Act rendered water quality standards unenforceable by citizen suits unless they have been translated into end-of-the-pipe effluent limitations. *Id. at 911*.

In *NWEA*, the Ninth Circuit acknowledged that, while the cases it cites regarding unenforceability of water quality standards by citizens (i.e., *Oregon Natural Resources Council* and *MESS)* are factually distinguishable, they stand for the proposition that "whenever courts have been faced with the question [of enforcing water quality standards], **[**21]** the answer has been that citizen suits **[*1109]** cannot be used to enforce water quality standards." *Id. at 907, 909*. The court then emphasized that not a single case could be found in which a court held that citizen suits could be used to enforce water quality standards, "whether the water quality standards were incorporated in a NPDES permit or not." *Id. at 907-08*.

After citing the provisions of the Act which concern citizen suits and water quality standards, the *NWEA* court concluded that the following statutory scheme exists:

> (1) *§ 1365(a)* allows citizen suits to enforce effluent limitations;
>
> (2) *§ 1365(f)* defines effluent limitations as end-of-the-pipe limitations and permit violations;
>
> (3) *§§ 1311 et seq.* establish a NPDES permit system to require end-of-the-pipe effluent limitations tailored to achieve water quality standards.

*Id. at 908*.

The *NWEA* court examined the statutory requirements for the issuance of NPDES permits, pursuant to *33 U.S.C. § 1342*. After asserting that these statutory sections require pollutant dischargers to meet effluent limitations calculated to achieve water quality standards, it concluded that "none of these sections, **[**22]** however, require that a permittee directly comply with water quality standards. Rather, it is the duty of the permit-issuing authority to include in the permit end-of-the-pipe effluent limitations that will ensure that water quality standards are met." *Id.* (citing *Oregon Natural Resources Council, 834 F.2d at 850*).

The court then focused on the permit issued to the City of Portland. The permit stated that "notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards as adopted in OAR 340-41-445 except in the following defined mixing zone . . . ." *Id. at 906-07* (citing 1984 Permit, E.R. 223). The court held that this permit failed to "set out such [effluent] limitations as to the CSOs (combined sewer overflows)." The court concluded that, as a result of the permit's failure to set forth water quality standards as effluent limitations, the plaintiffs had no standing to sue under *33 U.S.C. § 1365*. *Id. at 909*.

Although the court could have terminated its standing analysis

at that point, it instead conducted an exhaustive analysis of the legislative **[**23]** history of the Act and of the 1972 amendments, which drastically altered the enforcement scheme. The court first recognized that *33 U.S.C. § 1365(f)* puts no explicit limits on the types of permit conditions that citizens can enforce. *Id.* (citing 1972 U.S.C.C.A.N. at 3747)("In addition to violations of section 301(A) citizens are granted authority to bring enforcement actions for violations of . . . any condition of any permit issued under section 402."). The court asserted, though, that this broad grant of authority did not exist in a vacuum: its breadth is in fact directly contradicted by a more limited jurisdictional statement within the same document. In this earlier statement, the Senate Committee on Public Works stated that citizens could bring enforcement actions "against those who violate effluent standards or compliance orders." *Id.* (citing 1972 U.S.C.C.A.N. at 3677).

The *NWEA* court then assessed the balance of the legislative history surrounding the 1972 amendments to the Act. Prior to 1972, the federal government used water quality standards to protect and preserve the nation's bodies of water. Under the pre-1972 legislation, the federal government could bring **[**24]** an enforcement action whenever it determined that water quality standards were being violated; this approach proved ineffective, though, as enforcement of water quality standards was practically non-existent. *Id.* (citing Jeffrey M. Gaba, Federal Supervision of State Water Quality Standards Under the Clean Water Act, *36 Vand. L. Rev. 1167, 1179 (1983)*).

In 1972, the Act was amended, so that enforcement would focus on the quality and nature of the effluent being discharged into the receiving waters, rather than on the quality of the receiving waters themselves. While plaintiffs in this case argue that the amendments simply added end-of-the-pipe effluent limitations as an alternative enforcement measure [to the previously established **[*1110]** water quality standards], the Ninth Circuit found that the 1972 amendments "reflect a 180 degree shift in the government's attempts to control water pollution." *Id. at 909*. In essence, the court determined that end-of-the-pipe effluent limitations completely replaced water quality standards as enforcement measures. Water quality standards remain only a goal which end-of-the-pipe limitations strive to reach:

> This change in emphasis to an **[**25]** act geared towards discharge limits is reflected throughout the legislative history. *See, e.g.*, 1972 U.S.C.C.A.N. 3675 ("The legislation recommended by the Committee proposes a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits."). Although the 1972 Amendments retain some role for water quality standards, *see 33 U.S.C. § 1312* and *1313*, that role has changed. Prior to 1972, water quality standards served as both the end goal and the mechanism for achieving that goal. *Under the 1972 Amendments, water quality standards remain the goal, however discharge limits have taken over as the mechanism. See* 1972 U.S.C.C.A.N. 3675 ("The basis of pollution prevention and elimination will be the application of effluent limitations. *Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement.").*

*Id. at 909-10* (emphasis added).

The court then gave several examples from the legislative history in which legislators and policy-makers described the use of water quality standards as the goal to be reached through enforcement of end-of-the-pipe **[**26]** effluent limitations. *Id. at 910* (citations omitted). These examples also emphasize that *33 U.S.C. § 1313*, which assigns the new role to water quality standards, was intended as a means "to determine if more restrictive effluent limitations may be required" [12]; this section does not "weaken the effluent limitation approach and [restore] the old water quality standard based approach to water quality control[.]" [13]

The *NWEA* court discussed the reasons for the switch in enforcement mechanisms. *Id. at 910-11*. It first noted the difficulty litigants had experienced in proving that a defendant's discharges were in fact the cause of poor **[**27]** water quality in the receiving waters, where the water received discharges from more than one plant. The effluent limitation enforcement scheme was designed to give the courts a simpler, more objective task:

> Now in order for the court to determine liability, it need only compare the quality and quantity of the alleged polluter's discharge to the limits set forth in the applicable NPDES permit. If the discharges exceed the permit limits, the discharger has violated the Act; if they do not, there is no violation or liability.

*Id. at 910*.

Although the plaintiffs in this case contend that water quality

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[12] *See* Sen. Consideration of the Report of the Conference Committee, reprinted in 1 A Legislative History of the Water Pollution Control Act Amendments of 1972 (1972) (Legislative History) at 171 (statement of Sen. Muskie).

[13] *See* House Consideration of the Rept. of Conf. Comm. reprinted in Legislative History at 246 (statement of Sen. Harsha).

standards, when listed as a permit condition, provide a second or alternative measurement by which a court can find liability, the *NWEA* court rejected this "alternatives" argument as contrary to purpose of the amendments: "The enforcement of a general water quality maintenance condition in a permit, however, would require the court to engage in just the subjective analysis of technological considerations that Congress sought to avoid under *§ 1365*." *Id.* (citing 1972 U.S.C.C.A.N. at 3745 ("An alleged violation of an effluent control limitation or standard, would **[**28]** not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision.")).

The Ninth Circuit also considered the practical problems inherent in the "alternative enforcement" scheme suggested by the plaintiffs. It asserted that such an approach would place modern dischargers under the **[*1111]** same disadvantage faced by pre-1972 dischargers: the legality of their actions would be "dependant [sic] on natural conditions such as the weather and third parties' discharges." *Id.* (citation omitted). Thus, in light of the multitude of other factors which affect water quality standards in the receiving waters, no amount of planning or care could protect a discharger from potential liability. The court found this strict liability approach both unfair and untenable: "given the extreme cost of pollution abatement," dischargers (i.e. industries and cities) must have the ability to plan for the future with the assurance that, through such planning, they can keep themselves "on the correct side of the law." *Id. at 911*.

The *NWEA* court **[**29]** summarized its review of the legislative history as follows: the 1972 amendments (1) instructed courts to make liability determinations objective and non-technical, and (2) emphasized that water quality standards should be translated into end-of-the-pipe effluent limitations. In light of these instructions, the *NWEA* court was "convinced . . . that the single reference to 'any condition of any permit' cannot be read as broadly as NWEA suggests without eviscerating Congress's intent to restructure and revamp the statute. . . . Given the legislative history and the practical problems that NWEA's interpretation of the statute would entail, the court finds that under *33 U.S.C. § 1365*, water quality standards are unenforceable by way of citizen suit unless they have been translated into end-of-the-pipe effluent limitations." *Id.* Accordingly, the Ninth Circuit affirmed the district court's finding that the plaintiffs lacked federal jurisdiction to enforce the water quality conditions of the NPDES permits.

This court must now examine the case before it to determine whether the *NWEA* holding controls. Plaintiffs, in addition to arguing that the Ninth Circuit's holding in *NWEA* **[**30]** is absolutely incorrect, [14] **[**31]** contend that several distinctions exist between this case and *NWEA* which compel this court to reach a different result from that reached in *NWEA*. After a careful review of the points raised by plaintiffs, this court finds those distinctions insufficient to place this case beyond the reach of *NWEA's* broad holding. Consequently, the court must dismiss the claims relating to water quality standards [15] because the plaintiffs have no standing to assert those claims in a citizen suit in federal court. The court accordingly grants defendant's motion to dismiss and denies plaintiffs' motion for summary judgment as to these counts.

Plaintiffs primarily assert that, unlike the permit at issue in *NWEA*, the permits held by the Kailua and Kaneohe Plants contain specific water quality standards (described by the plaintiffs as "quantitative conditions"). The *NWEA* permit merely incorporated by reference the statutory water quality standards enacted by the State of Oregon (described by the plaintiffs as "narrative conditions"). The plaintiffs view this distinction as significant for two reasons: first, the *NWEA* holding as to "narrative conditions" should not affect specific water quality ("quantitative") permit conditions, and second, the practical problems cited by the *NWEA* court would not exist here because the permit conditions at issue are specific, well designed **[*1112]** and easily enforced. The court will address each of these in turn.

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[14] The plaintiffs emphasize that *NWEA* is the first appellate case to ever hold a permit condition unenforceable under any environmental statute.

Secondly, according to the plaintiffs, many of the cases relied on by the Ninth Circuit were factually distinguishable because they involved "non-point source pollution", as opposed to "point source pollution." Point source pollution essentially includes all discharges from pipes, channels, or other confined conveyances, and are regulated through the NPDES permit program in *33 U.S.C. § 1342*. In contrast, non-point sources include runoff from farms, mines, construction sites, and timber cutting. Nonpoint sources are not regulated through the permit program, but are instead addressed in the Act by three different land use planning processes. *See 33 U.S.C. §§ 1313(e)*, *1288*, *1281*. Plaintiffs argue that the *NWEA* court should not have relied on non-point source cases to determine standing in a point source case.

Finally, the plaintiffs mention that the status of *NWEA* is shaky. They emphasize the vigorous dissent by Judge Pregerson, and caution that there is a petition pending for rehearing en banc. As of the date and time of this order, that petition has not been granted.

[15] These are the Second (Kailua) and Ninth (Kaneohe) claims for relief in the complaint.

A. *Narrative Versus Quantitative Conditions*

While it is true that the permit at issue in *NWEA* incorporated by reference Oregon's statutory water quality standards, the *NWEA* court **[**32]** did not, as the plaintiffs do, distinguish narrative conditions from quantitative ones. There is no indication that the Ninth Circuit found the permit condition objectionable because it contained only a narrative condition, or limited its holding to only narrative conditions. In fact, in its analysis of the legislative history and the practical problems posed by water quality standard enforcement measures, the court repeatedly used the generic phrases "permit" or "permit condition", unqualified by the words "narrative" or "incorporated by reference". For example, the court's conclusion that "the permit at issue in the instant case fails to set out such limitations as to the CSOs" [16] indicates that the water quality standards contained in the permit are objectionable because they have not been translated into end-of-the-pipe effluent limitations. The court does not even suggest that the standards are unenforceable because they have been incorporated by reference to the statute, rather than made explicit.

**[**33]** The *NWEA* court's intent to render unenforceable all water quality standard permit conditions (which have not been translated into end-of-the-pipe effluent limitations) is even more apparent in the following statements:

> The enforcement of a general water quality maintenance condition in a permit, however, would require the court to engage in just the subjective analysis of technological considerations that Congress sought to avoid under § 1365. Congress's emphasis on the evidentiary simplicity of enforcement actions precludes the enforcement of water quality standards that have not been translated into effluent discharge limitations.

*Id. at 910*.

> This court [is convinced] that the single reference to "any condition of any permit" cannot be read as broadly as NWEA suggests without eviscerating Congress's intent to restructure and revamp the statute. . . . The court finds that under *33 U.S.C. § 1365*, water quality standards are unenforceable by way of a citizen suit unless they have been translated into end-of-the-pipe effluent limitations.

*Id. at 911*.

Plaintiffs present to the court various authorities to support their position that water **[**34]** quality permit conditions should be enforced in spite of the *NWEA* holding. First, plaintiffs cite many cases in which courts have allowed citizens to enforce permit conditions pursuant to *§ 1365(f)*. *NRDC v. Vygen Corp., 803 F. Supp. 97, 103 (D. Ohio 1992)* (holding reporting violations enforceable under the Act); *Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1115 (4th Cir. 1988)*(same); *SPIRG v. P.D. Oil & Chemical Storage, Inc., 627 F. Supp. 1074, 1087-88 (D.N.J. 1986)*; *U.S. v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979)*; *Pymatuning Watershed Citizens for a Hygienic Environment v. Eaton, 506 F. Supp. 902 (W.D. Pa. 1980)*, *aff'd*, *644 F.2d 995 (3rd Cir. 1981)*(holding conditions relating to maintenance enforceable); *Connecticut Fund for Envir. v. Raymark Industries, 631 F. Supp. 1283, 1285 (D. Conn. 1986)*(holding condition regulating discharge into a lagoon to be enforceable). None of these cases, however, specifically hold that a water quality condition in a permit is enforceable.

Plaintiffs do cite an unpublished opinion from the Northern District of California, in which Judge Patel held enforceable water quality standards found **[**35]** in the permit. *U.S. v. Louisiana-Pacific Corp.*, Cv. No. C 78-0567 (N.D. Cal. 1990). While the court appreciates Judge Patel's analysis of the issue, it notes that unpublished opinions cannot be used as authority in either the district or appellate courts. *Ninth Circuit Rule 36-3*. Additionally, while *Louisiana-Pacific* was not specifically referenced by the Ninth Circuit in *NWEA*, it would appear that the 1993 *NWEA* opinion supersedes and implicitly **[*1113]** overrules Judge Patel's 1990 holding as to the enforceability of the water quality permit condition.

Finally, the plaintiffs align themselves with Judge Pregerson in his dissent in *NWEA*. As Judge Pregerson interprets the legislative history, the 1972 amendments to the Act were intended "to improve enforcement, not to supplant the old system." *NWEA, 11 F.3d at 912* (Pregerson, J., dissenting). He points out that certain water quality standards cannot be expressed as effluent limitations, and that the regulatory scheme allows states to express criteria "'as constituent concentrations, levels, or narrative statements . . . .'" *Id.* (Pregerson, J., dissenting) (citing *40 C.F.R. 131.3(b) (1992)*). Judge Pregerson also asserts **[**36]** that the Act permits states to adopt stricter controls than those implemented by the federal government under the Act. *Id.* (Pregerson, J., dissenting) (citing *33 U.S.C. § 1370*).

However, in determining whether the *NWEA* holding applies to the case presently pending, the court cannot ignore that Judge Pregerson dissents specifically because he objects to the breadth of the majority's language: "By interpreting *§ 1365(a)(1)* to exclude citizen suit enforcement of water quality standards that are not translated into quantitative [end-

[16] *NWEA, 11 F.3d at 909*.

of-the-pipe] limitations, the majority opinion immunizes the entire body of qualitative regulations from an important enforcement tool." *Id.* (Pregerson, J., dissenting). Thus, Judge Pregerson interprets the majority opinion as applying not only to narrative conditions, but to all water quality permit conditions which have not been translated into end-of-the-pipe effluent limitations. Such is the condition at issue in the Kailua and Kaneohe Permits. Judge Pregerson's dissent therefore contributes to this court's finding that *NWEA* compels the outcome of the standing issue in this case.

In short, despite plaintiff's claims to the contrary, **[**37]** there is not a single statement in the *NWEA* opinion which can be construed as limiting the holding to permits containing narrative water quality conditions. In light of the *NWEA* court's extensive consideration of legislative history and the realities of Clean Water Act litigation, it is not for this court to limit the Ninth Circuit's decision to the facts before it. [17]

B. *Practical Enforcement Problems*

The court now turns to the plaintiffs' contention that the water quality standards in the Kailua and Kaneohe Permits would not cause practical enforcement problems, and should therefore be enforced despite the holding in *NWEA.* According to the plaintiffs, the permit conditions for the pollutants at issue (ammonia nitrogen and enterococcus) are specific, well designed and easily enforced. The Permits specify **[**38]** the location and monitoring protocols for these pollutants and allow the City to be excused from violations if the City can prove that the violation was not due to the influence of its discharge on the receiving waters. Thus, according to the plaintiffs, the City has both a permit provision and a scientific methodology built into the Permits to avoid liability for violations, and is thereby protected from arbitrary enforcement.

The court agrees that, because the Kailua and Kaneohe Permits explicitly allow the dischargers to escape liability for violations caused by others, they are distinct from those at issue in *NWEA.* However, this distinction does not render the permit condition enforceable. First, under the law, lack of causation has historically been a defense available to all dischargers. [18] The provision **[*1114]** in the Kailua and Kaneohe Permits which expressly exempts a discharger from liability for violations he does not cause simply internalizes the statutory and common law liability; it does not give the dischargers an extra form of protection.

**[**39]** In addition, even if this court were to determine that the permits provide a more reliable means of determining causation, and therefore offer the dischargers a greater degree of protection than the permits considered in *NWEA*, the breadth of *NWEA's* holding still prevents citizen enforcement of the water quality conditions. The Ninth Circuit, in deciding whether the legislative history supported its finding that plaintiffs lacked standing to sue, addressed these practical concerns as *one prong* of its analysis: "Practical considerations also militate in favor of an interpretation that does not allow for jurisdiction in this case." *NWEA, 11 F.3d at 910*. The court does not state that its holding rests on its assessment of the practical realities of enforcement and planning, nor does it imply that such an assessment is a crucial element of the standing determination. [19] Instead, the "practical considerations" segment, while important, appears simply to lend support to the majority's conclusion. Hence, a contrary finding by this court as to the practical realities faced by the dischargers neither necessitates nor warrants a contrary finding as to standing.

**[**40]** C. *Estoppel*

Next, the plaintiffs contend that the defendant should be estopped from complaining about the Permits for two reasons. Plaintiffs first assert that, because defendant failed to challenge the Permits when they were issued, it has lost "forever the right to do so." *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, 913 F.2d 64, 78 (3rd Cir. 1990), cert. denied, 498 U.S. 1109, 111 S. Ct. 1018, 112 L. Ed. 2d 1100 (1991)*; *Connecticut Fund for the Envir., 623 F. Supp. 207, 216-17* ("By failing to challenge its NPDES

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[17] This court, in deciding the cases before it, is bound to follow existing precedent; it cannot speculate as to the future actions and decisions of the Court of Appeals for the Ninth Circuit.

[18] However, proof problems arose when water quality standards were used for enforcement; courts had difficulty determining who, among various dischargers, caused the violation. Congress acknowledged this difficulty in 1972, when it amended the Act to establish effluent limitations as the new enforcement mechanism in order to facilitate liability determinations:

> Such direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated.

*EPA v. State of California, 426 U.S. 200, 204, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976)*.

[19] In fact, the practical considerations paragraph is the very last piece of the *NWEA* court's extensive analysis. In light of its placement in the opinion, this court is hesitant to find that the Ninth Circuit placed great importance on this aspect of the case in finding lack of standing.

permit under state law at a time when its purported legal deficiency should have been apparent to the defendant as it is now, the defendant is precluded from doing so in this action.").

The court agrees that, had the defendant known of any deficiencies when the Permits were issued, it would have been required to challenge them at that time. However, this principle does not estop the City from raising this issue now, for two reasons. Until the Ninth Circuit determined seven months ago that the water quality condition could not be enforced in a citizen suit, there was no "apparent legal deficiency" in the Permits of which the **[**41]** defendant should have been aware. As the plaintiffs note, there is ample case law to support the enforceability of any permit condition. Moreover, the holding of *NWEA*, and the holding of this case, address only the enforceability of this provision in a citizen suit: this case has no bearing on the ability of a federal or state agency to enforce the Permits. This court does not hold that the water quality condition is deficient in and of itself; the condition is simply not susceptible to enforcement by private citizens.

The second estoppel argument is based on jurisdiction: plaintiffs assert that only state courts can review the validity of a state-issued NPDES permit. *Municipal Authority of the Borough of St. Marys v. U.S.E.P.A., 945 F.2d 67, 71 (3rd Cir. 1991)*; *American Paper Institute, Inc. v. U.S.E.P.A., 890 F.2d 869, 875 (7th Cir. 1989)*; *Shell Oil Co. v. Train, 585 F.2d 408 (9th Cir. 1978)*. Thus, according to the plaintiffs, this court can only enforce the Permits; the defendant cannot challenge, and this court cannot review, the Permits' validity. The court agrees with plaintiffs' characterization of this court's jurisdiction, but reaffirms that neither the Ninth **[**42]** Circuit in *NWEA* nor this court holds the permit condition invalid on its face. Instead, this court has limited its review to the enforceability of the water quality condition by citizens.

In sum, this court must follow *NWEA's* holding that plaintiffs lack standing to enforce, through a citizen suit, the water quality **[*1115]** permit conditions which have not been translated into end-of-the-pipe effluent limitations. This court grants the defendant's motion to dismiss, and denies the plaintiffs' motion for summary judgment, as to Counts Two and Nine of the Complaint.

II. DO PLAINTIFFS HAVE A CAUSE OF ACTION FOR MAINTENANCE AND OPERATIONS CONDITIONS (THE SIXTH AND THIRTEENTH CAUSES OF ACTION)?

The second element of Defendant's Third Motion to Dismiss or for Summary Judgment alleges that plaintiffs have no standing to assert claims for violation of the maintenance and operations conditions of the Kailua and Kaneohe Permits. The defendant had previously raised this issue in its Motion to Dismiss or in the Alternative for Summary Judgment or Partial Summary Judgment dated July 27, 1992. In its Order dated October 27, 1992 ("1992 Order"), this court denied defendant's motion as to this **[**43]** claim. [20] Defendant has refiled this motion, asking the court to reconsider its decision in light of the Ninth Circuit's decision in *NWEA*.

**[**44]**

The disposition of a motion for reconsideration is within the discretion of the district court and will not be reversed absent an abuse of discretion. *Plotkin v. Pacific Tel. & Tel. Co., 688 F.2d 1291, 1292 (9th Cir. 1982)*. There is a "compelling interest in the finality of judgments which should not be lightly disregarded." *Rodgers v. Watt, 722 F.2d 456, 459 (9th Cir. 1983)*.

It is well settled in the Ninth Circuit that a successful motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision. Second, a motion for reconsideration "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Painting Ind. of Hawaii v. U.S. Dept. of Air Force, 756 F. Supp. 452 (D. Haw. 1990)* (citations omitted). Courts have established only three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice. *Id.* The District of Hawaii has implemented **[**45]** these standards in Local Rule 220-10.

According to the defendant, *NWEA* constitutes a change in the controlling law which compels the court to revise its earlier

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[20] In its 1992 Order, this court held that the plaintiffs satisfied the notice requirements established in *33 U.S.C. § 1365(b)(1)(A)* as to all of the claims in the complaint. The Order also addressed defendant's motion for summary judgment as to the maintenance and operations claims, which was based on defendant's allegation that plaintiffs had failed to demonstrate that defendant had violated an alleged "objective standard" within the Act. The court held that the Act does not require that violation of an objective standard be alleged, and that defendant's misguided reading of the legislative history would read the maintenance and operating requirements out the NPDES permits issued to Kailua and Kaneohe.

Defendant repeats those arguments in the instant motion, contending that the *NWEA* opinion changes the legal analysis required. For the reasons stated below, the court disagrees and reaffirms its 1992 Order denying summary judgment as to the maintenance and operations claims.

finding. In the defendant's reading of *NWEA*, the Ninth Circuit held that the *only* permit provision on which a citizen can bring an action is the effluent limitation condition. Defendant claims that the legislative history cited by the *NWEA* court fails to support a claim for a violation based on operations and maintenance permit conditions. Consequently, this court would violate the legislative intent of the Clean Water Act, as described in *NWEA*, if it allowed plaintiffs to raise operations and maintenance issues as grounds for enforcement.

The court disagrees with defendant's reading of *NWEA*. As discussed extensively in *Part I, supra*, the *NWEA* court decided only the issue of whether water quality permit conditions could form the basis of a citizen suit where they had not been translated into effluent limitations. It neither considered nor made reference to the relationship between effluent limitations and other types of permit conditions as potential grounds for enforcement. It therefore cited **[**46]** only the legislative **[*1116]** history relevant to the water quality standard/effluent limitation debate and did not mention the body of legislative materials surrounding other provisions of the NPDES enforcement scheme. In short, defendant completely overstates the breadth of the *NWEA* opinion by claiming that, because the Ninth Circuit explicitly disallowed citizen enforcement of water quality permit conditions in favor of enforcement based on effluent limitations, it necessarily prohibited citizen enforcement of all permit conditions other than effluent limitations.

The Ninth Circuit's decision in *NWEA* in no way changed the law regarding the enforcement of maintenance and operation permit conditions. Accordingly, the court denies defendant's motion to reconsider its prior ruling denying defendant's Motion to Dismiss or for Summary Judgment as to the Maintenance and Operations Claims.

III. SUMMARY JUDGMENT AS TO DEFENDANT'S ALLEGED FAILURE TO MEET SECONDARY TREATMENT LEVELS AT THE PLANTS (FIRST AND EIGHTH CLAIMS FOR RELIEF)

A. *Have the Plaintiffs Satisfied the Gwaltney Doctrine?*

The Supreme Court determined in *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, **[**47]** 484 U.S. 49, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987)*, that citizens cannot bring suits to enforce "wholly past violations." This ruling requires that citizens allege "ongoing violations" of the Act, not just violations that had completely ceased at the time the lawsuit was filed.

In its 1992 Order, this court unequivocally held that the allegations in plaintiffs' complaint satisfied the requirements of *Gwaltney:*

> *Gwaltney*, however, does not require, as the City contends, that a plaintiff prove that a defendant is in violation of the Act at the time of the commencement of the suit. Rather, all that is required is that a defendant be alleged to be in continuous or intermittent violation of the Act. Any other construction of § 505 reads the word "alleged" out of the Act. (citations omitted).
>
> Paragraphs 6 and 58 of plaintiffs' complaint contain specific allegations that the City's conduct is of an ongoing nature. As such, it satisfies the requirement of § 505 as interpreted by *Gwaltney*.

1992 Order at 12; *see also Sierra Club v. Union Oil Co. of California (Union Oil II), 853 F.2d 667, 670 (9th Cir. 1988)* ("Sierra Club had to make good faith allegations of **[**48]** continuous or intermittent ongoing NPDES permit violations for jurisdiction to attach.").

The Ninth Circuit has explained that the phrase "ongoing violations" in *Gwaltney* is a term of art that requires the plaintiff to show that there exists a reasonable likelihood of intermittent or sporadic violations in the future:

> [A] citizen plaintiff may prove ongoing violations either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.

*Union Oil II, 853 F.2d at 671*. Moreover, "intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Id.* (citing *Chesapeake Bay Foundation v. Gwaltney, (Gwaltney II) 844 F.2d 170, 172 (4th Cir. 1988))*.

In assessing whether there are "ongoing violations," a court may consider any remedial actions taken by the defendant and "any other evidence [21] presented during the proceedings that bears on whether the risk of defendant's continued violation had been completely eradicated **[**49]** when the citizen plaintiffs filed suit." *Union Oil II, 853 F.2d at 671*. Significantly, the court's assessment of the likelihood of future violations should begin with the date on which the complaint was filed; the court is not to view the likelihood of continuing violations from its present vantage-point.

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[21] Post-complaint violations can constitute hard evidence of "ongoing violations." ***Sierra Club v. Union Oil Co. of California (Union Oil III), 716 F. Supp. 429, 433 (N.D. Cal. 1988)***.

*Chesapeake Bay Foundation v. **[*1117]** Gwaltney, (Gwaltney III) 890 F.2d 690, 693 (4th Cir. 1989)*(finding that proper point for which to assess the likelihood of continuing violations is not the present, with its advantage of hindsight, but the time of the original suit); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1134-35 (11th Cir. 1990)*(stating that the court must always look to the date the complaint was filed).

This court has already determined that the plaintiffs had no duty to actually **[**50]** prove the existence of an ongoing violation at the time they filed the complaint; their allegations thereof, if reasonable and made in good faith, are sufficient to invoke this court's jurisdiction. *See* 1992 Order at 12. The court must now determine whether, as of May 5, 1992, [22] a reasonable trier of fact could have found ongoing violations (either continuing violations or likelihood of recurring intermittent or sporadic violations) by the City. [23]

The City primarily argues that, in December of 1991, it had installed a "new upgraded trickling filter process" which would provide secondary treatment at the Kailua Plant. The City claims that, since the new filter was installed, the Kailua Plant has been in compliance with **[**51]** secondary treatment requirements. Hence, according to the City, the plaintiffs' allegations of future violations were groundless.

The plaintiffs acknowledge that the City made improvements to the trickling filter in December of 1991. However, the plaintiffs have presented substantial evidence that the new filter, at the time of its installation, could not and was not expected to, "completely eradicate the risk" of future secondary treatment violations. *Union Oil II, 853 F.2d at 671*. Plaintiffs cite three fundamental problems at the Kailua Plant which experts believed, as of May 5, 1992, were reasonably likely to continue despite the new filter.

First, plaintiffs offer unrefuted evidence that the Kailua Plant was unable to handle the substantial flows which resulted during periods of heavy rainfall. Although flows as high as 34 million gallons per day (MGD) were recorded as recently as March 1991 and are expected to continue, [24] the Plant operator admitted in a deposition that the Plant could not handle more than 18 MGD. [25] When the Kailua Plant is unable to handle the increased flow, the sewage has to be re-routed (bypassed) to alternative outfalls. In a letter dated October **[**52]** 22, 1991, the Chief Engineer of the Kailua Plant indicated to DOH that "perennial bypassing has been occurring when intense rainfalls result in high flows." [26] These emergency bypasses have, in the past, led to permit violations. [27]

Furthermore, while the plant may recently have achieved technical compliance, there is no indication that the new filter completely eradicated the risk that the Kailua Plant would be unable to handle exceptionally heavy rainfall. In March of 1992, four months after the new filter was installed, a consultant to the City confirmed that bypassing would still be required at flows of over 24 MGD. [28] The anticipated failure of the new filter to manage flows exceeding 24 MGD signifies that, as of **[**53]** May 5, 1992, similar bypassing problems were likely to occur in the future. [29]

**[*1118]** Second, plaintiffs have produced uncontroverted evidence that the Kailua Plant lacks "redundancy" in its treatment units: it has only one major component for each of its major treatment processes. The Director and Chief Engineer of the **[**54]** Kailua Plant specified that "the facility has no redundant primary or secondary treatment units." [30] **[**55]** As a result, whenever a single piece of equipment fails, no replacements are available, thereby

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[22] The complaint was filed on May 5, 1992.

[23] The court notes that the City has raised the *Gwaltney* defense only as to the Kailua Plant. The court will therefore limit its discussion to the likelihood of continuing, intermittent, or sporadic violations at the Kailua Plant.

[24] *See* Exhibit "6" to Plaintiffs' Reply Memorandum to Related Motion at 2-3.

[25] *See* Exhibit "8" to Plaintiffs' Reply Memorandum to Related Motion at 26.

[26] *See* Exhibit "4" to Plaintiffs' Reply Memorandum to Related Motion.

[27] *See* Part IV, *infra.*

[28] *See* Exhibit "5" to Plaintiffs' Reply Memorandum to Related Motion (Ahuimanu-Kaneohe-Kailua Infiltration/Inflow Report, prepared by Barrett Consulting Group, March of 1992)(reporting that the maximum capacity flow that can normally be handled by the Kailua Plant is 12 MGD; when the trickling filter is used, 24 MGD can be accommodated).

[29] See Bell Declaration at PP 13-14; Exhibit "4" to Plaintiffs' Reply Memorandum to Related Motion (October 22, 1991 Letter from Chief Engineer to DOH, admitting that "bypassing is anticipated to continue until such time that the high flows caused by the rains can be reduced. These incidents are the results of shortcomings with the existing systems").

[30] In a letter from Chief Engineer to PTA President of Aikahi Elementary School PTA, dated November 7, 1991, the author admits that the Kailua Plant lacks redundant facilities which necessitates bypassing in times of repairs. *See* Exhibit "7" to Plaintiffs' Reply Memorandum to Related Motion.

causing the Plant to bypass some or all of the treatment units on a temporary basis. [31] In a letter dated December 20, 1991, the Chief Engineer characterized the Plant as "a maintenance nightmare due to a lack of redundant facilities." *See* Exhibit "2" to Plaintiffs' Reply Memorandum to the Related Motion (letter from Sam Callejo to John Felix, Chair of the Public Works and Safety Committee). Significantly, this letter was written at exactly the same time the new filter was installed. Defendant has produced no other evidence of improvements or new machinery which might have increased the redundancy of the Plant. Hence, there is no indication that, as of May 5, 1992, the new filter (or any other innovations) corrected or even ameliorated the redundancy problem.

Third, plaintiffs have demonstrated that the Kailua Plant has a "weaker than normal influent" (influent with lower than average concentrations of BOD and TSS). [32] As a result, in order to meet the Act's 85% removal requirement, Kailua's sewage requires a high degree of treatment. Kailua had, in the past, experienced difficulty meeting this 85% requirement, and was not expected to reach compliance even with the new trickling filter installed in December of 1991. In the September 1991 Memorandum to the Head of the Planning and Public Service Branch cited above, the Superintendent of the Wastewater Treatment and Disposal Branch expressed his fear that, due to the medium to weak influent, "we do not anticipate consistently meeting the 85 percent removal efficiency requirements even though we may meet the 30/30 mg/l concentration limitations." The Superintendent also indicated that his office had failed in its attempt to convince DOH to remove or delete the 85% five-day BOD and TSS removal efficiency requirements for the Kailua Plant. *See* Exhibit "3" to **[**56]** Plaintiffs' Reply Memorandum to the Related Motion. These difficulties were corroborated by the Chief Engineer of the Kailua Plant, who asserted in his December 20, 1991 letter that "the plant, as it operates today, will not meet the requirements of secondary treatment as defined in the Clean Water Act." *See* Exhibit "2" to Plaintiffs' Reply Memorandum to the Related Motion. The predictions of these insiders that the Kailua Plant was unlikely to meet the 85% removal requirement provide a solid basis for plaintiffs' beliefs that, as of May 5, 1992, the risk of future noncompliance was significant.

For the foregoing reasons, the court finds well-supported the plaintiffs' allegation that, on May **[**57]** 5, 1992, there was a significant risk of future violations by the Kailua Plant. Despite defendant's assertions regarding its success, defendant's installation and improvement of the trickling filter did not "completely eradicate" the risks of bypass, redundancy, and removal problems as of May 5, 1992. Plaintiffs thus satisfy the requirements of *Gwaltney*, and can present evidence of violations by the Kailua Plant.

B. *Should the Kailua Plant Claims Be Dismissed as Moot?*

The City contends that, because it has installed the new trickling filter in the Kailua Plant and because the Kailua Plant has not committed any secondary treatment violations **[*1119]** in the last two and a half years, the plaintiffs' claim for injunctive relief is moot. The City also argues that, because the problems of which the plaintiffs complain were solved before the complaint was filed, the plaintiffs' prayer for civil penalties is also moot.

Subject matter jurisdiction is determined with respect to circumstances at the time the complaint is filed. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 2141 n.4, 119 L. Ed. 2d 351 (1992)*. Post-filing events cannot, therefore, strip a court of its properly **[**58]** conferred jurisdiction. *Natural Resources Defense Council v. Texaco Refining & Marketing, Inc., 2 F.3d 493, 503 (3d Cir. 1993)*.

Nonetheless, the doctrine of mootness precludes a court from adjudicating claims that no longer present a concrete and substantial controversy which can be redressed through specific relief. *See U.S. v. Michigan Nat'l Corp., 419 U.S. 1, 4, 42 L. Ed. 2d 1, 95 S. Ct. 10 (1974)*. A defendant bears a "heavy burden" to prove that a lawsuit is moot. *County of Los Angeles v. Davis, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979)*; *Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988)*. The Supreme Court has emphasized that a defendant asserting mootness must demonstrate that it is "*absolutely clear* that the alleged wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 66, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987)* (emphasis in the original); *U.S. v. Phosphate Export Ass'n. Inc., 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)*. In addition, the Supreme Court has distinguished between mootness of the entire case and mootness of one form of relief: **[**59]**

> Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests . . . . The remaining live issues supply the constitutional requirement of a case or controversy.

*Powell v. McCormack, 395 U.S. 486, 496-97 n.8, 23 L. Ed.*

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[31] *See* Bell Declaration at P 16.

[32] *See* Exhibit "3" to Plaintiffs' Reply Memorandum to Related Motion. This September 6, 1991 Memorandum from the Superintendent of the Wastewater Treatment and Disposal Branch to the Head of the Planning and Public Service Branch states: "The strength of the influent is typically considered medium to weak[.]"

2d 491, 89 S. Ct. 1944 (1969)*.

While the Supreme Court in *Gwaltney* did not specifically address whether mootness bars damage claims in addition to claims for injunctive relief, the appellate courts which have ruled on the matter have answered the question in the negative: In Clean Water Act cases, the mooting of injunctive relief does not moot a plaintiff's prayer for civil penalties and thus does not moot the case as a whole. *Natural Resources Defense Council v. Texaco Refining & Marketing, Inc., 2 F.3d 493, 503 (3d Cir. 1993)*; *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp., 993 F.2d 1017, 1020-21 (2d Cir. 1993)* ("We hold . . . that a defendant's ability to show, after suit is filed but before judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil **[**60]** penalties moot."); *Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1135-36 (11th Cir. 1990)* (stating that "the mooting of injunctive relief will not moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed."); *Gwaltney III, 890 F.2d at 696-97 (4th Cir. 1989)* ("The penalty factor keeps the controversy alive between plaintiffs and defendants in a citizen suit . . . even though the ultimate judicial remedy is the imposition of civil penalties assessed for past acts of pollution.").

In *Texaco,* the Third Circuit agreed with the Second and Eleventh Circuits' conclusions regarding mootness of claims for damages. *See 2 F.3d at 503*. The Third Circuit determined that the language and structure of the Clean Water Act supported the conclusion that damage claims could not be mooted by later compliance. Because the Act contains mandatory language concerning the imposition of penalties for proven violation, the court held that "allowing a polluter to escape all liability through post-complaint compliance is at odds with the mandatory language of [the Act]." *Id.* [33]

**[**61]** **[*1120]** The *Texaco* court also found policy reasons which supported this result. First, "the potential imposition of penalties is an important mechanism to deter companies from violating their NPDES permits." *Id.* Second, "if penalty claims could be mooted, polluters would be encouraged to 'delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial.'" *Id.* (citing *Tyson Foods, 897 F.2d at 1137*). Third, the court had difficulty embracing a rule which would allow the mootness of claims to be determined by the "vagaries of when the district court happens to set the case for trial." *Id.*

This court finds the reasoning of the Second, Third, and Eleventh Circuits both cogent and persuasive. Consequently, although neither the Ninth Circuit nor the United States Supreme Court has specifically addressed this issue, the court holds that, even if plaintiffs' claims for injunctive relief are mooted by the City's record of post-complaint compliance, the claims for damages remain unaffected and allow this case to go forward. This result is consistent with **[**62]** Supreme Court instructions to analyze a mootness claim directed at one form of relief separately from a mootness claim directed at another form. *See Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435, 441-42, 80 L. Ed. 2d 428, 104 S. Ct. 1883 (1984)*.

The City claims that the above authorities do not apply to the situation at hand, because they reference post-complaint compliance only. According to the City, the Kailua Plant was in compliance even before the complaint was filed; hence, both the injunction and damage claims should be dismissed for mootness. The City points to the installation of the new trickling filter in December of 1991 as the instrument which solved all of the Kailua Plant's problems.

Having already thoroughly examined the issue of the City's compliance at the time of filing in the preceding portion of this order, the court finds it unnecessary to analyze this issue again. To reiterate its previous conclusion, the court finds that, based on the City-generated documents cited in plaintiffs' papers and the inadequate response filed by the defendant, [34] there was a reasonable likelihood that the violations would continue even after the trickling filter was **[**63]** installed. Thus, the Kailua Plant was not, as defendant claims, in pre-complaint compliance for mootness purposes: at the time of filing, it was not absolutely clear that violations could not reasonably be expected to recur. Having determined that the defendant was not in pre-complaint compliance, the court declines to decide whether the rules cited above governing mootness of damage claims apply only to post-complaint compliance.

The court must, then, consider whether the claims for injunctive relief have in fact been mooted by defendant's post-complaint behavior. The mootness claim is based solely on the fact that the Kailua Plant has not recorded any secondary treatment violations since the complaint was filed.

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[33] The *Pan Amer. Tanning* court reached this same conclusion. *993 F.2d at 1020*: "A rule requiring dismissal of a citizen suit in its entirety based on a defendant's post-complaint compliance appears to conflict with the language of the Act."

[34] Defendant submitted the affidavit of its own expert, who described the various steps taken by the Kailua Plant since the filing of the complaint. These assertions, even if supported, tell the court nothing about the state of the Kailua Plant before the complaint was filed.

The City attributes **[**64]** this success to the construction of a new plant. The new plant is not, however, fully operable, even though it was required to be completed and operating by December 31, 1993. This new plant cannot, therefore, explain the past two years of success. Moreover, until the new plant has been thoroughly tested, particularly during Kailua's rainy season, this court cannot conclude that violations will not occur in the future, when the new plant is used on a daily basis.

The City also contends that the new trickling filter installed in December of 1991 has solved all of the Kailua Plant's treatment problems. While it is true that the new filter has improved the Plant's ability to handle sewage, the new filter is hardly the panacea the City claims it to be. First of all, the **[*1121]** filter does not address the redundancy or weak influent problems cited in the City's own documents. [35] In addition, the Director of the City Water Treatment Plants wrote on the day the filter was installed that the Kailua Plant "will not meet the requirements of secondary treatment as defined in the Clean Water Act." [36] Consultants studying the new filter projected that it could handle flows up to 24 MGD, even though **[**65]** Kailua has experienced in the past, and is expected to experience in the future, flows of up to 34 MGD. [37]

The compliance report prepared for DOH's consent agreement [38] paints an even bleaker picture of the Plant's capacity as of December 31, 1991 (the date of the filter's installation):

> [The Kailua Plant needs] standard operating procedures to handle abnormally high flows or other unusual conditions.
> * * *
> . . . The maximum treatment capacity of Kailua WWTP is *7* MGD. The maximum hydraulic flow capacity is 14 MGD. . . . Kailua WWTP lacks the flexibility of allowing partial bypasses from the treatment units. . . . When influent flows surpass 14 MGD, pretreated (screened and degritted) sewage must be diverted around the primary and secondary treatment units because the influent **[**66]** pumps are not capable of pushing higher flows into the distribution box prior to the primary clarifier.

While this report indicates that improvement of Kailua's pumping capacity was to be completed on July 31, 1992, the City has produced no evidence demonstrating that these improvements were made, or that the Plant is currently able to handle unusually large flows.

In light of the evidence produced, the court finds that, despite Kailua's recent success with its new filter, defendant has not proven that the new filter eliminates the reasonable possibility of future violations. Documents generated by the City indicate that the new trickling filter, while helpful, does not solve all of the old plant's problems.

The court notes that, where past courts have found injunction claims to be moot, future violations were *impossible* due to a drastic change in conditions. *See, e.g.*, *Texaco, 2 F.3d at 502* (finding that **[**67]** an offending outfall was no longer subject to regulation because permit standards had been altered; hence, no future outfall violations could occur); *Pan Amer. Tanning, 993 F.2d at 1019* (finding that all necessary improvements to an internal pretreatment system were completed at time of ruling, and that the plant's settlement with Sewer Board mooted citizens' claims for injunctive relief); *Tyson Foods, 897 F.2d at 1135* (finding that compliance was directly related to Tyson's new facility for wastewater treatment, which the court expected would continue to operate adequately in the future). Thus, where the targeted outfall was no longer subject to regulation, or the offending plant had been replaced with a new facility or completely renovated, the issue was moot because the problem complained of was completely and irrevocably removed, not just temporarily solved. Here, the problem has not been completely and irrevocably removed, because the Kailua Plant is still subject to regulation and still operates with a filter which has not been proven to solve all past problems. Moreover, unlike the new facility in *Tyson*, the new plant is not yet fully functional and thus defendant **[**68]** cannot assure this court of its future compliance. Because the risk of future violations is still present, this court cannot find that plaintiffs' claims for injunctive relief are moot.

C. *Does the Kaneohe Plant's Compliance with the Interim Permit Satisfy the Act?*

The Act clearly requires treatment plants to meet secondary treatment levels by July 1, 1988. *33 U.S.C. § 1311(i)(1)*. However, in 1990, DOH, in recognition of the **[*1122]** City's inability to meet the treatment standards by this deadline, issued to the Kaneohe Plant an administrative Consent Order which set effluent limits lower than those required by the Act. Defendant argues that this administrative action was well within DOH's powers, as enumerated in *33 U.S.C. § 1342(b)*,

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[35] *See* notes 29-31 and accompanying text concerning redundancy and weak influent problems.

[36] *See* Exhibit "2" to Plaintiff's Reply Memorandum to Related Motion.

[37] *See* notes 23, 27.

[38] *See* Exhibit A to Defendant's Supplemental Memorandum, filed on April 29, 1994.

and that this citizen enforcement suit should not be allowed to contravene DOH's authority to set lower limits.

Plaintiffs assert that this court, and all others which have considered the issue, [39] have held that no administrative agency, state or federal, has the power to extend the July 1, 1988 statutory deadline for secondary treatment compliance. The modified effluent limitations contained in the Consent Order issued by DOH to the City were therefore **[**69]** void from the outset, and the City's compliance with them is irrelevant to the City's failure to comply with the Act's requirements.

**[**70]** Congress, in passing the Act, predicted that some dischargers might have financial or logistical difficulty meeting secondary treatment standards by the deadline, which was initially set at July 1, 1977. Consequently, Congress enacted *33 U.S.C. § 1311(i)*, which allows the EPA or a state agency to extend the time for compliance; however, Congress demanded that such extensions last "in no event later than July 1, 1988." *33 U.S.C. § 1311(i)(1)*. Thus, the statutes plainly indicate that Congress set a final compliance deadline of July 1, 1988 for all treatment plants who had not been granted waivers.

It appears that all courts which have considered the flexibility of this rule have concluded that administrative agencies have no power to extend the deadline. In *Bethlehem Steel*, the Third Circuit characterized the compliance deadline as "a rigid guidepost" to which the EPA must adhere: "On the basis of the legislative history and the adjudicated cases, we hold that the EPA is without authority to grant an extension, in NPDES permits, of the July 1, 1977 date." *544 F.2d at 663*.

Later courts faced with cases involving public treatment plants followed suit, holding that the EPA has **[**71]** no authority to set a POTW's effluent limitation levels below statutory secondary treatment standards after July 1, 1977. *State Water Control Board v. Train, 424 F. Supp. 146 (E.D. Va. 1976)*, *aff'd*, *559 F.2d 921 (4th Cir. 1977)*; *Student Public Interest Research Group v. Fritzsche, 579 F. Supp. 1528, 1536 (D.N.J. 1984)*; *Nunam Kitlutsisti v. Arco Alaska, Inc., 592 F. Supp. 832, 842-44 (D. Alaska 1984)*; *U.S. v. City of Hoboken, 675 F. Supp. 189 (D.N.J. 1987)*. In fact, in *City of Hoboken*, the defendant had received an interim consent order similar to the one held by the City in this case and argued that its interim effluent limitations could extend beyond the statutory deadline. The court disagreed, reaffirming that the "EPA had no authority to extend the secondary-treatment standard deadlines" and emphasizing that "this statutory limit on extensions is wholly unambiguous." *Id.; see also Republic Steel Corp. v. Costle, 581 F.2d 1228 (6th Cir. 1978)*, *cert. denied, 440 U.S. 909, 59 L. Ed. 2d 457, 99 S. Ct. 1219 (1979)* (holding that the July 1, 1977 compliance deadline is unconditional).

EPA memoranda confirm that neither the EPA nor a state agency has the **[**72]** authority to issue permits with terms less strict than the statutory measures:

> Permits cannot contain a schedule to meet secondary treatment requirements later than July 1, 1988. In fact, only those POTWs that applied for and are eligible **[*1123]** for a § 301(i) extension may be issued a permit with a schedule to meet secondary treatment past July 1, 1977. In those cases, the requirement to meet final limits should be as soon as possible, but not later than July 1988. All other permits must contain a requirement to meet secondary limits at the time of issuance, since (as stated above) the final compliance date for these POTWs was July 1, 1977. Any POTW not meeting secondary treatment requirements and not eligible for a 301 (i) extension is in violation of the Act and is subject to an enforcement action.

*See* Memorandum from Jack Ravan, EPA Assistant Administrator for Water, to Regional Administrators (April 12, 1985). In 1987, the EPA concluded specifically that administrative orders, such as the 1990 Consent Order, cannot be used to extend compliance with the July 1, 1988 deadline. *See* Enforcement Strategy Memorandum from EPA Director of Water Enforcement and Permits, **[**73]** to Water Management Division Directors (September 22, 1987). EPA advised its regional offices that any extension of the deadline must be contained in and authorized by a judicial order. *Id.; cf. Republic Steel, 581 F.2d at 1232* (holding that the deadline cannot be extended or waived by the courts).

This court is compelled to agree with these authorities in finding the statutory deadline unambiguous with respect to its

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[39] Plaintiffs rely heavily on, *inter alia*, *Sierra Club v. City and County of Honolulu*, Cv. No. 90-00219ACK, Summary Judgment Order filed December 31, 1990 ("The courts appear to be unanimous on this issue that a municipality's failure to comply with the secondary treatment requirements under the Act by the congressional deadline constitutes a violation of the Act."); *Hawaii's Thousand Friends v. City and County of Honolulu*, Cv. No. 90-00218HMF, Summary Judgment Order filed May 8, 1992 ("The Act requires POTWs that have not been granted relief under § 301(h) waiver to have met effluent limitations based upon 'secondary treatment' standards no later than the deadline of July 1, 1988"); *Bethlehem Steel Corp. v. Train, 544 F.2d 657 (3rd Cir. 1976)*, *cert. denied, **430 U.S. 975, 52 L. Ed. 2d 369, 97 S. Ct. 1666 (1977)*** (holding that the EPA was without authority to issue a permit which would allow dischargers to comply with effluent limitations less restrictive than the Act's after the deadline).

boundaries. Because the City did not possess a valid waiver, it was required to comply with the secondary treatment standards by July 1, 1988 at the latest. The Consent Order issued by DOH does not alter this result, because neither the EPA nor a state agency is empowered to extend or modify this rigid statutory deadline. *See Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 1383, 1393 (D. Haw. 1993)* (finding that because neither EPA nor DOH had authority to extend secondary treatment deadlines, the consent order purportedly lowering the effluent limitations for the plant is of no effect after the statutory deadline). [40]

**[**74]** Defendant argues that the Consent Order constitutes a "government enforcement action" which should preclude a citizen enforcement suit. *Gwaltney, 484 U.S. at 60* (stating that citizen suits are proper only if the federal, state and local agencies fail to exercise their enforcement responsibility). This court disagrees with defendant's characterization of the Consent Order. The Consent Order appears to set forth interim effluent limits until final agency action is taken. Nothing before the court indicates that either DOH or EPA has taken any steps to enforce compliance with these limits. The court can only speculate as to the reason for this lack of government enforcement: perhaps the City is in compliance with the Consent Order's limitations (as the City asserts), or perhaps the agencies have elected to allow citizens to enforce the violations through a citizen suit. Whatever the reason, no branch of the state or federal government has taken any enforcement action in this matter. [41] Accordingly, this citizen **[*1124]** suit is not barred by prior government enforcement.

**[**75]** D. *Violations of Secondary Treatment Requirements*

There are no genuine issues of fact as to the failure of the Kailua and Kaneohe Treatment Plants to meet the Act's secondary treatment requirements. Plaintiffs have established, and defendant has offered no evidence to rebut, that since August 1989, both Plants have consistently discharged improperly or insufficiently treated effluent. The court must assess, therefore, the number and type of secondary treatment violations caused by each Plant.

Congress delegated to the EPA the responsibility for defining "secondary treatment." *40 C.F.R. § 133.102*. This EPA regulation defines secondary treatment along seven different parameters, all of which must be met by a treatment plant:

(1) 85% removal of BOD;
(2) 85% removal of TSS;
(3) average concentration of 30 mg/l on a 30-day average for BOD;
(4) average concentration of 30 mg/l on a 30-day average for TSS;
(5) average concentration of 45 mg/l on a 7-day average for BOD;
(6) average concentration of 45 mg/l on a 7-day average for TSS;
(7) pH level between 6.0 and 9.0.

The 1990 NPDES permit held by each Plant sets forth the identical seven secondary treatment **[**76]** effluent limitations.

A review of the City's DMRs [42] reflects that the Plants failed to meet the six statutory/permit BOD and TSS effluent limitations on numerous days between August 1, 1989 and the present. The number and type of violations are charted as follows: [43]

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[40] Defendant has cited, and the court has found, no case which arrives at a contrary result.

[41] Additionally, *33 U.S.C. § 1319(g)*'s enforcement scheme was designed "to safeguard the public's right to participate in the administrative action process." *Natural Resources Defense Council v. Vygen Corp., 803 F. Supp. 97, 101 (N.D. Ohio 1992)*. A citizen suit can only be barred by the government enforcement action if the public has been given the opportunity to participate meaningfully in the government's action.

Protection of the public's right to participate demands that the public be given notice of a proposed order and be provided with a reasonable opportunity to comment on the order before it is finalized. *33 U.S.C. § 1319(g)(1)*. Courts have held that the public participation requirements apply to both federal and state agency enforcement actions. *Id.; Public Interest Research Group of New Jersey v. New Jersey Expressway Authority, 822 F. Supp. 174, 184 & n.14 (D.N.J. 1992)*; *Atlantic States Legal Foundation v. Universal Tool, 735 F. Supp. 1404 (N.D. Ind. 1990)*.

Here, plaintiffs assert, and defendant fails to rebut, that the general public was not allowed to participate in any way in either the Consent Order proceeding or the formulation of the Order. The general public was not even given the opportunity to comment on the Order before it was issued. Consequently, even if this court were to find that the Consent Order constituted agency enforcement action, DOH's failure to comply with the requisite public participation procedures would effectively prohibit the defendant from arguing preclusion of the citizen suit.

[42] DMRs and other documents filed by the defendant under penalty of perjury with DOH are binding admissions usable for summary judgment purposes. *SPIRG v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1429-30 (D.N.J. 1985)*; *SPIRG v. Tenneco Polymers, Inc., 602 F. Supp. 1394, 1399-1400 (D.N.J. 1985)*.

[43] This information is derived from the Smaalders Declaration, attached to Plaintiffs' Related Motion, at P 6. In his declaration, Smaalders, a Resource Analyst for the Sierra Club Legal Defense

Go to table2

**[**77]** In addition to establishing effluent concentration requirements, the Kailua and Kaneohe Permits establish effluent quantity requirements: they set 30-day average and 7-day average limitations on the total quantity of BOD and TSS that can be discharged every day. These requirements are known as "mass emission or loading rates." [44] Thus, the Permits establish four additional effluent limitations tied to secondary treatment levels, all of which the Plants have violated numerous times:

Go to table3

**[**78] [*1125]** Thus, the DMRs, as compiled in Exhibits "A" and "B" to the Smaalders Declaration, reflect that the Plants have violated six of the seven EPA defined parameters (everything except pH level) and all of the Permits' additional mass loading requirements on a chronic basis since August 1, 1989. The court treats the exceedence of each effluent limitation as a separate violation. It also assumes that the violation of a 30-day average counts as a violation for every day of that month (i.e., there will be 31 violations if the month has 31 days, 30 violations if the month has 30 days, etc.) and that the violation of a 7-day average counts as 7 violations. *See* *Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1138-40 (11th Cir. 1990)*; *Atlantic States Legal Foundation v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743 (N.D. Ind. 1992)*. That being said, the DMRs reflect a total of 2,521 violations (1,991 + 530 = 2,521) for the Kailua Plant, while the Kaneohe Plant has recorded 8,574 (5,686 + 2,888 = 8,574) violations.

The parties, in their summary judgment papers, have argued concerning the proper way for the court to affix penalties to these proven violations. The **[**79]** court, however, finds that the issue of assessing civil liabilities is more appropriately dealt with at a later date, after all possible violations have been conclusively established as to each count in the complaint. *See* *PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158 (D.N.J. 1989)* (assessing civil penalties to defendant months after issuing orders determining number of violations). As these summary judgment motions do not allow the court to dispose of all counts in the complaint, the court will refrain from assessing penalties as to any count until after trial in this matter.

IV. SUMMARY JUDGMENT AS TO DEFENDANT'S ALLEGED FAILURE TO MEET BYPASS REQUIREMENTS (THIRD AND TENTH CLAIMS FOR RELIEF)

A. *Does the Clean Water Act Preclude Plaintiffs' Claims?*

In its Second Motion to Dismiss or, in the Alternative, for Summary Judgment, defendant submits that, under *Section 1319(g)(6)(A)* of the Act, some of plaintiffs' claims are precluded from being adjudicated by this court by: (1) the EPA's enforcement action and Findings of Violation and Order ("EPA Administrative Order") issued to the City under *33 U.S.C. § 1319*; and *(2)* DOH's Notices of Violation and Orders ("DOH **[**80]** Administrative Orders") issued to the City requiring compliance. Because the court, in considering defendant's Second Motion, has reviewed the relevant affidavits and exhibits attached thereto, the motion will be treated as one for partial summary judgment. *See* *Fed. R. Civ. P. 12(b)*.

*Section 1365* of the Act authorizes private enforcement of the Act through citizen lawsuits. The statute provides, in pertinent part, as follows:

> Except as provided in subsection (b) of this section and section 309(g)(6) [*33 U.S.C. § 1319(g)(6)*], any citizen may commence a civil action on his own behalf --
>
> > (1) against any person including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the *eleventh amendment to the Constitution*) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .

*33 U.S.C. § 1365(a) (1987 & Supp. 1993)*. Both the Congress and the courts of the United States have regarded citizen suits under the Act to be an integral part of its overall enforcement scheme. **[**81]** Indeed, "Congress's clear intention was to 'encourage citizen participation rather than treat it as a curiosity or a theoretical remedy,' that citizen plaintiffs are not to be treated as 'nuisances or troublemakers' but rather as 'welcomed participants in the vindication of environmental interests.'" *Proffitt v. Municipal Authority of the Borough of*

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Fund, summarizes the DMRs supplied by the defendant. The defendant has not challenged Smaalders' assessments or calculations. The court has reviewed the documentation summarized by Smaalders and attached to his declaration and finds his summaries credible and reliable.

[44] The 1990 Kaneohe Permit contained a daily maximum mass emission rate, instead of a 7-day average. The Modified 1990 Kaneohe Permit replaced this daily maximum limitation with the 7-day average limitation.

*Morrisville, 716 F. Supp. 837, 844 (E.D. Pa. 1989)* (quoting *Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976)*). Moreover, citizen participation **[*1126]** is effective in assuring compliance with the Act's regulations: "Citizen suits are a proven enforcement tool. They operate as Congress intended to both spur and supplement to government actions. They have deterred violators and achieved significant compliance gains." *Id.* (quoting Report of the Senate Committee on Environmental and Public Works, S.99-50 at 27 (May 14, 1985)). The Ninth Circuit has recognized that Congress intended citizen suits to be "handled liberally, because they perform an important public function." *Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517 (9th Cir. 1987)*. Further, "citizens should be unconstrained to bring these actions, and . . . courts **[**82]** should not hesitate to consider them." *Id.* (quoting S. Rep. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 3746).

Defendant argues, however, that Congress intended citizen suits to be subordinate to agency enforcement, and that, in the instant case, plaintiffs' suit is barred by the EPA Administrative Order. Defendant relies upon section 309(g) of the Act, which provides, in pertinent part, as follows:

> Action taken by the Administrator or Secretary . . . under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this Act; except that any violation --
>
> (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
>
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
>
> (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject **[**83]** of a civil penalty action under subsection (d) of this section or section 311(b) or section 505 of this Act [*33 U.S.C. § 1321(b)* or *1365*].

*33 U.S.C. § 1319(g)(6)(A) (Supp. 1993)*.

Under this provision of the Act, private citizens may be precluded from bringing a particular civil penalty action when the EPA is diligently prosecuting an administrative penalty action for the same violations, or when a state is diligently prosecuting an action under a state law "comparable" to *section 1319(g)*. The United States Supreme Court has stated that this "bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney, 484 U.S. at 60* (quoting S. Rep. No. 92-414, at 64 (1971), reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1482 (1973)). The Court held citizen suits to be proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id.* (emphasis in the original).

The EPA Administrative Order, filed on November 22, 1991, mandates that the City take certain steps to improve **[**84]** its sewage collection system across the Island of Oahu. In its findings, the EPA states:

> There has been an excessive number of overflows and spills of untreated wastewater from the CCH collection system. During the period of August 1, 1986 through July 31, 1991, there have been at least 100 days of reported unauthorized discharges from CCH's collection system, most of which discharged to surface waters. In addition, Infiltration and/or Inflow (I&I) of stormwater into the sewer system has caused the hydraulic capacity of some CCH wastewater treatment plants to be exceeded, resulting in untreated or partially treated wastewater bypassing treatment units and discharging through system outfall pipes. These unauthorized discharges are documented in the collection system spill reports and the treatment plant emergency by-pass reports submitted by the CCH to EPA and the Hawaii State Department of Health.

*See* EPA Administrative Order, attached as Exhibit "A" to Defendant's Second Motion, at 2.

The compliance order requires the City to:

**[*1127]** (1) Reduce the number of spills in the collection system;

(2) Submit a Collection System Spill Reduction Action Plan to address **[**85]**

(a) collection system administration and preventive maintenance,
(b) collection system and pump station personnel training,
(c) information management,
(d) equipment and spare parts inventory, and
(e) pump station operating instructions;

(3) Submit a long-term sewer rehabilitation and Infiltration/Inflow ("I/I") plan;

(4) Prepare quarterly progress reports; and

(5) Complete a summary of collection system spills and overflows, capital costs, and resources.

*See generally id.*

Defendant asserts that the EPA's compliance order is intended to address both the collection system spills and the treatment plant bypasses. According to the defendant, the EPA's enforcement action already addresses the substance of plaintiffs' Third and Tenth claims seeking relief for alleged bypasses at the Kailua and Kaneohe Plants, and Fourth and Eleventh claims seeking relief for alleged violations of reporting requirements in the Kailua Permits and the City directives for reporting bypass incidents.

In response, plaintiffs argue that the EPA Administrative Order is not an administrative penalty action under *33 U.S.C. § 1319(g)* and thus cannot bar plaintiffs' lawsuit. Plaintiffs submit **[**86]** that the only action taken by the EPA over the City's collection system -- the issuance of an administrative compliance order pursuant to *33 U.S.C. § 1319(a)* -- does not preempt their claims for relief. Plaintiffs point to the terms of the compliance order itself, which state that EPA's findings of violation and order for compliance were issued pursuant to *33 U.S.C. §§ 1318(a)* and *1319(a)(3)*,*(4)*, and *(5)(a)*. The statute allowing for such enforcement action reads, in pertinent part, as follows:

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act . . . or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act . . . by him or by a State or in a permit issued under section 404 of this Act . . . by a State, he shall issue an order requiring such person to comply with such section or requirement, *or* he shall bring a civil action in accordance with subsection (b) of this section.

*33 U.S.C. § 1319(a)(3)* (emphasis added).

The statute itself makes clear that the EPA Administrator **[**87]** has two distinct options once he or she finds a violation: to issue a compliance order or to bring an enforcement action. Clearly, then, a compliance order does not amount to an enforcement action.

The Ninth Circuit has recently considered the issue of whether a citizen's suit by a public interest group may be barred by an EPA administrative compliance action. In *Washington Pub. Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883 (9th Cir. 1993)* *("WASHPIRG")*, the EPA issued a compliance order finding the defendant, a textile mill operator, in violation of its NPDES permit. The order required the defendant to prepare a report describing the causes for its violations and identifying actions needed to bring it into compliance. *Id. at 884-85*. The order also required the defendant to make those physical improvements identified as necessary. An amended compliance order set a target date for the improvements and threatened daily monetary sanctions for violation of its terms. *Id. at 885*. As a result of the defendant's continued permit violations, the plaintiff notified the EPA in accordance with the citizen suit provision of the Act and filed a complaint seeking **[**88]** declaratory and injunctive relief as well as civil penalties. *Id.* The district court entered summary judgment in favor of the defendant, holding that the existence of the EPA's compliance action barred the plaintiff's citizen suit. *Id.*

The Ninth Circuit reversed the lower court's order, recognizing that the language of the Act did not bar citizen suits absent an **[*1128]** administrative penalty action. *Id. at 886*. The court expressly held that "Congress did not draft the Act to bar citizen suits when EPA is pursuing an administrative compliance order." *Id. at 886-87*. The court held that the plain, unambiguous language of *section 1319(g)* compelled this interpretation: "The plain language of the statute states that [citizen suits under *section 1365*] are barred only when the EPA is prosecuting an action 'under this subsection,' i.e., *section 1319(g)*, which deals only with administrative penalty actions." *Id. at 885*.

In its Reply Memorandum, defendant asserts that the EPA Administrative Order does, in fact, refer to *section 1319(g)* of the Act and that plaintiffs' suit is thus barred by the federal enforcement action. Defendant refers to the second page of the EPA's November **[**89]** 22, 1991 letter to the City ("EPA Enforcement Letter"), which states as follows:

> Any violation of the terms of this Order or continued violations of the NPDES permit could subject the CCH to a civil action for appropriate relief, pursuant to Section 309(b) of the Act [*33 U.S.C. Section 1319(b)*] and/or civil penalties under Section 309(d) of the Act [*33 U.S.C. Section 1319(d)*] of up to $ 25,000 per day of violation. In addition, under Section 309(g) of the Act [*33 U.S.C. Section 1319(g)*], any violation of the NPDES permit could also subject CCH to an administrative penalty action of up to $ 10,000 per day of violation not to exceed $ 125,000.

*See* EPA Enforcement Letter, attached as Exhibit "A" to Defendant's Second Motion, at 2. In addition, the EPA Administrative Order states as follows:

> VII. *Reservation of Rights*
>
> A. This Order does not in any way relieve CCH of

obligations imposed by the Clean Water Act, or any other State or Federal law. EPA reserves the right to seek any and all remedies available under Section 309(b), (c), (d) or (g) of the Act [*33 U.S.C. Section 1319(b), (c), (d)* or *(g)*] for any violation cited in this Order.

B. Issuance **[**90]** of an Administrative Order shall not be deemed an election by the EPA to forego any civil or criminal action to seek penalties, fines or other appropriate relief under the Act.

EPA Administrative Order, at 12-13.

Defendant argues that, because the EPA "reserved its rights" to seek remedies under *section 1319*, plaintiffs' suit for penalties and injunctive or declaratory relief is effectively barred. In addition, defendant states that it is currently "negotiating the matter of civil penalties in addition to taking further remedial actions to address the issue of bypass." *See* Defendant's Memorandum in Support of its Second Motion, at 11. Defendant also asserts that it has negotiated a settlement with EPA and DOH for the payment of civil penalties and that such payment "will be made pending the finalization of the Consent Decree." *Id. at 15*. The defendant submits that it "has committed to making a settlement payment" and that this constitutes "diligent prosecution by the EPA DOH because the City Council has committed the City to payment of civil penalties for the alleged bypass of August 15, 1991 at the Kailua Plant." *Id.*

Defendant's arguments are unpersuasive. The **[**91]** EPA Administrative Order is, by its own terms, a compliance order. Furthermore, it is undisputed in this case that the EPA has never commenced a civil penalty action, regardless of whether it has "reserved its rights" to do so. The fact that the EPA may bring an administrative penalty action at some unspecified future date is simply not sufficient to constitute the "commencement" and "diligent prosecution" of an action under *section 1319(g)*. Indeed, the Ninth Circuit has recently held that the EPA's issuance of a compliance order containing the threat of a daily $ 25,000 penalty for violation of its terms did *not* constitute the institution of a "penalty action" under the Act. *See WASHPIRG, 11 F.3d at 885*. The court finds the *WASHPIRG* holding to be particularly instructive, since defendant has cited the EPA's threat of $ 10,000-per-day sanctions as evidence that the EPA has preempted plaintiffs' suit by referring to *section 1319(g)* in its compliance order.

In addition, the wording of the EPA Administrative Order itself supports the conclusion **[*1129]** that it was not meant to constitute a civil penalty action. The order states that its "issuance . . . shall not be deemed an election **[**92]** by EPA to forego any civil or criminal action to seek penalties, fines or other appropriate relief under the Act." EPA Administrative Order, at 13. By this statement, the EPA obviously intended to reserve the option of seeking penalties at a later date; such a statement would be nonsensical if the compliance order itself were to constitute commencement of penalty proceedings.

Furthermore, this court would be contradicting Congress's stated interest in promoting private enforcement actions if it allowed the EPA's "reservation" of its own civil penalty options to effectively bar plaintiffs' lawsuit. Reserving the right to use a range of potential enforcement tools at some unspecified future date is far different from actually commencing an action using any one of them. The EPA may elect to move forward with one or more of the actions it has "reserved" or it may not -- the parties and this court have no way of knowing. To date, the EPA has not elected to do so. Indeed, the Ninth Circuit has rejected the argument that "Congress . . . intended the EPA to be able to pursue compliance actions free from citizens who seek penalties that the EPA thinks are not yet warranted." *WASHPIRG, [**93] 11 F.3d at 886*. Whether or not the EPA and the City are currently negotiating a settlement, and whether that settlement addresses civil penalties, are irrelevant. Regardless of the outcome of any such settlement discussions, no action under *section 1319(g)* had commenced when plaintiffs filed their notice of intent to sue on January 7, 1992; the EPA Administrative Order has no effect upon this lawsuit. Thus the court finds that plaintiff's action is not barred under the provisions of *33 U.S.C. § 1319(g)(6)(A)(i)*.

Defendant also argues, however, that plaintiffs' lawsuit is barred by the DOH Administrative Orders, filed June 23, 1989, August 14, 1989, and December 3, 1991. The June 23, 1989 Order addressed the Kaneohe Plant's violation of Parts I.A.1.a, I.A.1.e, II.A.8, and II.A.10 of its Permit. *See* DOH Notice and Finding of Violations of June 23, 1989, attached as Exhibit "E" to Defendant's Second Motion. In this Order, DOH stated that the City "should take corrective action . . . to prevent further violations and should notify the DOH of the corrective actions taken." *Id.* DOH assessed a penalty of $ 200,000 for these violations. *See* DOH Administrative Order of June 23, **[**94]** 1989, attached as Exhibit "E" to Defendant's Second Motion.

The August 14, 1989 Order concerned the Kailua Plant's violation of Parts I.A.1.a, I.A.1.e, and II.A.10 of its Permit. *See* DOH Notice and Finding of Violations of August 14, 1989, attached as Exhibit "F" to Defendant's Second Motion. In this Order, DOH stated that the City should take further action to correct future violations. *Id.* DOH also assessed a penalty of $ 110,000 for these violations. *See* DOH Administrative Order of August 14, 1989, attached as Exhibit "F" to Defendant's Second Motion. With regard to the

bypasses at the Kailua and Kaneohe Plants, the City and DOH entered into a Consent Agreement on March 6, 1990. *See* Consent Agreement and Addendum, attached as Exhibits "G" and "H" to Defendant's Second Motion.

The December 3, 1991 Order concerned the Kailua Plant's violation of Section 14.d of the Standard NPDES Permit Conditions, updated as of February 10, 1989 and applicable to the Kailua Plant, and of *Haw. Rev. Stat. § 342D-50(a)*, for unpermitted bypassing of partially treated and untreated sewage to the Pacific Ocean on August 15, 1991. *See* DOH Notice and Finding of Violation of December **[**95]** 3, 1991, attached as Exhibit "C" to Defendant's Second Motion. DOH assessed a penalty of $ 10,000 for the violation. *See* DOH Administrative Order of December 3, 1991, attached as Exhibit "C" to Defendant's Second Motion. Defendant indicates that on July 29, 1993, the City Council approved settlement with EPA/DOH and part of the settlement included the December 3, 1991 Order. *See* Exhibit "D," attached to Defendant's Second Motion.

Defendant argues that the Hawaii enforcement actions were brought under Haw. Rev. Stat. chs. 91 and 342D, and Chapter 11-55 of the Hawaii Administrative Rules -- a statutory scheme which defendant submits is "comparable" **[*1130]** state law under the provisions of *33 U.S.C § 1319(g)*. Thus, defendant argues, the filing of the DOH Administrative Orders bars plaintiffs' lawsuit. Plaintiffs contend, however, that the Hawaii statutory scheme is not comparable to *section 1319(g)* because it does not afford the public with sufficient rights of participation in state administrative enforcement procedures. Plaintiffs state that the DOH Administrative Orders were formulated entirely behind closed doors, and that the public was not made aware of these findings until "after **[**96]** the ink was dry." Plaintiffs assert that such procedures are contrary to the Act's purpose of ensuring full public participation in all penalty actions under *section 1319(g)* or comparable state laws.

Under federal law, public notice is governed by the provisions of *section 1319(g)*, which provide, in pertinent part:

> Rights of interested persons. (A) Public notice. Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of, and reasonable opportunity to comment on the proposed issuance of such order.
>
> (B) Presentation of evidence. Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have reasonable opportunity to be heard and to present evidence.
>
> (C) Rights of interested persons to a hearing. If no hearing is held under paragraph (2) before the issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days **[**97]** after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph 2(A) in the case of a class I civil penalty and paragraph 2(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and reasons for such denial.

*33 U.S.C. § 1319(g)(4)*.

Hawaii's notice laws, by contrast, focus exclusively on the rights of the violators themselves; the statutes are silent as to the rights of the public to pre-decision notice. Specifically, *Haw. Rev. Stat., ch. 342D-9*, requires written notice to be served upon alleged water pollution violators. The statute also provides for hearings to be conducted pursuant to the contested case provisions of state administrative procedure. *See Haw. **[**98]** Rev. Stat. § 342D-9(e)*. Under Hawaii law, DOH must make available for public inspection all of its final opinions and orders. *Haw. Rev. Stat. § 91-2(4)*. In all contested cases, all parties to the action must be afforded an opportunity for hearing after reasonable notice. *Haw. Rev. Stat. § 91-9(a)*.

On the other hand, *section 91-14* addresses after-the-fact responses by persons other than violators themselves:

> Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right to trial by jury, provided by law.

*Haw. Rev. Stat. § 91-14(a)*. For the purposes of this statute, an "aggrieved person" may include individuals, partnerships, corporations, associations, public or private organizations, or agencies. *See Haw. Rev. Stat. §§ 91-1(2)* and *91-14(a)*.

Further, DOH Rules of Practice and Procedure provide as follows: **[**99]**

> Applications for intervention [in a DOH proceeding] will be granted to persons properly seeking and entitled as of right to be admitted as a party; otherwise at the discretion of the presiding officer, they **[*1131]** may be denied. As a general policy, such applications shall be denied unless the petitioner shows that he has an interest in a question of law or fact involved in the contested matter.

DOH Rules, Part C, § 14.

While the above rules provide for public disclosure of and response to final decisions, there appears to be no provision in the Hawaii statutes or regulations requiring the agency to provide the public with notice of, or the opportunity to intervene in, *proposed* decisions or settlements. In contested cases, the state is required to provide notice and an opportunity to be heard only to the water pollution violators; as members of the general public would not be "parties" to the state enforcement action, they appear to have no rights to contest agency decisions or settlements before they become final.

In support of its argument that DOH's administrative enforcement procedures are "comparable" to those under the Act, defendant cites *Connecticut Coastal* **[**100]** *Fishermen v. Remington Arms, 777 F. Supp. 173 (D. Conn. 1991)*. In *Connecticut Coastal*, the court considered whether, for purposes of *section 1319(g)*, the Connecticut state law was comparable in meaning to the Act. The court cited *Atlantic States Legal Foundation v. Universal Tool & Stamping, 735 F. Supp. 1404 (N.D. Ind. 1990)*, which held that a state law that is "comparable" within the meaning of the Act "must include provisions as to public notice and participation, penalty assessment, judicial review, and other matters comparable to those in *§ 1319(g)*." *Id. at 1415*. The *Connecticut Coastal* court recognized that state law required the Connecticut Department of Environmental Protection ("DEP") to consider the specific circumstance before assessing penalties, provide a public hearing on request, and submit to judicial review. *Connecticut Coastal, 777 F. Supp. at 183*. The court also noted that Connecticut law liberally allowed intervenors in DEP enforcement actions, and that, although the plaintiff was notified of the DEP's proposed orders, it had chosen not to intervene. *Id.* Thus the court found that the notice afforded the plaintiff by the state agency was **[**101]** "comparable" to the notification provided under the Act. *Id.*

Defendant also relies upon *North and South Rivers Watershed Ass'n v. Scituate, 949 F.2d 552 (1st Cir. 1991)*. In that case, the Court of Appeals for the First Circuit stated in a footnote that "so long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act." *Id. at 556 n.7*. The court held that, although the Massachusetts statute at issue did not provide for prior public notice of enforcement orders, the state administrative action was nevertheless "comparable" to the provisions under the Act. *Id.* In support of this conclusion, the court made the following observations about the Massachusetts state law in question: (1) administrative orders were public documents; (2) upon showing adequate cause, any individual could intervene in actions brought to assess civil penalties; and (3) any person with an interest in the matter had the opportunity to file a claim for an individual hearing. *Id.*

*Connecticut Coastal* **[**102]** and *Scituate* do not, however, constitute the universe of case law on this issue. The reasoning of *Scituate* has been called into question by other courts, including the Ninth Circuit. This court must therefore consider the entire body of law, paying particular attention to the instructions of the Ninth Circuit, in assessing whether Hawaii's laws are sufficiently comparable to the federal scheme to allow for pre-emption in this case.

In *Natural Resources Defense Council v. Vygen Corp., 803 F. Supp. 97 (N.D. Ohio 1992)*, the court found that Ohio's Water Pollution Control Act was not comparable to the federal Act because it lacked the public participation safeguards present in *section 1319(g)*. Tracing the language of the federal statute, the court noted that the *section 1319(g)* requirements for public notice were mandatory rather than permissive. *Id. at 101*. The court held that state laws must contain certain safeguards comparable to those of *§ 1319(g)* if the state agency orders are to preclude citizen suits; these safeguards **[*1132]** must be mandatory, rather than permissive, if state law is to be considered comparable to *§ 1319(g)*. *Id.* (citing *Universal Tool, 735 F.* **[**103]** *Supp. at 1415*). The court stated that, as evidenced by the detailed notice requirements of the Act, "Congress was careful to limit preclusion of citizen enforcement actions only in those situations where the affected public had *ample* opportunity to participate in the process by which the administrative action was taken." *Id.* (emphasis in the original).

The *Vygen* court then found the Ohio notification and participation provisions to be inadequate because they were discretionary, not mandatory. The court held such procedures were not "comparable" to those of the Act, which clearly mandate public notice and opportunity to be heard prior to the imposition of a civil penalty. *Id.* Moreover, the court flatly rejected the rationale of *Scituate*, and held as follows:

> The detailed, mandatory safeguards of citizen participation contained in § 1319(g)(4) are not comparable to simply having a public record on file somewhere for a citizen to look at should that citizen somehow discover that a particular action has been taken. Public notice is fundamental to protecting citizen participation in agency decisions. If the public does not know about agency actions, it cannot **[**104]** avail itself of any right to participate in any action that may be taken pursuant to that statute.

*Id. at 102*.

This court agrees with the holdings of *Vygen* and of other courts that state administrative orders may preclude citizen suits only if they contain mandatory safeguards of public participation and notice comparable to § 1319(g). *See, e.g.*, *Public Interest Research Group of New Jersey v. New Jersey Expressway Authority, 822 F. Supp. 174, 184 & n.14 (D.N.J. 1992)*; *Public Interest Research Group of New Jersey v. GAF, 770 F. Supp. 943, 950-51 (D.N.J. 1991)*; *Universal Tool, 735 F. Supp. at 1416*; *cf. Tobyhanna Conservation Ass'n v. Country Place Waste Treatment Co., 734 F. Supp. 667* (holding that a citizen suit was not precluded by an earlier letter and administrative conference where no hearing was held and no notice was given to the public). The legislative history of *section 1319(g)* strongly supports this interpretation. Senator Chaffee, the principal author and sponsor of the 1987 amendments to the Act, emphasized that state statutes must safeguard public participation rights to be considered "comparable" to *section 1319(g)*:

> The limitation **[**105]** of 309(g) applies only where a State is proceeding under a State law that is comparable to section 309(g). For example, in order to be comparable, a State law must provide for a right to hearing and for public notice and participation procedures similar to those set forth in section 309(g) . . . .

1133 Cong. Rec. 5737 (daily ed., Jan. 14, 1987) (quoted in *Universal Tool, 735 F. Supp. at 1415*).

In addition, this court finds the rationale of *Scituate* and its progeny to be inconsistent with the liberality with which the Ninth Circuit has recently addressed citizen enforcement actions. In *Scituate*, the court rejected the argument that the determination of "comparability" for the purposes of § 1319(g) should turn upon whether the precise statutory section under which the state issues its administrative order contains provisions comparable to the federal Act. The court stated that such a reading of the Act would turn on the "logistical happenstance of statutory drafting." *Scituate, 949 F.2d at 556*. The court held that "the focus of the statutory bar to citizen's suits is not on state statutory construction, but on whether corrective action already taken and diligently **[**106]** pursued by the government seeks to remedy the same violations as duplicative civilian action." *Id.*

In *WASHPIRG*, the Ninth Circuit criticized the First Circuit's departure from the plain statutory wording of *section 1319(g)*, and eschewed *Scituate's* method of deferring to the state agency's enforcement plan wherever that agency has "specifically addressed the concerns of an analogous citizen's suit." *See Scituate, 949 F.2d at 557*. Instead, the *WASHPIRG* court stated as follows:

> General arguments about congressional intent and the EPA's need for discretion cannot persuade us to abandon the clear language that Congress used when it **[*1133]** drafted the statute. 'The most persuasive evidence of . . . [congressional] intent is the words selected by Congress' . . . not a court's sense of the general role of citizen suits in the enforcement of the Act.'

*11 F.3d at 886* (quoting *Turner v. McMahon, 830 F.2d 1003, 1007 (9th Cir. 1987)*, *cert. denied, 488 U.S. 818, 102 L. Ed. 2d 37, 109 S. Ct. 59 (1988)*).

This court recognizes that "comparable state law," as used in *section 1319(g)(6)*, does not mean that a state's regulatory authority or processes must be identical **[**107]** to the federal government's. *Saboe, 819 F. Supp. 914, 917* (citing *Sierra Club v. Port of Townsend Paper Corp., 1988 U.S. Dist. LEXIS 17137, 19 Envtl. L. Rep. 20532 (W.D. Wash. 1988)*). However, it is clear from the plain wording of *section 1319* that its public notice and participation provisions were meant to be mandatory ones, not to be applied permissively or at the EPA's discretion. It is this court's holding that state laws which do not provide similar mandatory safeguards of public notice and participation cannot be deemed "comparable" to *section 1319(g)*.

The Hawaii statutes, administrative regulations, and DOH Rules simply do not mandate the kind of public notice and participation rights required under the federal Act. The Hawaii laws relevant to this action, which require it to provide only violators with notice and an opportunity to be heard on the prefinal decisions, fail to establish the *public's right* to early information and intervention; Hawaii's laws thus differ markedly from the laws at issue in *Connecticut Coastal* and *Scituate*. [45] **[**109]** Indeed, defendant concedes that, in

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[45] The court notes that other cases citing favorably to *Scituate* have also involved statutes authorizing a degree of public notice and participation that is non-existent in Hawaii's administrative

the past, the DOH has not required public notice of any settlements; DOH Administrative **[**108]** Order dated March 6, 1990 did not undergo public notice. *See* Defendant's Reply Memorandum in Support of its Second Motion, at 8-9 [46]. DOH did not provide, and had no legal obligation to provide, notice of its proposed settlement to the public. Plaintiffs also had no right to intervene in any proposed settlement, and there is no evidence that a public hearing was held on the proposed settlement. Hawaii law is not, therefore, sufficiently "comparable" to the Act to allow preemption of plaintiffs' instant lawsuit under *33 U.S.C. § 1319(g)(6)(A)(ii)*.

Defendant also asserts that remedies sought by the plaintiffs duplicate EPA's and DOH's enforcement efforts, and that *section **[**110]** 1319(g)* bars plaintiffs' claims for declaratory and injunctive relief. However, because this court holds that plaintiffs' suit is not barred by either the federal or state administrative actions under *33 U.S.C. § 1319(g)(6)(A)*, the court need not reach the issues of (1) whether a citizen suit seeking injunctive relief would be barred under *§ 1319(g)*, or *(2)* whether the plaintiffs' claims impermissibly overlap with the subjects of either EPA's Administrative Compliance Order or DOH's Administrative Orders. The court therefore **[*1134]** DENIES defendant's Second Motion for Partial Summary Judgment.

B. *Plaintiff's Bypass Claims*

In their Countermotion to Defendant's Second Motion for Partial Summary Judgment, plaintiffs seek summary judgment on their claims of bypass violations. Plaintiffs claim that, contrary to the clear provisions of their NPDES permits, both the Kailua and the Kaneohe Plants have chronically bypassed sewage around the Plants' key treatment equipment, and at times around the Plants themselves. "Bypass" is defined by the Permits as the "intentional diversion of waste streams from any portion of a treatment facility." Plaintiffs claim that in the four-year period from August **[**111]** 1, 1989 through August 31, 1993 the City executed at least 406 illegal bypasses at the Plants. Plaintiffs have submitted three charts, attached to the Declaration of Mark Smaalders as Exhibits "1," "2," and "3," to categorize the alleged bypass violations. Exhibits "1" and "2" list by date the alleged bypasses at the Kaneohe and Kailua Plants, respectively. Exhibit "3" lists the City's alleged weekly bypasses of the trickling filter at the Kailua Plant.

Plaintiffs allege that the bypasses depicted in Exhibits "1" and "2" generally fall into three categories: (1) bypasses relating to "wet weather" capacity; (2) bypasses relating to equipment that failed or operated improperly; and (3) bypasses relating to repair or replacement of equipment. Exhibit "3" depicts a fourth category of bypasses: those relating to weekly maintenance of the trickling filter at the Kailua Plant.

Federal regulations prohibit bypasses; violators may be subject to enforcement actions, unless the bypass falls within one of the following limited exceptions:

1. *Bypasses Not Exceeding Effluent Limitations*

> Permittees may allow a bypass to occur if it does not exceed effluent limitations, but only if it also **[**112]** is for essential maintenance to assure efficient operation.

2. *Bypasses Exceeding Effluent Limitations*

> All other bypasses are illegal, unless:
>
> a. the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage (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);
>
> 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

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procedures. *See, e.g. Arkansas Wildlife Federation v. ICI Americas Inc., 842 F. Supp. 1140 (E.D. Ark. 1993)* (involving state regulations allowing "any person" to intervene at any stage of an enforcement proceeding if such person timely files a petition to intervene and has an interest which may be adversely affected by the outcome of the proceeding); *Saboe v. State of Oregon, 819 F. Supp. 914 (D. Or. 1993)* (involving state regulations which allow interested parties other than the penalized party to participate in a hearing, and which authorize the state agency to hold public hearings and accept public comment regarding the violation and proposed remedies).

[46] Defendant asserts that all administrative orders subsequent to March 6, 1990 have undergone public notice. Defendant submits two public notice announcements which were run in the December 10, 1993 editions of the *Honolulu Advertiser* and the *Honolulu Star-Bulletin*, both of which reference the DOH's Notice and Findings of Violation and Order regarding the violations at the Kailua Plant, filed December 3, 1991. *See* Exhibit "A," attached to Defendant's Reply Memorandum in Support of its Second Motion.

Aside from the fact that this notice was published approximately two years after the DOH Administrative Order was issued, the notice did not afford the public the opportunity to participate *before* the penalty order was issued. Thus, this court finds that DOH's notice procedures relating to its December 3, 1991 administrative order did not safeguard the public's participation rights sufficiently to preempt plaintiffs' suit under *section 1319(g)(6)(A)(ii)*.

prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance; *and*
c. the permittee submitted notices:

(i) if possible, at least 10 days before the date of bypass, if the bypass is *anticipated;*

(ii) within 24 hours, **[**113]** if the bypass is *unanticipated.*

*See* 40 CFR § 122.41(m).

Plaintiffs allege that none of the City's bypasses fall under the above-enumerated exceptions. Plaintiffs' evidence first indicates, with respect to the first exception, that the City never met effluent limitations during any of the bypasses at the Kaneohe Plant, and that the Kailua Plant met effluent limitations for only two of the bypasses -- on September 11, 1992 and August 6, 1993. Plaintiffs submit that neither of these two bypass incidents were required for "essential maintenance" of the Kailua Plant, and were therefore impermissible. Concerning the second type of exception, plaintiffs contend that only three of the trickling filter bypasses met effluent limitations: those occurring on October 13, 1989, October 20, 1989, and October 27, 1989. However, none of these three **[*1135]** bypasses involved essential maintenance to the facility. Plaintiffs present a January 24, 1991 letter from the City indicating that these three bypass incidents involved only "routine" maintenance which the City was required to perform during "low flow" periods (i.e. early morning hours), when a bypass could easily have been avoided.

**[**114]** The City's main excuses for not completing this maintenance work during the low flow period are (1) its desire to avoid paying for overtime, and (2) its assertion that lighting had yet to be installed in the trickling filter, and thus no work could be accomplished at night. Plaintiffs argue, and this court agrees, that the overtime expense cannot possibly justify bypassing the principal secondary treatment equipment at the plant. Such an excuse would virtually exempt all cost-conscious plant operators from the prohibitions against bypass. Additionally, the Kailua Plant supervisor, Robert Endler, confirmed that lighting was required in any event for proper nighttime operation of the plant. *See* Endler Deposition, attached as Exhibit "4" to Walters Declaration, attached to Plaintiffs' Countermotion, at 121. Thus, the lighting fixtures, or lack thereof, cannot excuse the decisions to bypass during daylight (substantial flow) hours. Furthermore, the Permits themselves require that the interest of achieving compliance with the Permits takes precedence over operation and maintenance needs. *See* Exhibits "B" and "E," attached to Plaintiffs' Summary Judgment Memorandum, Standard Condition **[**115]** 6.

In opposing plaintiffs' motion, defendant submits that, of the 406 bypass infringements alleged in plaintiffs' complaint, 340 cannot be considered to be violations by this court. First, defendant argues that twenty of the bypasses -- including nine resulting from inadequate wet weather capacity -- are currently the subject of an ongoing EPA enforcement action and should not, therefore, be the subject of a duplicative proceeding in this court. For the reasons articulated in *Part IV.A., supra*, this court has ruled that the present lawsuit is not preempted by DOH's administrative orders. Plaintiffs' claims as to these twenty bypasses have been properly brought before this court. Since defendants have submitted no evidence to create a genuine issue of material fact as to the illegality of these bypasses, the court must enter summary judgment in plaintiffs' favor on these claims.

Next, defendant asserts that, as to the 122 alleged trickling filter bypass infringements, plaintiffs have failed to prove any "ongoing violations" or the reasonable likelihood of future violations. Thus, defendant argues, under the *Gwaltney* doctrine, this court has no jurisdiction over the claims **[**116]** relating to the trickling filter bypasses. However, as this court has already stated in *Part III.A., supra*, defendant's installation and improvement of the trickling filter did not "completely eradicate" the risks of bypass, redundancy, and removal problems as of May 5, 1992. Plaintiffs have thus satisfied the requirements of *Gwaltney* by articulating good faith allegations of ongoing violations at the Kailua Plant. Since defendant has supplied this court with no additional evidence creating a genuine issue of material fact as to the illegality of the trickling filter bypasses, summary judgment must be entered in favor of plaintiffs on these claims.

Defendant next argues that 198 of plaintiffs' bypass allegations involve instances where DOH's prior approval was obtained for anticipated bypasses. Defendant has submitted documentation of DOH's bypass approvals in these instances. *See* Exhibits "C" through "O," attached to the Declaration of James Baginski. Defendant maintains that these bypasses fall into the exception provided by the federal regulations and do not, therefore, constitute "violations" for the purposes of a citizens' enforcement action. Defendant cites *40 C.F.R. **[**117]** § 122.41(m)(4)(ii)*, which states that "the Director 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 (m)(4)(i) of this section."

Nevertheless, unless the requirements of (1) prevention of life, personal injury, or severe property damage, (2) no

feasible alternative, and (3) proper notice have been met by the Plant, the Director has no authority to approve a bypass. Plaintiffs submit that **[*1136]** these 198 bypasses involved the repair and maintenance of equipment at the treatment facilities; there is no evidence that these situations threatened loss of life, personal injury, or severe property damage. Further, plaintiffs point out that there is no suggestion in any of the requests for bypass approval that there were no "feasible alternatives" available to the City. Plaintiffs argue that the City should have installed sufficient backup facilities to alleviate the need for bypasses in situations involving equipment maintenance and repair.

Upon reviewing the approval requests and DOH's bypass approvals attached to the affidavit of James Baginski, this court must agree with plaintiffs **[**118]** that there is no evidence that *section 122.41(m)*'s strict criteria were met. The correspondence between the City and DOH indicate that the bypasses were for normal repairs and treatment improvements and were clearly not unavoidable to prevent loss of life or other serious harm. Furthermore, it appears that the City simply chose to continue bypassing whenever the treatment facilities were required to shut down for repairs or maintenance. The City had a feasible alternative to such bypasses: it could have installed adequate backup facilities. Defendant has not provided the court with any evidence indicating that bypass approvals were warranted based on the exception provided in *section 122.41(m)*. Indeed, these exceptions are scarcely mentioned in the correspondence seeking approval for bypasses. DOH's approvals thus appear to be nothing more than rubber stamps for prohibited bypasses. Because there is no genuine issue of material fact as to the impropriety of these bypass approvals, the court grants plaintiffs' motion for summary judgment on these claims.

Finally, defendant contends that the 66 remaining bypass allegations involve unanticipated bypasses due to equipment failure and **[**119]** that, since they may fall into the limited exception for unavoidable bypasses with no feasible alternative, summary judgment is improper as to these claims. [47] According to plaintiffs, defendant has utterly failed to produce any evidence whatsoever that these bypasses properly fell within *section 122.41(m)*'s narrow exception. This court agrees. Defendant may not survive plaintiffs' motion for summary judgment merely by stating that *section 122.41(m)* may apply to these bypasses, without submitting a single piece of admissible evidence to support its conclusion. There is no indication within the record that these bypasses were unavoidable, or that feasible alternatives were unavailable. Accordingly, the court grants plaintiffs' motion for summary judgment as to all 406 of their bypass claims.

**[**120]** V. SUMMARY JUDGMENT AS TO DEFENDANT'S ALLEGED FAILURE TO MONITOR (FIFTH AND TWELFTH CLAIMS FOR RELIEF)

A fundamental aspect of the Act's NPDES system is the program of self-monitoring to ensure compliance with the Act's requirements. Section 308 of the Act expressly requires NPDES permittees to establish and maintain records; to install, use and maintain monitoring equipment; to sample effluent; and to report on a regular basis to the permit-issuing agency regarding the facility's discharge of pollutants. *33 U.S.C. § 1318*. EPA regulations also mandate that NPDES permits contain extensive requirements governing, *inter alia*, mechanisms for both monitoring and maintaining records. *40 C.F.R. § 122.41(j)* and *40 C.F.R. Part 136*.

**[*1137]** Pursuant to this regulation, the Kailua and Kaneohe Permits contain detailed monitoring requirements for both the Plants' processes and the receiving waters. With respect to the receiving waters, the 1990 Kailua Permit requires the City to monitor enterococcus bacteria [48] five times per month at twelve designated monitoring locations at the edge of the Zone of Mixing ("ZOM"). These twelve locations consist of three testing levels (surface, mid-depth, **[**121]** and bottom grab) at each of four stations (ZM-1, ZM-2, ZM-3, and ZM-4). Tests must be performed at each of the three levels for each of the four sites. The Kailua Permit also requires the City to monitor ammonia nitrogen and total phosphorus once each month at these same twelve locations. *See* Exhibit 3 to Plaintiffs' Related Motion. Kailua's Permit additionally mandates that the City continuously monitor the effluent flow as it leaves the Plant. *See* Exhibits "2" and "3" to Plaintiffs' Related Motion.

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[47] It appears from the parties' memoranda and affidavits that one of the plaintiffs' bypass claims was derived from the deposition testimony of Robert Endler, who indicated that a bypass had occurred during Hurricane Iniki. *See* Endler Deposition, attached as Exhibit "4" to Eric Walters in Support of Plaintiffs' Countermotion. Endler stated that he did not remember the date of the bypass, but that an official report of the situation was submitted to DOH. Defendant asserts that a bypass on this date is not recorded anywhere, and that Endler's memory may be in error. The court finds, however, that Mr. Endler's deposition testimony is clear and that, in light of plaintiffs' allegations that the City failed to report many of the bypasses that occurred at the Plants, defendant's "no recordation" defense is somewhat suspect. Moreover, defendant has submitted no evidence to contradict the allegation that an illegal bypass occurred on September 11, 1992. The court, therefore, will consider this bypass allegation equally with plaintiffs' other claims.

[48] Enterococcus bacteria is an indicator organism for pathogens dangerous to human health.

The Kaneohe Permit is similar in that it requires monitoring of enterococcus five times per month and of ammonia nitrogen and total phosphorus once per month at each of four stations. However, the Kaneohe Permit requires only that samples be taken from the bottom grab; it makes no mention of surface and mid-depth monitoring. [49] *See* Exhibit "5" at 9 to Plaintiffs' Related Motion. The Kaneohe Plant must also, **[**122]** pursuant to the Permit, continuously monitor is effluent flow as it leaves the Plant. *Id.* at 10.

Neither Permit requires the City to conduct its tests on any particular day; it demands only that the requisite number of samples be taken each month. Also, as stated above, the Act provides for strict liability for NPDES violations. Hence, good faith but unsuccessful attempts by the City to comply are relevant only to the amount of penalties affixed; they do not preclude a finding of liability.

Plaintiffs' expert, Mark Smaalders, has summarized the monitoring statements submitted by the Kailua and Kaneohe Plants for the period from March 1, 1990 to August 31, 1993. *See* Smaalders Declaration at PP 11-18 and Exhibits "C," "D," "E," "K," "L," "M," and "N" attached **[**123]** thereto. After reading this Declaration and conducting its own review of the monitoring reports, the court concludes that:

> (1) defendant failed completely to monitor for ammonia nitrogen and total phosphorus at any of the monitoring sites during the month of June 1990. This failure equals 24 violations for the Kailua Plant (2 for each of 12 monitoring sites) and 8 violations for the Kaneohe Plant (2 for each of 4 monitoring sites). Violations for ammonia nitrogen and total phosphorus monitoring total 32.
>
> (2) defendant failed to monitor as required for enterococcus bacteria 66 times between March 1, 1990 and August 31, 1993. This failure equals 792 violations for the Kailua Plant (1 for each of 12 monitoring sites on 66 occasions) and 264 violations for the Kaneohe Plant (1 for each of 4 monitoring sites on 66 occasions). Violations for enterococcus bacteria monitoring total 1,056.
>
> (3) defendant failed to monitor effluent flow properly at the Kaneohe Plant 12 times [50] **[**124]** between August 1, 1989 [51] and August 31, 1993.
>
> (4) defendant failed to monitor effluent flow properly at the Kailua Plant 10 times [52] between August 1, 1989 and September 30, 1993.

**[*1138]** The City's only defense to the record of station monitoring failures produced by the plaintiffs is that occasionally the City was unable to take samples at monitoring stations due to bad ocean or weather conditions or to boat problems. The plaintiffs correctly point out that, while these obstacles may have existed on the day scheduled for the tests, the City could easily have rescheduled the tests for another day with more favorable conditions. The inconvenience presented by these weather/boat conditions does not, therefore, excuse the City's failure to test altogether. Moreover, because the Act applies strict liability to permit violations, the City's failed attempts to monitor on these bad weather days do not save it from liability.

With respect to its failures to monitor effluent flow, the **[**125]** City offers explanations for several of the dates cited by the plaintiffs:

*Kailua Plant:*

(1) For its failure to monitor on August 28, 1990, the City asserts that a new effluent flow meter was installed on that date. During the period of installation, effluent flows could not be measured or recorded.

(2) For its failure to monitor from August 8 through August 9, 1993, the City asserts that, while the flow meter and totalizer were functional, the recorder had malfunctioned. Hence, while the flows were measured, they were not properly recorded.

(3) For its failure to monitor from September 23 through September 24, 1993, the flow recorder had again malfunctioned. Thus, while the flows were measured, they were not properly recorded.

*Kaneohe Plant:*

(1) For its failure to monitor from March 19, 1991 through March 21, 1991, the City asserts that the Plant experienced a breakdown, which forced a bypass into Kaneohe Bay. Due to

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[49] The court notes that plaintiffs read the Kaneohe Permit as requiring testing at twelve locations (three levels per each of the four stations). The court, however, can find no indication in the Permit itself that twelve test sites are required.

[50] Defendant failed to monitor effluent flow on the following days: March 19, 20, 21, 1991; August 12, 13, 14, 15, 16, 17, 1991; October 16, 17, 1991; and April 6, 1993.

[51] The effluent flow monitoring requirement has been in place in both Kailua's and Kaneohe's Permits since August 1, 1989.

[52] Defendant failed to monitor effluent flow on the following days: August 14, 1990; August 28, 1990; June 10, 11, 12, 13, 1992; August 8, 9, 1993; September 23, 24, 1993.

this bypass, the effluent flow did not enter the effluent pump station for monitoring.

(2) For its failure to monitor from August 12, 1992 through August 17, 1991, the City asserts that maintenance and repairs were being done at the Plant, causing **[**126]** a bypass.

(3) For its failure to monitor from October 16, 1991 through October 17, 1991, the City asserts that, due to high flows, the effluent was bypassed.

(4) For its failure to monitor on April 6, 1993, the City asserts that its was changing a valve, necessitating a bypass.

The City contends that, because it notified DOH of these bypasses, it should not be held responsible for these monitoring failures.

In assessing these purported defenses, the court notes first that the City has failed to refute the alleged violations at the Kailua Plant on August 14, 1990 and June 10-13, 1993. The court accepts this failure to refute as an admission of liability. Secondly, the court reminds the defendant that strict liability governs the finding of violation; while the plaintiffs do not dispute that the repairs took place on the dates cited by the defendant, they correctly argue that equipment repairs and replacements are not excused under the Act. Finally, with respect to the August 8-9, 1993 and September 23-24, 1993 excuses, the court notes that, for these four days, the City actually submitted to DOH Noncompliance Reports. *See* Exhibit "L" attached to Smaalders Declaration. Because **[**127]** these reports are submitted under penalty of perjury, they constitute admissions of noncompliance which bind the defendant in this proceeding. [53]

**[**128] [*1139]** More importantly, though, the court disagrees with defendant's characterization of its responsibility to monitor. The Permits require continuous monitoring; they do not provide exceptions for days during which the flow had to be bypassed to accommodate equipment failures at the Plant. If such were the case, a plant could repeatedly bypass its effluent flow simply to avoid this monitoring requirement. Instead, it is apparent from the Permits that the bypass requirements (and reporting thereof) are wholly independent of the monitoring requirement; compliance with one neither excuses nor voids compliance with the other. The strict liability standard of the Act demands nothing less. To alleviate this problem in the future, given the frequency with which flows need to be bypassed, the City could install a second flow meter at the point of bypass.

In sum, there are no genuine issues of fact as to the City's failure to monitor ammonia nitrogen and total phosphorus during the month of June 1990, or as to its failure to monitor enterococcus bacteria on 66 occasions since March 1, 1990. Additionally, there are no genuine issues of fact as to the City's failure to monitor effluent flow at **[**129]** the Kaneohe Plant on 12 occasions and at the Kailua Plant on 10 occasions. As a result of these failures, the City has committed 1,110 monitoring violations. While the excuses advanced by the City will be considered during the penalty phase of this proceeding, the court grants the plaintiffs' motion for summary judgment as to liability for monitoring violations.

## VI. SUMMARY JUDGMENT ON DEFENDANT'S ALLEGED FAILURE TO REPORT NONCOMPLIANCE EVENTS (FOURTH AND ELEVENTH CLAIMS FOR RELIEF)

In their Related Motion for Summary Judgment, plaintiffs allege that defendant has repeatedly failed to comply with reporting requirements in its Permits. EPA regulations require that all NPDES permits contain numerous specific provisions governing the reporting of noncompliance with any permit condition. *See* 40 CFR § 122.41(1)(6)-(7). Pursuant to these regulations, the City's Permits contain extensive conditions for reporting noncompliance events. The City is required to report orally, within twenty-four hours, any noncompliance event which may endanger public health or the environment. *See* 1990 Permits, attached to Plaintiff's Related Motion as Exhibits "2," "3," and "5," each at § D.2.a. **[**130]** and Standard Condition 13.f(1). The Permits require the City to submit a written report within five days. *See id.*, Standard Condition 13.f(1). The City is also required to report "all instances of noncompliance" at the time it submits its DMRs. *See id.*, Standard Condition 13.g. The Noncompliance Reports must include the following information:

> [A] description of the noncompliance and its cause; the period of noncompliance, including exact dates and

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[53] The Ninth Circuit has stated that to allow a permittee to contradict his earlier reports "would be sanctioning countless hours of NPDES litigation," contrary to Congress's intent that enforcement actions be streamlined and factual disputes minimized. Union Oil I, 813 F.2d at 1492. The Ninth Circuit further asserted:

> In addition, if each self-monitoring report is to be considered only prima facie rather than conclusive evidence of an exceedence of a permit limitation, citizens groups like the Sierra Club would be taking a considerable risk whenever they initiated a citizen enforcement action pursuant to 33 U.S.C. § 1365. While a permittee's publicly filed reports might clearly indicate that illegal pollution was taking place, the permittee might have additional information unavailable to citizen groups indicating that sampling error rendered the reports meaningless.

The Ninth Circuit concluded that a permittee could not impeach its own publicly filed reports. *Id.*

> 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.

*See* Standard condition 13.f(1). According to plaintiffs, these reporting requirements are designed to ensure that (1) regulatory agencies and the public are immediately notified of any permit noncompliance and (2) the violation will not recur.

The plaintiffs allege that defendant has repeatedly failed to comply with the above-mentioned reporting requirements. First, plaintiffs offer evidence indicating that the City has failed to properly report any of its 1,088 violations of permit conditions regarding receiving **[****131]** water quality monitoring. [54] **[****132]** **[*1140]** Second, plaintiffs demonstrate that the defendant failed to submit Noncompliance Reports for 18 of its 22 effluent flow monitoring violations. Third, the plaintiffs establish that the defendant has failed to report any of its 7,492 violations of ammonia nitrogen water quality standards, [55] despite the fact that the City's own study determined that the City was responsible for the violations. *See* June 1990 report entitled "Ammonia Nitrogen in Kailua Bay," prepared by the Water Quality Section of the City's Division of Wastewater Management, attached as Exhibit "11" to Plaintiffs' Related Motion. Plaintiffs state that this ongoing concealment has deprived DOH and the public of critical information concerning the Plants' impact on the water quality of Kailua Bay and has effectively allowed the City to continue polluting the bay illegally.

A. *Failure to Report Failures to Monitor Water Quality (1,088 Violations)*

As stated above, with regard to the City's noncompliance with monitoring requirements, the court finds that defendant committed 32 violations involving ammonia nitrogen and total phosphorus monitoring and 1,056 violations involving enterococcus bacteria monitoring, totalling 1,088 violations in all.

According to the defendant, the City submitted to DOH and to EPA, together with its DMRs, "information regarding water quality monitoring at the ZOM." *See* Defendant's Memorandum in Opposition to Plaintiffs' Related Motion, at 19; Affidavit of David I. Nagamine ("Nagamine Affidavit"), at PP 8 and 9. Such "information," the City asserts, would indicate when samplings were taken as well as when samplings were not taken at the ZOM stations.

Defendant's arguments are curious: on one hand, the **[****133]** City claims that it has complied with the permit monitoring requirements; on the other hand, it claims to have properly reported its noncompliance with the identical monitoring requirements. In any case, there is no dispute that the City never submitted Noncompliance Reports for its monitoring violations as required by the standard conditions of the permits. None of the documents referenced in the Nagamine Affidavit informed DOH or the public that the City had violated its Permits, and none contained any information concerning the steps taken or planned to eliminate or to prevent recurrence of the violations. As a result of this failure to properly report its violations of the receiving water quality monitoring requirements, the City committed an additional 1,088 permit violations. The court grants the plaintiffs' motion for summary judgment as to failure to report violations of receiving water quality monitoring requirements.

B. *Failure to Report Failures to Monitor Effluent Flow (18 Violations)*

With regard to plaintiffs' allegations that the City failed to report its effluent flow monitoring violations, defendant simply repeats its arguments that it did not violate the NPDES **[****134]** monitoring requirements; it neglects to mention its obligations to report noncompliance events. For example, the City claims that its effluent flow monitoring violations at the Kaneohe Plant were not in fact violations, because it was bypassing at the time. The City also claims that, at the Kailua Plant, it did monitor on August 8-9, 1993 and September 24-24, 1993.

However, as discussed above, the Permits require continuous monitoring; they do not provide exceptions for days during which the flow had to be bypassed to accommodate equipment failures at the Plant. Moreover, plaintiffs acknowledge that the City did submit Noncompliance Reports for the violations occurring on August 8-9 and September 23-24, 1993; plaintiffs do not assert any reporting violations for those days. Because the City does not contest the fact that it failed to properly submit Noncompliance Reports for the remaining effluent flow monitoring violations, the court finds

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[54] Plaintiffs allege that the City has failed to report 1,296 monitoring violations. This number is derived from plaintiffs' reading of the Kaneohe Permit as requiring testing at twelve locations. However, as discussed *supra*, the Kaneohe Permit requires only that samples be taken from the bottom grab, without mentioning surface or mid-depth monitoring. Thus the court finds no indication in the Permit itself that twelve test sites are required. As a result, the overall number of alleged reporting violations pertaining to water quality monitoring should be reduced to 1,088.

[55] Although originally alleging 6,032 ammonia nitrogen violations, plaintiffs argue that the City committed an additional 1,460 violations in 1993, for a total of 7,492 violations from August 1, 1989 through December 31, 1993.

that the City committed an additional 18 reporting violations. The court grants plaintiffs' motion for summary **[*1141]** judgment as to failure to report monitoring violations concerning effluent flow.

C. *Failure to Report Violations of Water Quality* **[**135]** *Permit Conditions (7,492 Violations)*

The court next turns to plaintiffs' allegations that the City failed to report any of its 7,492 alleged violations of ammonia nitrogen water quality standards. As discussed in *Part I, supra*, the issue of whether defendant in fact violated permit conditions pertaining to receiving water quality limitations is not properly before this court. Under the holding of *NWEA*, plaintiffs simply have no standing to bring an enforcement action regarding these water quality standard permit conditions. The question remains, however, as to whether plaintiffs may seek enforcement of the Permits' requirements for reporting incidences of noncompliance with such water quality permit conditions. This court holds that they may not.

The court acknowledges that the NPDES reporting requirements serve the particularly important purpose of ensuring that regulatory agencies and the public are immediately notified of any permit noncompliance. Public health and safety concerns obviously justify the strict NPDES requirements for reporting potentially hazardous fluctuations in water quality in the Kailua and Kaneohe Bays. Moreover, the Ninth Circuit has not specifically **[**136]** precluded citizens from enforcing NPDES reporting requirements: the *NWEA* court did not reach the issue of whether private citizens have standing to bring enforcement actions on reporting requirements involving receiving water quality standard violations.

Nevertheless, any investigation into whether the City failed to report a noncompliance event is necessarily contingent upon a finding that the event in fact occurred. Thus, because plaintiffs have no standing to ask this court to find receiving water quality violations or to penalize the City therefor, this court may not properly reach the issue of whether the City failed to *report* these alleged violations. While this court is cognizant of its duty not to broaden unnecessarily the Ninth Circuit's holding in *NWEA*, a contrary result would subvert the rationale of that case by requiring an exhaustive assessment of the merits of plaintiffs' allegations of water quality violations. The court, therefore, denies plaintiffs' motion for summary judgment on their claims pertaining to the City's failure to report alleged violations of water quality permit conditions, and grants the defendant's motion to dismiss these claims for lack **[**137]** of standing.

D. *Failure to Report Bypass Incidents (75 Violations)*

Finally, plaintiffs allege that defendant has violated the bypass reporting conditions of its Permits on at least 75 occasions since August 1, 1989. The Permits require that any bypasses be *immediately* reported to DOH and to the media, to warn the public and to mitigate potential public health hazards. *See* 1990 Permits, attached to Plaintiffs' Related Motion as Exhibits "2," "3," and "5," each at § D.2 and Standard Condition 14. For anticipated bypasses, the City is required to submit prior notice to DOH "if possible, at least 10 days before the date of bypass." *See id.* at Standard Condition 14.c. If bypass is unanticipated, the City must provide to DOH immediate oral notice and a written report within five days. In addition, the City must notify the UPI and AP wire services. *See id.* at § H & Standard Conditions 13.f and 14. Plaintiffs assert that the primary purpose of the reporting requirements is to ensure that (1) DOH and the public can take necessary measures to minimize risks to human health, and (2) bypass violations do not recur in the future.

Plaintiffs allege that, despite the City's **[**138]** own internal directives and standard operating procedures, it has failed on at least 75 occasions to report bypasses properly. First, plaintiffs offer evidence indicating that from August 1, 1989 through the present, the City has failed to report properly at least 73 routine bypasses of the trickling filter at the Kailua Plant. Plaintiffs also establish that the City failed to report the bypass at the Kailua Plant on or about September 11, 1992, about which plaintiffs first learned during Mr. Endler's deposition. Finally, plaintiffs demonstrate that the City inaccurately reported **[*1142]** the Kaneohe Plant bypass on October 16-17, 1991 as taking place only for a single day, rather than for two days. *See* notice letter of October 23, 1991 and supervisor's daily report for October 17, 1991, attached as Exhibit "1" to Declaration of Eric Walters in Support of Plaintiffs' Countermotion. Plaintiffs argue that the City's failures to report the bypasses at the plants constituted significant violations of both its Permits and the Act.

In response to plaintiffs' evidence, defendant fails entirely to address the issue of the 75 alleged bypass reporting violations. The defendant has not offered one **[**139]** piece of evidence to create an issue of fact as to these claims. [56] The court, therefore, grants plaintiffs' motion for summary judgment as to its bypass reporting claims.

*CONCLUSION*

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[56] Defendant's opposition consisted only of its pre-emption arguments, which this court has already found unpersuasive. *See Part IV.A., supra.*

For the reasons stated above, the court holds the following:

(1) As to Counts One and Eight, the court GRANTS the plaintiffs' motion for summary judgment as to 11,095 secondary treatment violations.

(2) As to Counts Two and Nine, the court GRANTS the defendant's motion to dismiss based on lack of standing. The court DENIES the plaintiffs' motion for summary judgment on these counts.

(3) As to Counts Three and Ten, the court GRANTS the plaintiffs' motion for summary judgment as to 406 bypass violations. The court DENIES defendant's motion to dismiss or for summary judgment as to these counts.

(4) As to Counts Four and Eleven, the court GRANTS the plaintiffs' **[**140]** motion for summary judgment as to 75 failures to report bypass incidents, 1,088 failures to report failures to monitor water quality, and 18 failures to report failures to monitor effluent flow. However, the court DENIES the plaintiffs' motion and GRANTS the defendant's motion to dismiss based on lack of standing as to the failures to report violations of receiving water quality permit conditions.

(5) As to Counts Five and Twelve, the court GRANTS the plaintiffs' motion for summary judgment as to 1,110 failures to monitor receiving water quality.

(6) As to Counts Six and Thirteen, the court DENIES the defendant's Motion for Reconsideration of this court's July 27, 1992 Order concerning maintenance and operations conditions.

The court hereby finds a grand total of 13,792 violations were committed by the City. The court reserves ruling on the proper penalties to be affixed.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 27 1994.

DAVID ALAN EZRA

UNITED STATES DISTRICT JUDGE

**Table1 (*Return to related document text*)**

| *5*DISCHARGE LIMITATIONS | *2*Mass Emissions | *2*Concentration | | |
|---|---|---|---|---|
| Kailua | | | | |
| | KG/Day Monthly Average (lbs/day) | KG/Day 7-Day Average (lbs/day) | Monthly Average | 7-Day Average |
| BOD | 795 (1752) | 1192 (2629) | 30 mg/l | 45 mg/l |
| TSS | 795 (1752) | 1192 (2629) | 30 mg/l | 45 mg/l |
| Kaneohe | | | | |
| BOD | 488 (1077) | 732 (1614) | 30 mg/l | 45 mg/l |
| TSS | 488 (1077) | 732 (1614) | 30 mg/l | 45 mg/l |

**Table1 (*Return to related document text*)**

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**Table2 (*Return to related document text*)**

| Kailua Plant | *3*Number of Violations BOD | TSS |
|---|---|---|
| Concentration 30-day average | 546 | 332 |
| Concentration 7-day average | 42 | 35 |
| Percent Removal | 852 | 184 |
| Total Violations | 1440 | 551 |
| Grand Total: 1991 | | |

| Kaneohe Plant | *3*Number of Violations BOD | TSS |
|---|---|---|
| Concentration 30-day average | 1125 | 1430 |
| Concentration 7-day average | 196 | 224 |
| Percent Removal | 1400 | 1300 |
| Total Violations | 2721 | 2965 |
| Grand Total: 5686 | | |

**Table2 (***Return to related document text***)**

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**Table3 (***Return to related document text***)**

| Kailua Plant | *3*Number of Violations BOD | TSS |
|---|---|---|
| Mass Loading 30-day average | 273 | 123 |
| Mass Loading 7-day average | 77 | 56 |
| Mass Loading Daily Maximum | 0 | 1 |
| Total violations: | 350 | 180 |
| Grand Total: 530 | | |

| Kaneohe Plant | *3*Number of Violations BOD | TSS |
|---|---|---|
| Mass Loading 30-day average | 1245 | 1431 |
| Mass Loading 7-day average | 63 | 98 |
| Mass Loading Daily Maximum | 25 | 26 |
| Total violations: | 1333 | 1555 |
| Grand Total: 2888 | | |

**Table3 (***Return to related document text***)**

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# ATTACHMENT NO. 12

# *County of Contra Costa v. State of California*

Court of Appeal of California, Third Appellate District

January 31, 1986

Civ. No. 24357

**Reporter**
177 Cal. App. 3d 62 *; 222 Cal. Rptr. 750 **; 1986 Cal. App. LEXIS 2528 ***

COUNTY OF CONTRA COSTA et al., Plaintiffs and Respondents, v. THE STATE OF CALIFORNIA, Defendant and Appellant

**Subsequent History: [***1]** As Modified February 13, 1986. Respondents' Petition for Review by the Supreme Court was Denied April 23, 1986. Mosk, J., was of the Opinion that the Petition should be Granted.

**Prior History:** Superior Court of Sacramento County, No. 300784, James Timothy Ford, Judge.

**Disposition:** The judgment is reversed.

## Core Terms

reimbursement, Statutes, mandates, Counties, local government, administrative remedy, exhaust, costs, regulation, bills, state mandate, subvention of funds, superior court, appropriation, funding, executive order, local agency, provisions, courts, exhaustion of administrative remedies, statutory enactment, costs mandated, new program, unenforceable, declare, void, trial court, statewide, Taxation, requires

## Case Summary

**Procedural Posture**
Defendant, the State of California, challenged the decision of the Superior Court of Sacramento County (California) granting judgment for plaintiff county and declaring certain bills void under Cal. Const. art. XIIIB, § 6.

**Overview**
The trial court entered a judgment declaring that certain bills enacted during defendant state's legislative session were void and that certain challenged bills were unenforceable. The trial court reasoned that defendant state had failed to provide a subvention for reimbursement of the costs imposed on local governments as required by Cal. Const. art. XIIIB, § 6. Defendant appealed arguing that plaintiff county failed to exhaust its administrative remedies and that the contested statutes did not constitute reimbursable mandates under the constitution. The court agreed and held that a judicial action before the legislative process had been completed was premature and that the trial court was without jurisdiction until administrative remedies had been exhausted. Moreover, the court reasoned that nothing in Cal. Const. art. XIIIB rendered the statutory administrative procedure for hearing and determining claims void. Also, the court held that plaintiff failed to present evidence showing that it would be futile to submit the claims to the administrative procedure.

**Outcome**
The court reversed the judgment of the trial court granting judgment for plaintiff. The court reasoned that plaintiff failed to exhaust its administrative remedies.

## LexisNexis® Headnotes

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

*HN1*[] **Reviewability, Exhaustion of Remedies**

The doctrine of exhaustion of administrative remedies is not a matter of judicial discretion but is a fundamental rule of procedure.

Civil Procedure > ... > Justiciability > Exhaustion of

Remedies > Administrative Remedies

Governments > Legislation > Statutory Remedies & Rights

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Exceptions

*HN2*[] **Exhaustion of Remedies, Administrative Remedies**

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. When no exception applies, the exhaustion of an administrative remedy is a jurisdictional prerequisite to resort to the courts.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

*HN3*[] **Reviewability, Exhaustion of Remedies**

The doctrine of exhaustion of administrative remedy applies to actions raising constitutional issues.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Environmental Law > Land Use & Zoning > Eminent Domain Proceedings

*HN4*[] **Separation of Powers, Legislative Controls**

While the legislature may not unreasonably curtail or impair a right granted by a self executing constitutional provision, it may adopt reasonable procedural requirements for assertion of the right.

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Governments > Legislation > Enactment

Constitutional Law > Separation of Powers

Governments > State & Territorial Governments > General Overview

*HN5*[] **Justiciability, Exhaustion of Remedies**

The powers of state government are legislative, executive and judicial. Under that tripartite system, the legislative power of the state is vested in the California Legislature; the supreme executive power of the state is vested in the Governor; and the judicial power of this state is vested in the supreme court, courts of appeal, superior courts, municipal courts, and justice courts. One branch of government may not exercise the powers of another branch. Persons charged with the exercise of one power may not exercise either of the others except as permitted by the constitution.

Constitutional Law > The Judiciary > Jurisdiction > General Overview

*HN6*[] **The Judiciary, Jurisdiction**

The judicial function is to declare the law and to determine the rights of parties to controversies.

Constitutional Law > Separation of Powers

*HN7*[] **Constitutional Law, Separation of Powers**

Under the separation of powers clause, the legislature can neither exercise nor place limitations upon judicial powers.

Constitutional Law > Separation of Powers

*HN8*[] **Constitutional Law, Separation of Powers**

The legislative function is to enact laws and to appropriate funds.

Constitutional Law > Separation of Powers

*HN9*[] **Constitutional Law, Separation of Powers**

Courts cannot interfere with the legislative process and courts cannot compel legislative action.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

*HN10*[] **Reviewability, Exhaustion of Remedies**

An administrative procedure is part of the legislative process and it has been recognized that the legislative process remains incomplete until the administrative remedy is exhausted.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Governments > Local Governments > Claims By & Against

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

*HN11*[] **Reviewability, Exhaustion of Remedies**

A judicial action before the legislative process has been completed is premature and a court is without jurisdiction until administrative remedies have been exhausted. To hold otherwise would be to permit the courts to engage in an unwarranted interference with the legislative process.

Governments > Local Governments > Finance

Governments > Local Governments > Licenses

*HN12*[] **Local Governments, Finance**

In the event it is determined that a reimbursable mandate exists then a local government claims bill must be introduced to fund such a mandate. In the event the legislature fails to provide an appropriation to fund the mandate then the local government agency may proceed to have a judicial declaration that the mandate is unenforceable.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > Procedures

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > ... > Elements > Just Compensation > Property Valuation

*HN13*[] **Special Proceedings, Eminent Domain Proceedings**

The *California Code of Civil Procedure section 1263*. 510, relating to eminent domain, requires a condemnor to pay for business goodwill when condemning property.

## Headnotes/Syllabus

**Summary**
**CALIFORNIA OFFICIAL REPORTS SUMMARY**

Thirty-eight counties and the County Supervisors Association of California filed a complaint for declaratory relief against the state seeking a judicial declaration that 20 bills enacted in the 1980-1981 legislative session and three bills enacted after January 1, 1975, but before the effective date of Cal. Const., art. XIII B, were invalid, unconstitutional, or unenforceable because such bills established "reimbursable mandates" requiring the state, whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, to provide a subvention of funds to reimburse such local government for the cost of such program or increased level of service--with certain exceptions, and the state failed to provide a subvention for reimbursement of the cost imposed for any of the bills in question. The trial court ruled that the bills were void or had become unenforceable because the state had, indeed, failed to provide a subvention for reimbursement of costs imposed on local governments as is required by Cal. Const., art. XIII B. (Superior Court of Sacramento County, No. 300784, James Timothy Ford, Judge.)

The Court of Appeal reversed, holding that, as to the bills enacted in the 1980-1981 legislative session, plaintiffs failed to exhaust their administrative remedy to obtain

reimbursement for the cost of implementing state-mandated programs, and, absent an exception to the rule requiring the exhaustion of administrative remedies, which did not exist with regard to these bills, this requirement was a jurisdictional prerequisite to their resort to the courts. Stating that an administrative enforcement procedure is part of the legislative process and that the legislative process remains incomplete until the administrative remedy is exhausted, the court held that a judicial action before the legislative process has been completed is premature and a court is without jurisdiction until administrative remedies have been exhausted, absent an exception to the rule, which did not exist here. The court further held that plaintiffs did not establish the futility exception to the exhaustion of remedies requirement by showing that only 8 of 24 claims previously submitted to the administrative process had been funded; the fact that some, if only a few, of the claims had been funded precluded plaintiffs from establishing the exception. As to the three remaining bills, the court held that two fell within an exception to *Cal. Const., art. XIII B, § 6*, which excepts legislation defining a new crime or legislation changing an existing definition of a crime from the reimbursement requirement, and that the third, requiring a condemnor to pay for business goodwill when condemning property, was not a bill requiring reimbursement. A county is not required to condemn property, and must pay for goodwill only when it elects to condemn. Therefore, payment for loss of goodwill is not a state-mandated cost under *Rev. & Tax. Code, §§ 2231*, *2270*. (Opinion by Sparks, J., with Puglia, P. J., and Sims, J., concurring.)

**Headnotes**
**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to California Digest of Official Reports, 3d Series

*CA(1)*[] **(1)**

**Administrative Law § 86—Judicial Review and Relief—Limitations on Availability—Exhaustion of Administrative Remedies—Statement of Doctrine.**

--Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. When no exception applies, the exhaustion of an administrative remedy is a jurisdictional prerequisite to resort to the courts. This doctrine is not a matter of judicial discretion but is a fundamental rule of procedure.

*CA(2)*[] **(2)**

**Administrative Law § 89—Judicial Review and Relief—Limitations on Availability—Exhaustion of Administrative Remedies—Exceptions.**

--The doctrine of exhaustion of administrative remedies is not an inflexible dogma. It contains its own exceptions, as when the subject matter of the controversy lies outside the administrative agency's jurisdiction, when pursuit of an administrative remedy would result in irreparable harm, when the administrative agency cannot grant an adequate remedy, and when the aggrieved party can positively state what the administrative agency's decision in his particular case would be. Thus, the doctrine precludes original judicial actions only in the absence of those exceptions.

*CA(3)*[] **(3)**

**Administrative Law § 88—Judicial Review and Relief—Limitations on Availability—Exhaustion of Administrative Remedies—Constitutional Issues.**

--The doctrine of exhaustion of administrative remedies applies to actions which raise constitutional issues. There is an exception when the constitutionality of the agency itself is challenged. A litigant is not required to exhaust his administrative remedies where the challenge is to the constitutionality of the administrative agency.

*CA(4)*[] **(4)**

**Constitutional Law § 7—Operation and Effect—Mandatory, Directory, and Self-executing Provisions.**

--The fact that a constitutional provision is self-executing does not relieve a party from complying with reasonable procedure for assertion of the constitutional right. While the Legislature may not unreasonably curtail or impair a right granted by a self-executing constitutional provision, it may adopt reasonable procedural requirements for assertion of the right.

*CA(5a)*[] **(5a)** *CA(5b)*[] **(5b)**

**Constitutional Law § 39—Distribution of Governmental Powers—Between Branches of Government—Legislative Power and Its Limits.**

--While our branches of government are coequal they are not completely independent. Although the Legislature cannot exercise judicial functions or deprive the courts of judicial powers, it may regulate procedures and place reasonable

restrictions upon judicial functions. While the Legislature cannot act as a "supercourt," rejecting judicial decisions with which it disagrees, it may make a law to prospectively abrogate the effect of a judicial decision. Thus, where the Legislature provided for a procedure before an administrative agency by which local governmental entities could present claims for reimbursement of the cost of state mandates imposed on such entities, have those claims determined, and have the result of those proceedings reviewed in a judicial proceeding, several counties were required to exhaust that administrative remedy before seeking to have the legislative bills containing the state mandates judicially declared void. The determination of reimbursement claims was within the jurisdiction of the administrative agency by legislative decree, pursuit of the remedy would not result in irreparable harm, the agency could grant an adequate remedy, and the agency's decision was not preordained. Failure to exhaust those remedies was therefore jurisdictional.

*CA(6)*[⬇] **(6)**

**Administrative Law § 86—Judicial Relief and Review—Limitations on Availability—Exhaustion of Administrative Remedies—Statement of Doctrine.**

--An administrative procedure is part of the legislative process and the legislative process remains incomplete until the administrative remedy is exhausted. A judicial action before the legislative process has been completed is premature and a court is without jurisdiction until administrative remedies have been exhausted, unless there exists an exception to the rule requiring the exhaustion of administrative remedies.

*CA(7a)*[⬇] **(7a)** *CA(7b)*[⬇] **(7b)**

**Administrative Law § 89—Judicial Review and Relief—Limitations on Availability—Exhaustion of Administrative Remedies—Exceptions.**

--The futility exception to the requirement of exhaustion of administrative remedies is a very narrow one. Insofar as a futility exception exists, as when it can be demonstrated that an agency's decision is certain to be adverse, its application is very limited. Thus, exhaustion of administrative remedy is required unless the appellant can positively state that the administrative agency has declared what its ruling will be in a particular case.

*CA(8)*[⬇] **(8)**

**Administrative Law § 89—Judicial Review and Relief—Limitations on Availability—Exhaustion of Administrative Remedies—Exceptions.**

--In an action in which several counties sought to have several legislative bills judicially declared invalid, on the ground that the bills allegedly imposed state-mandated costs but were not funded by the Legislature, plaintiffs did not establish the futility exception to the exhaustion of remedies requirement by showing that only 8 of 24 claims previously submitted to the administrative process had been funded. The fact that some, if only a few, of the claims had been funded precluded plaintiffs from establishing the exception.

*CA(9)*[⬇] **(9)**

**Eminent Domain § 22—Compensable Property and Rights—Business Goodwill—Payment by City—Reimbursement From State—State-mandated Cost.**

--Whether a county decides to exercise eminent domain is essentially an option of the county rather than a mandate of the state. The county is not required to exercise eminent domain, but if it does, then it must pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost under *Rev. & Tax. Code, § 2231, subd. (a)*, and *Rev. & Tax. Code, § 2207*.

*CA(10)*[⬇] **(10)**

**Public Funds § 5—Expenditures.**

--*Pen. Code, § 597w*, making it a misdemeanor to use high-altitude decompression chambers to destroy dogs and cats, constitutes legislation defining a new crime or changing the definition of an existing crime, and as such is expressly excluded from the operation of Cal. Const., art XIII B. Consequently, the state need not provide a subvention of funds to reimburse a local government for the cost of substituting a new program.

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**Judges:** Opinion by Sparks, J., with Puglia, P. J., and Sims, J., concurring.

**Opinion by:** SPARKS

## Opinion

**[*66] [**753]** In this declaratory relief action the Superior Court of Sacramento County entered a judgment declaring that **[***2]** 14 bills enacted during the 1980-1981 legislative session were void, and that the challenged bills enacted in 1975 and in 1978 have become unenforceable. The court reasoned that the state had failed to provide a subvention for reimbursement of the costs imposed on local governments as is required by *California Constitution, article XIII B, section 6*. The defendant State of California appeals contending that the plaintiffs failed to exhaust their administrative remedies, and that the contested statutes do not constitute reimbursable mandates under the constitution. We conclude that the state's position on exhaustion is the correct one and therefore reverse the judgment.

Factual and Procedural Background

As we noted in *City of Sacramento v. State of California (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258]*, "[the] question of reimbursement had its genesis in the 'Property Tax Relief Act of 1972.' (Stats. 1972, ch. 1406, § 1, p. 2931.) That act, generally known as 'SB 90,' provided for a system of limitations on local governments' power to levy property taxes, with the concomitant requirement of reimbursement to such local governments for costs mandated upon them by the **[***3]** state in the form of increased levels of services or programs. . . . [para. ] On November 6, 1979, California voters determined to make a limitation-reimbursement system similar to 'SB 90' a part of the Constitution. By initiative measure at the special statewide election **[*67]** on that date, the voters enacted Proposition 4, thereby adding article XIII B to the California Constitution . . . . The so-called 'Spirit of 13' initiative provided for limitations on the ability of all California governmental entities to appropriate funds for expenditures. (*Cal. Const., art. XIII B, §§ 1, 8, subds. (a), (b).*)" ( *Id., at p. 188.*)

Fiscal relief to local governments was provided in the provision we are concerned with in this case, section 6 of article XIII B. Section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [para. ] (a) Legislative mandates **[***4]** requested by the local agency affected; [para. ] (b) Legislation defining a new crime or changing an existing definition of a crime; or [para. ] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." Article XIII B became effective on July 1, 1980. (Art. XIII B, § 10.) [1]

**[***5]** This action was commenced on January 11, 1982, when 38 counties and the County Supervisors Association of California (Counties) filed a complaint for declaratory relief against the State of California. The Counties set forth a list of 20 bills enacted in the 1980-1981 legislative session which they contend establish reimbursable mandates but for which no subvention of funds has been provided. They also set forth three bills enacted after January 1, 1975, but before the effective date of article XIII B, which they allege establish reimbursable mandates but for which no subvention of funds has been provided. The Counties sought a declaration that the challenged statutory enactments are invalid, unconstitutional, and/or unenforceable. The state, represented by the Attorney General, answered **[**754]** the complaint by denying that the challenged bills were invalid or unconstitutional, and asserting as an affirmative defense that the Counties had failed to exhaust their administrative remedies.

Before trial the Counties withdrew their challenge to four of the bills enacted in the 1980-1981 legislative session. A court trial was held with **[*68]** regard to 16 bills enacted in **[***6]** that session, and 3 bills enacted in 1975, 1976, and 1978. The trial court issued a tentative decision holding that the Counties had failed to exhaust their administrative remedies by failing to submit their claims to the Board of Control as provided for in *Revenue and Taxation Code sections 2231* and *2250* and

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[1] After the adoption of article XIII B, section 6, the Legislature in 1980 amended *Revenue and Taxation Code sections 2207* and *2231*, and expanded the definition of "costs mandated by the State" by including certain specified statutes enacted after January 1, 1973. (Stats. 1980, ch. 1256, § 5, p. 4248.) In ***County of Los Angeles v. State of California (1984) 153 Cal.App.3d 568, 573 [200 Cal.Rptr. 394]***, the court concluded that "this reaffirmance constituted the exercise of the Legislative discretion authorized by *article XIII B, section 6, subdivision (c), of the California Constitution* [to provide subvention of funds for mandates enacted prior to January 1, 1975]."

following. The court also indicated an intent to hold that article XIII B does not apply to bills enacted before its effective date.

The Counties moved for a new trial. In support of their motion they submitted a written statement of the Board of Control concerning a claim of the Pajaro Valley Unified School District for reimbursement for costs mandated by a state regulation (Cal. Admin. Code, tit. 5, §§ 90-101, relating to voluntary desegregation). The board determined that the regulation did not impose reimbursable state-mandated costs. In doing so the board stated that its authority to review claims for reimbursement was limited to statutory provisions for reimbursement under provisions in the Revenue and Taxation Code and did not extend to claims under the Constitution. [2] This decision was submitted in support of Counties' argument that they had no administrative remedy **[***7]** for claims arising under the Constitution. A new trial was granted.

Upon a new trial the court held that the Board of Control does not have the authority or jurisdiction to determine whether a statute contains a reimbursable mandate under the Constitution. The court further found that even if the board had such authority it would have been futile for the Counties to have exhausted their administrative **[***8]** remedies. The court held that 14 bills enacted during the 1980-1981 legislative session contained reimbursable mandates and since the Legislature has not provided a subvention of funds the court found those acts to be void. With respect to acts enacted in 1975 and in 1978, the court held that the acts were valid when enacted but that since the Legislature had failed to provide a subvention of funds after the effective date of article XIII B, the acts had become unenforceable.

Judgment was entered holding the following legislative enactments to be void: (1) Statutes of 1981, chapter 1141, relating to taxation; (2) Statutes of 1981, chapter 617, relating to fire inspection records; (3) Statutes of 1981, chapter 618, relating to juvenile courts; (4) Statutes of 1981, chapter **[*69]** 1111, relating to parole; (5) Statutes of 1981, chapter 846, relating to real property; (6) Statutes of 1981, chapter 1088, relating to the California Debt Advisory Commission; (7) Statutes of 1981, chapter 962, relating to environmental quality; (8) Statutes of 1981, chapter 332, relating to juvenile court law; (9) Statutes of 1981, chapter 990, relating to developmental disabilities; (10) Statutes **[***9]** of 1981, chapter 612, relating to local agency employer-employee relations; (11) Statutes of 1981, chapter 958, relating to small claims court; (12) Statutes of 1981, chapter 875, relating to minors; (13) Statutes of 1981, chapter 866, relating to public contracts; and (14) Statutes of 1981, chapter 876, relating to building standards. The judgment also declared the following legislative enactments to be unenforceable: (1) Statutes of 1975, chapter 1275, relating to acquisition of property **[**755]** for public use; and (2) Statutes of 1978, chapter 1146, relating to animals.

Discussion

I

As we noted in *City of Sacramento*, the concept of reimbursement of local governmental entities for state mandated costs did not begin with the enactment of article XIII B to the Constitution. In the Property Tax Relief Act of 1972 the Legislature had earlier provided for limitations on local governments' power to levy property taxes, with a requirement of reimbursement to such local governments for costs mandated by the state in the form of increased levels of services or programs. This statutory limitation-reimbursement scheme is contained in *Revenue and Taxation Code section 2201 et seq.* **[***10]** (Stats. 1973, ch. 358, § 3, p. 779.) [3] *Section 2207* provides: "'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [para. ] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program; [para. ] (b) Any executive order issued after January 1, 1973, which mandates a new program. [para. ] (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. [para. ] (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 above the levels required by such federal statute or regulation. [para. ] (e) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which implements or interprets a statute or amendment **[*70]** adopted or enacted pursuant **[***11]** to the approval of a statewide ballot

[2] That piece of evidence added nothing to the dispute. First of all, the decision of the Board of Control was not rendered until May 26, 1983, more than a year and five months *after* this lawsuit was filed. It hardly justifies the failure of the Counties to seek their administrative remedy before they filed this suit. Secondly, the board only "determined that its authority to review alleged mandates was limited to the authority delineated in the *Revenue and Taxation Code, Section 2201 et seq.*" The Counties have failed to show how that determination precluded the board from granting relief in this case.

[3] All further section references are to the Revenue and Taxation Code unless otherwise indicated.

measure by the voters and, by such implementation or interpretation, increases program or service levels above the levels required by such ballot measure. [para. ] (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. [para. ] (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 the program or service. [para. ] (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 such program or service if the local agencies have no reasonable alternatives other than to continue the optional program."

**[***12]** *Section 2231, subdivision (a)* provides that the state shall reimburse local agencies for all costs mandated by the state as defined in *section 2207*. [4] *Subdivision (b) of section 2231* provides that the reimbursement for the initial fiscal year shall be provided by an appropriation in the statute mandating the costs or, in the case of an executive order, by a bill appropriating the funds which must accompany the order or alternatively by a provision in the Budget Bill for the following fiscal year. In the following fiscal years the costs are to be included in the State Budget and in the Budget Bill. The State Budget and the Budget Bill shall also include appropriations for reimbursement of claims which **[**756]** have been awarded pursuant to section 2253, subdivisions (b), (c), and (d). The procedure for the submission and payment of claims by local governments is also set forth in *section 2231*.

**[***13]** Section 2240 and the sections following it set forth the procedure for determining and appropriating funds for the reimbursement of local governments. Essentially, the Legislative Counsel is to make the initial determination whether a bill will require reimbursement. (§ 2241.) If it will then the Department of Finance is to estimate the amount of reimbursement which will be required. (§§ 2242-2243.) In every subsequent fiscal year the State Budget and the Budget Bill shall contain appropriations for reimbursement of such costs. (§ 2245.) The Department of Finance and the Legislative Analyst are to make yearly reports to the Legislature with respect to **[*71]** unfunded statutes to aid in determining whether reimbursement is in fact required and whether the mandate should be repealed. (§§ 2246, 2246.1.)

*Section 2250* and those following it provide a hearing procedure for the determination of claims by local governments. The State Board of Control is required to hear and determine such claims. (*§ 2250*.) For purposes of such hearings the board consists of the members of the Board of Control provided for in part 4 (commencing with § 13900) of division 3 of title 2 of the **[***14]** Government Code, together with two local government officials appointed by the Governor. (§ 2251.) The board was required to adopt procedures for receiving and hearing such claims. (§ 2252.) The first claim filed with respect to a statute or regulation is considered a "test claim" or a "claim of first impression." (§ 2218, subd. (a).) The procedure requires an evidentiary hearing where the claimant, the Department of Finance, and any affected department or agency can present evidence. (§ 2252.) If the board determines that costs are mandated, then it must adopt parameters and guidelines for the reimbursement of such claims. (§ 2253.2.) The claimant or the state is entitled to commence an action in administrative mandate pursuant to *Code of Civil Procedure section 1094.5* to set aside a decision of the board on the grounds that the board's decision is not supported by substantial evidence. (§ 2253.5.)

At least twice each calendar year the board is required to report to the Legislature on the number of mandates it has found and the estimated statewide costs of these mandates. (§ 2255, subd. (a).) In addition to the estimate of the statewide costs for each mandate, the report **[***15]** must also contain the reasons for recommending reimbursement. (§ 2255, subd. (a).) Immediately upon receipt of the report a local government claims bill shall be introduced in the Legislature which, when introduced, must contain an appropriation sufficient to pay for the estimated costs of the mandates. (§ 2255, subd. (a).) In the event the Legislature deletes funding for a mandate from the local government claims bill, then it may take one of the following courses of action: (1) include a finding that the legislation or regulation does not contain a mandate; (2) include a finding that the mandate is not reimbursable; (3) find that a regulation contains a mandate and direct that the Office of Administrative Law repeal the regulation; (4) include a finding that the legislation or regulation contains a reimbursable mandate and direct that the legislation or regulation not be enforced against local entities until funds become available; (5) include a finding that the Legislature cannot determine whether there is a mandate and direct that the legislation or regulation shall remain in effect and be enforceable unless a court determines that the

[4] *Section 2231* also provides for reimbursement to school districts for costs mandated by the state as defined in section 2207.5. We are not here concerned with the claims of any school district so we shall restrict our discussion to the provisions applicable to reimbursement of local governments.

legislation or regulation contains a reimbursable **[***16]** mandate in which case the effectiveness of the legislation or regulation shall be suspended and it shall not be enforced against a local entity until funding becomes available; or **[*72]** (6) include a finding that the Legislature cannot determine whether there is a reimbursable mandate and that the legislation or regulation shall be suspended and shall not be enforced against a local entity until a court determines whether there is a reimbursable **[**757]** mandate. (§ 2255, subd. (b).) If the Legislature deletes funding for a mandate from a local government claims bill but does not follow one of the above courses of action or if a local entity believes that the action is not consistent with article XIII B of the Constitution, then the local entity may commence a declaratory relief action in the Superior Court of the County of Sacramento to declare the mandate void and enjoin its enforcement. (§ 2255, subd. (c).) [5]

**[***17]** Effective January 1, 1985, the Legislature has established a new commission to consider and determine claims based upon state mandates. This is known as the Commission on State Mandates and it consists of the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and Research, and a public member with experience in public finance, appointed by the Governor and approved by the Senate. ( *Gov. Code, § 17525*.) "Costs mandated by the state" are defined as "any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of *Section 6 of Article XIII B of the California Constitution*." ( *Gov. Code, § 17514*.) The procedures before the commission are similar to those which were followed before the Board of Control. ( *Gov. Code, § 17500 et seq.*) Any claims which had not been included in a local government claims bill prior to January 1, 1985, were to be transferred to and considered **[***18]** by the commission. ( *Gov. Code, § 17630*; § 2239.) [6]

**[*73]** The Attorney **[***19]** General contends that exhaustion of these administrative remedies constituted a condition precedent for resort to this judicial action for declaratory relief. We agree. *CA(1)*[↑] **(1)** *HN1*[↑] The doctrine of exhaustion of administrative remedies, it has been held, is not a matter of judicial discretion but is a fundamental rule of procedure. ( *Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 293 [109 P.2d 942, 132 A.L.R. 715]*.) "*HN2*[↑] In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." ( *Id., at p. 292*.) When no exception applies, the exhaustion of an administrative remedy is a jurisdictional prerequisite to resort to the courts. ( *Id., at p. 293*.) The cases which so hold are legion. (See 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 234, pp. 264-265; 2 Witkin, *op. cit. supra*, Jurisdiction, § 69, p. 437.) As Witkin explains it, "[the] administrative tribunal is created by law to adjudicate the issue sought to be presented to the court. The claim or 'cause of action' is within the special jurisdiction of the administrative tribunal, and **[***20]** the courts may act only to *review* the final administrative determination. If a court allowed a suit to be maintained prior to such final determination, it would be interfering with the subject matter jurisdiction of another tribunal. Accordingly, **[**758]** the exhaustion of an administrative remedy has been held *jurisdictional* in California." (3 Witkin, *op. cit. supra*, Actions, § 234, p. 265; italics in original.) But before the doctrine can be said to be jurisdictional it must first apply to the case at issue. *CA(2)*[↑] **(2)** As the Court of Appeal explained in *Ogo Associates v. City of Torrance (1974) 37 Cal.App.3d 830 [112 Cal.Rptr. 761]*, "the doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma. It contains its own exceptions, as when the subject matter of the controversy lies outside the administrative agency's jurisdiction, when pursuit of an administrative remedy would result in irreparable harm, when the administrative agency cannot grant an adequate remedy, and when the aggrieved party can positively state what the administrative agency's decision in his particular case would be." ( *Id., at p. 834*, citations omitted; see **[***21]** also 4 Davis, Administrative Law Treatise (2d ed. 1983) The

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[5] At the time this litigation commenced section 2255 did not contain any alternative for the Legislature to appropriate funds to pay for mandates found by the board, and did not provide for a suit to declare the mandate void and enjoin its enforcement. (Subds. (b) and (c).) These provisions were added in 1982. (Stats. 1982, ch. 327, § 147, pp. 1480-1481; Stats. 1982, ch. 1638, § 7, pp. 6662-6663.)

[6] In 1984, the Legislature established a State Mandates Claims Fund. ( *Gov. Code, § 17614*.) Claims for which the statewide cost does not exceed $ 500,000 are to be paid from the fund by the Controller upon certification of parameters and guidelines by the commission. ( *Gov. Code, § 17610*.) For purposes of these claims the fund is to be continuously appropriated without regard to fiscal years. ( *Gov. Code, § 17614*.) The Counties suggest that the Legislature attempted, by this legislation, to limit reimbursement for state mandates to those claims which are less than $ 500,000 statewide, a limitation which is not found in the Constitution. They are mistaken. Claims for which the statewide costs exceeds $ 500,000 are not precluded; rather, the appropriation for such claims must be contained in a local government claims bill rather than a continuous appropriation without regard to fiscal years. ( *Gov. Code, §§ 17612, subd. (a), 17614*.)

Exhaustion Problem, § 26:1, pp. 414-415.) Thus the jurisdictional sweep of the doctrine presupposes that none of these recognized exceptions applies. Consequently, the doctrine precludes original judicial actions only in the absence of those exceptions. The question in this case then is whether any of the exceptions apply here. As we shall explain, none does.

By the Property Tax Relief Act of 1972, the Legislature assumed a statutory obligation of reimbursing local governments for state mandated costs, including any costs incurred by the local government as the result of any law enacted after January 1, 1973, "which mandates a new program or an increased level of service of an existing program." (*§§ 2207, subd. (a), 2231*.) At the same time, the Legislature provided an administrative procedure **[*74]** with the right to judicial review by which claims that a law requires reimbursement may be made and determined. (*§ 2250 et seq.*; *Gov. Code, § 17500 et seq.*) As a statutory requirement for reimbursement the 1972 provisions were subject to amendment or repeal by the Legislature. ( *County of Los Angeles v. State* ***[***22]*** *of California, supra, 153 Cal.App.3d at p. 573*.) Perhaps in recognition of its repealable and thus impermanent character, the People, by enacting article XIII B, have imposed a constitutional requirement of reimbursement. Yet nothing in article XIII B renders the statutory administrative procedure for hearing and determining claims void. That procedure remains a viable administrative remedy by which the local governments may claim reimbursement for state mandated costs.

The Counties contend that they are not required to exhaust the administrative remedy because they are asserting that the challenged acts are unconstitutional. [7] **[***25]** *CA(3)*[↑] **(3)** However, *HN3*[↑] the doctrine of exhaustion **[**759]** of administrative remedy applies to actions raising constitutional issues. ( *Security-First Nat. Bk. v. County of L.A. (1950) 35 Cal.2d 319, 321 [217 P.2d 946]*; *United States v. Superior Court (1941) 19 Cal.2d 189, 195 [120 P.2d 26]*; *People v. Coit Ranch, Inc. (1962) 204 Cal.App.2d 52, 57-58 [21 Cal.Rptr. 875]*; *Tushner v. Griesinger (1959) 171 Cal.App.2d 599, 604-608 [341 P.2d 416]*; see also 3 Witkin, *op. cit. supra*, Actions, § 236, p. 267; Reed, *Exhaustion of* **[***23]** *Administrative Remedies in California* (1968) 56 Cal.L.Rev. 1061, 1073-1074.) It is true that there is an exception when the constitutionality of the **[*75]** agency itself is challenged. A litigant is not required to exhaust his administrative remedies where the challenge is to the constitutionality of the administrative agency. ( *State of California v. Superior Court (Veta) (1974) 12 Cal.3d 237, 251 [115 Cal.Rptr. 497, 524 P.2d 1281]*.) But here the Counties are not challenging the constitutionality of the State Board of Control, the Commission on State Mandates, or even the statutory scheme for hearing and determining claims; instead, they are asserting that they need not submit to that procedure because the claims they assert have roots in the Constitution. Their claim is that a provision for subventions is a constitutional condition precedent to the enactment of statutes which impose local mandates. If the subvention is not included in the statute, or at least prior to the effective date of the statute, they argue, the enactment violates section 6 of article XIII B. Thus the claim asserted in this case is that the cost mandating statutes are unconstitutional and **[***24]** that claim does not fall within the exception to the rule that administrative remedies must be exhausted prior to resort to the courts. ( *Id., at pp. 249-250*.) [8]

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[7] In contending that a failure to provide a subvention of funds renders a bill void, the Counties rely upon four cases from three other states with constitutional provisions mandating reimbursement to local governments. However, the provisions involved in those states contained markedly different language from our constitutional provision. In Missouri the provision states that "[a] new activity or service or an increase in the level . . . shall not be required by [the state] unless a state appropriation is made and disbursed . . . ." (See *State v. County Court of Greene County (Mo. banc 1984) 667 S.W.2d 409, 411*; *Boone County Court v. State (Mo. banc 1982) 631 S.W.2d 321, 323*.) In Michigan the provision states "The state is prohibited from requiring any new or expanded activities . . . without full financing . . . ." (See *Delta County v. Mich. Dept. of Nat. Resources (1982) 118 Mich.App. 458 [325 N.W.2d 455, 456]*.) In Massachusetts the provision states that a statutory mandate "shall be effective . . . only if . . ." financing is provided by the state. (See *Town of Lexington v. Commissioner of Educ. (1985) 393 Mass. 693 [473 N.E.2d 673, 675]*.) In those states there is no provision for any administrative remedy because the unfunded legislation is simply not effective. In contrast, the California constitutional provision requires that when the state mandates a new program or higher level of service "the state shall provide a subvention of funds to reimburse" the local government. (Art. XIII B, § 6.) The Legislature has provided an administrative remedy when the state fails to reimburse the local entity. It is only after the Legislature has deleted the reimbursement contained in the administrative agency's report and in the local government claims bill that the local agency "may file in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." ( *Gov. Code, § 17612, subd. (b)*; see also § 2255, subd. (c), providing the mandate may be declared void and its enforcement enjoined if the Legislature deletes reimbursement from a local government claims bill funding for a mandate but does not follow one of the alternative courses of action provided for in subd. (b).)

[8] The Counties alleged that the Board of Control (now the Commission on State Mandates) does not have the jurisdiction to consider claims under the Constitution. The trial court agreed. In fact, an administrative agency does not have the power to declare a

**[***26]** Counties emphasize that they consider article XIII B to be self executing and consequently they may disregard the statutory scheme for claiming reimbursement for state mandated costs. CA(4)[] **(4)** But the fact that a constitutional provision is self executing does not relieve a party from complying with reasonable procedures for assertion of the right. HN4[] While the Legislature may not unreasonably curtail or impair a right granted by a self executing constitutional provision, it may adopt reasonable procedural requirements for assertion of the right. ( *Vinnicombe v. State of California (1959) 172 Cal.App.2d 54, 56 [341 P.2d 705]*.) For example, former *article I, section 14 of the Constitution* prohibited the taking or damaging of private property for public use "without just compensation having first been made to, or paid into court for, the owner." This section was self executing and under its provisions a property owner could maintain an action against a governmental entity that took or damaged his property. ( *Powers Farms v. Consolidated* ***[*76]*** *Irr. Dist. (1941) 19 Cal.2d 123, 126* ***[**760]*** *[119 P.2d 717]*.) In the *Powers Farms* case the plaintiff brought an action **[***27]** against an irrigation district for damage to its property without first filing a verified claim with the district as required by the Irrigation District Liability Law (Stats. 1935, ch. 833, p. 2250). The plaintiff claimed that it did not have to comply with the claims statute because its action was based upon the self executing constitutional provision. The Supreme Court said: "But the fact that the cause of action is one of that kind does not exclude it from the operation of a claim statute, the terms of which are broad enough to embrace it. Although the Constitution grants the right to compensation, it does not specify the procedure by which the right may be enforced. Such procedure may be set up by statutory or charter provisions, and when so established, a failure to comply with it is deemed to be a waiver of the right to compel the payment of damages." (*Ibid*., citations omitted.) Thus, as the high court later held in *City of San Jose v. Superior Court (1974) 12 Cal.3d 447 [115 Cal.Rptr. 797, 525 P.2d 701, 76 A.L.R.3d 1223]*, the "fact that inverse condemnation is founded directly on the *California Constitution (art. I, § 14)* neither excuses plaintiffs from compliance **[***28]** with the claims statutes, nor renders the claims statutes unconstitutional." ( *Id., at pp. 454-455*, citations omitted.) Similarly, former *Government Code section 16047*, which required an undertaking as a condition of bringing an action against the state, was held applicable to actions brought under former article I, section 14. ( *Vinnicombe v. State of California, supra, 172 Cal.App.2d at p. 56*.)

CA(5a)[] **(5a)** The jurisdictional aspect of the exhaustion of remedies doctrine is based in part upon the separation of powers of the three branches of government. HN5[] "The powers of state government are legislative, executive and judicial." (*Cal. Const., art. III, § 3*.) Under that tripartite system, the "legislative power of this State is vested in the California Legislature" (*Cal. Const., art. IV, § 1*); the "supreme executive power of this State is vested in the Governor" (*Cal. Const., art. V, § 1*); and the "judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts." (*Cal. Const., art. VI, § 1*.) One branch of government may not exercise the powers of another branch. "Persons charged with the exercise of one power may **[***29]** not exercise either of the others except as permitted by this Constitution." (*Cal. Const., art. III, § 3*.)

HN6[] The judicial function is to declare the law and to determine the rights of parties to controversies. ( *Marin Water etc. Co. v. Railroad Com. (1916) 171 Cal. 706, 711-712 [154 P. 864]*.) HN7[] Under the separation of powers clause, the Legislature can neither exercise nor place limitations upon judicial powers. ( *In re McKinney (1968) 70 Cal.2d 8, 10 [73 Cal.Rptr. 580, 447 P.2d 972]*.) HN8[] The legislative function is to enact laws and to appropriate funds. (See *Schaezlein v. Cabaniss (1902) 135 Cal. 466, 467 [67 P. 755]*; **[*77]** see also *Mandel v. Myers (1981) 29 Cal.3d 531, 550 [174 Cal.Rptr. 841, 629 P.2d 935]*.) HN9[] Courts, by the same constitutional restriction, cannot interfere with the legislative process. ( *Santa Clara County v. Superior Court (1949) 33 Cal.2d 552, 559 [203 P.2d 1]*; *Johnston v. Board of Supervisors (1947) 31 Cal.2d 66, 70 [187 P.2d 686]*.) And courts cannot compel legislative action. ( *City Council v. Superior Court (1960) 179 Cal.App.2d 389, 395 [3 Cal.Rptr. 796]*.) [9] CA(6)[] **(6)** HN10[] An administrative

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statute unconstitutional or unenforceable. (*Cal. Const., art. III, § 3.5*.) But the Board of Control (now the commission) has the power to determine whether a statute or regulation mandates a new program, or higher level of service of an existing program and whether there are any "costs" mandated by the legislation. A proceeding before the board will promote judicial efficiency by unearthing the relevant evidence and providing a record which the court may review. (See ***Edgren v. Regents of the University of California (1984) 158 Cal.App.3d 515, 521 [205 Cal.Rptr. 6]***.) It is still the rule that a party must exhaust administrative remedies even though, if unsuccessful, he intends to raise constitutional issues in a judicial proceeding. (See ***Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal.App.3d 82, 96 [143 Cal.Rptr. 441]***.) We note parenthetically that the interplay between the constitutional and the statutory provisions for reimbursement of counties in the context of a board proceeding is pending before the Supreme Court. (*County of Los Angeles* v. *State of California, L.A.* 32106, rev. granted Sept. 19, 1985.)

[9] While our branches of government are coequal they are not completely independent. While the Legislature cannot exercise

procedure **[**761]** **[***30]** is part of the legislative process and it has been recognized that "'the legislative process remains incomplete' until the administrative remedy is exhausted." ( *Abelleira v. District Court of Appeal, supra, 17 Cal.2d at p. 295*, citing *Porter v. Investors Syndicate (1931) 286 U.S. 461, 468 [76 L.Ed. 1226, 1230, 52 S.Ct. 617]*.) ***HN11***[↑] A judicial action before the legislative process has been completed is premature and a court is without jurisdiction until administrative remedies have been exhausted. ( *Abelleira v. District Court of Appeal, supra.*) To hold otherwise would be to permit the courts to engage in an unwarranted interference with the legislative process. (See *Santa Clara County v. Superior Court, supra, 33 Cal.2d at p. 556*.) As we have recounted at length, the Legislature has provided for a procedure by which local governmental entities may present claims for reimbursement of the costs of state mandates, those claims may be determined, a subvention of funds may be provided, and the result of those proceedings may be reviewed in a judicial proceeding. Unless the Counties can establish an exception to the rule requiring the exhaustion of administrative **[***31]** remedies, a judicial action without exhausting those remedies must be considered premature.

***CA(7a)***[↑] **(7a)** The Counties assert, and the trial court agreed, that it would have been futile for them to have submitted their claims **[***32]** to the administrative process. In support of this contention the Counties presented evidence that out of 24 mandates found by the board and reported to the Legislature, only 8 had been funded in a claims bill. This evidence does not support the contention that it would be futile to submit the claims to the administrative procedure. ***CA(8)***[↑] **(8)** The futility exception to the requirement of exhaustion of administrative remedies is a very narrow one. "Insofar as a 'futility' exception exists, as when it can be demonstrated that an agency's decision is certain to be adverse (see *Ogo Associates v. Torrance (1974) 37 Cal.App.3d 830 [112 Cal.Rptr. 761]*), its application is very limited. Thus, exhaustion **[*78]** of administrative remedy is required unless the appellant 'can *positively* state that the [administrative agency] has declared what its ruling will be in a *particular* case.' ( *Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal.2d 314, 318 [109 P.2d 932]*, italics added.)" ( *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1985) 40 Cal.3d 654, 662 [221 Cal.Rptr. 488, 710 P.2d 288]*. See also *Doyle v. City of Chino (1981)* ***[***33]*** *117 Cal.App.3d 673, 683 [172 Cal.Rptr. 844]*; *Mountain View Chamber of Commerce v. City of Mountain View, supra, 77 Cal.App.3d at p. 92*.) ***CA(7b)***[↑] **(7b)** The fact that the Legislature has provided for funding of some of the mandates found by the board, albeit only a portion, precludes the Counties from establishing the futility exception.

The Counties next assert that their remedy before the board (now commission) is inadequate. We disagree. The applicable procedures provide for an evidentiary hearing and decision by the board with the right to judicial review. (§§ 2252, 2253.2, 2253.5; *Gov. Code, §§ 17551*, *17559*.) ***HN12***[↑] In the event it is determined that a reimbursable mandate exists then a local government claims bill must be introduced to fund such a mandate. (§ 2255, subd. (a); *Gov. Code, § 17612, subd. (a)*.) In the event the Legislature fails to provide an appropriation to fund the mandate then the local government agency may proceed to have a judicial declaration that the mandate is unenforceable. (§ 2255, subd. (c); *Gov. Code, § 17612, subd. (b)*.) In that event the court will have the advantage and benefit of the evidence and record compiled in the administrative proceeding. Pursuant **[***34]** to this procedure the Legislature cannot escape the constitutional requirement that the state reimburse local governments for reimbursable mandates.

***CA(5b)***[↑] **(5b)** For these reasons we conclude that the trial court erred in concluding that the Counties are not required to exhaust their administrative remedies before resorting to a judicial action with respect to reimbursable state mandates. The determination of **[**762]** a reimbursement claim was within the jurisdiction of the administrative agency, pursuit of the remedy would not result in irreparable harm, the agency could grant an adequate remedy, and the agency's decision was not preordained. The failure to exhaust those remedies was therefore jurisdictional. The judgment with respect to the bills enacted during the 1980-1981 legislative session must be reversed because no claims were filed with respect to those bills. For this reason we need not and do not consider whether those bills contain reimbursable state mandates or whether they pass constitutional muster.

II

With respect to the three bills enacted before 1980 the Counties assert, and the state concedes, that administrative remedies were exhausted by the **[*79]** filing and **[***35]** determination of claims. The bills challenged for which the administrative process was completed included Statutes of 1975, chapter 1275, relating to eminent domain; Statutes of

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judicial functions or deprive the courts of judicial powers, it may regulate procedures and place reasonable restrictions upon judicial functions. ( ***Briggs v. Superior Court (1931) 211 Cal. 619, 627 [297 P. 3]***, procedure for punishing contempt; ***Brydonjack v. State Bar (1929) 208 Cal. 439, 443 [281 P. 1018]***, restrictions on the admission to the practice of law.) And while the Legislature cannot act as a "supercourt," rejecting judicial decisions with which it disagrees ( ***Mandel v. Myers, supra, 29 Cal.3d at p. 552***), it may make a law to prospectively abrogate the effect of a judicial decision. ( ***Matter of Coburn (1913) 165 Cal. 202, 210 [131 P. 352]***.)

1976, chapter 1139, relating to determinate sentencing; and Statutes of 1978, chapter 1146, relating to animals. The trial court found that the Statutes of 1976, chapter 1139, fall within an exception to article XIII B, section 6, which excepts legislation defining a new crime or legislation changing an existing definition of a crime from the reimbursement requirement. The court further determined, however, that Statutes of 1975, chapter 1275, and Statutes of 1978, chapter 1146, did contain reimbursable mandates and that they have become unenforceable due to the Legislature's failure to provide a subvention of funds. The state challenges these findings.

***HN13***[↑] Statutes of 1975, chapter 1275, relating to eminent domain, requires a condemnor to pay for business goodwill when condemning property. ( *Code Civ. Proc., § 1263.510*.) The Counties contend that the payment for business goodwill constitutes a state mandated cost for which reimbursement is required. Pursuant to a claim submitted to the Board of Control, **[***36]** the board agreed with Counties' contention and submitted claims for reimbursement for such expenses in a local government claims bill. The Legislature deleted the claims from the claims bill, and directed that the board shall not accept or submit to the Legislature any more claims pursuant to Statutes of 1975, chapter 1275. (Stats. 1981, ch. 1091, § 3, p. 4193.) The issue is thus now ripe for decision. (§ 2255, subd. (c).)

In resolving this question we agree with and adopt the reasoning of the Court of Appeal in *City of Merced v. State of California (1984) 153 Cal.App.3d 777, at page 783 [200 Cal.Rptr. 642]*. There, with respect to the same statutory provisions, the court said: "We agree that the Legislature intended for payment of goodwill to be discretionary. ***CA(9)***[↑] **(9)** The above authorities reveal that whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss **[***37]** of goodwill is not a state-mandated cost." For this reason the trial court erred in finding that Statutes of 1975, chapter 1275 constitutes a reimbursable mandate. [10]

**[***38] [*80] [**763]** ***CA(10)***[↑] **(10)** Statutes of 1978, chapter 1146, relates to the destruction of dogs and cats. The aspect of this legislation which the Counties claim constitutes a state mandate imposing costs is the amendment of *Penal Code section 597w*, which prohibits the use of a high-altitude decompression chamber for the destruction of dogs and cats. The Counties contend that this removes a less expensive option in destroying dogs and cats and thus constitutes a state mandated cost. The Board of Control agreed and submitted a claim for such costs to the Legislature. The Legislature, however, deleted the claim from the local government claims bill and directed the board not accept or submit further claims based upon this provision. (Stats. 1981, ch. 1091, § 3, p. 4193.)

We hold that the trial court erred in finding that Statutes of 1978, chapter 1146, constitutes a reimbursable mandate under article XIII B, section 6. The state, through its penal law, has long prohibited acts which might be described as cruelty to animals. ( *Pen. Code, § 596 et seq.*) The state has determined that the use of high-altitude decompression chambers to destroy dogs and cats constitutes cruelty to animals, **[***39]** and has made it a misdemeanor to do so. ( *Pen. Code, §§ 597w*, *597y*.) This is clearly legislation defining a new crime or changing the definition of an existing crime, and as such is expressly excluded from the operation of article XIII B, section 6, by subdivision (b) thereof.

The judgment is reversed.

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[10] We note that we employed analogous reasoning in *City of Sacramento v. State of California (1984) 156 Cal.App.3d 182, at pages 196-197 [203 Cal.Rptr. 258]*. There the city contended that a state law requiring public employees to be covered by the state unemployment insurance law constituted a state mandate. The state countered that it was only complying with a federal requirement, did not itself mandate the coverage, and was thus not required to reimburse the city. We noted that federal law provided financial incentives and that it would have been politically unpalatable for the state to refuse to extend coverage to public employees, but nonetheless the decision was optional with the state. This precluded the state from asserting that it was only complying with a federal requirement rather than mandating a new program on local government. The same reasoning applies here: the decision to proceed in eminent domain is optional with the local government. Since the state does not mandate that the local agency incur the costs it claims, the agency is not entitled to reimbursement from the state.

# ATTACHMENT NO. 13

# County of Los Angeles v. State of California

Supreme Court of California

January 2, 1987

L.A. No. 32106

**Reporter**
43 Cal. 3d 46 *; 729 P.2d 202 **; 233 Cal. Rptr. 38 ***; 1987 Cal. LEXIS 273 ****

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents. CITY OF SONOMA et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents

**Subsequent History: [****1]** Appellants' petition for a rehearing was denied February 26, 1987.

**Prior History:** Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges. The Court of Appeal, Second Dist., Div. Five, affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings (B001713 and B003561).

**Disposition:** The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

## Core Terms

workers' compensation, reimbursement, local agency, increased level of service, local government, Taxation, costs, employees, mandated, programs, appropriation, subvention, benefits, changes, plenary power, electorate, increases, repeal, constitutional provision, higher level of service, pro tanto repeal, increased cost, new program, Statutes, workers' compensation benefits, cost of living, state-mandated, requirements, discipline, attorneys

## Case Summary

**Procedural Posture**
Appellant county and city sought review of a decision of the Court of Appeals, Third Appellate District, Second Division (California), which held that state-mandated increases in workers' compensation benefits, that do not exceed the rise in the cost of living, were not costs which must be borne by respondent state under Cal. Const. art. XIII B, and its legislative implementing statutes.

**Overview**

Proceedings were initiated to determine whether legislation, which increased certain workers' compensation benefit payments, was subject to the command of Cal. Const. art. XIII B that local government costs mandated by respondent state must be funded by respondent. Appellant county and city sought review of the appellate court decision which held that state-mandated increases in workers' compensation benefits, that did not exceed the rise in the cost of living, were not costs which must be borne by respondent under Cal. Const. art. XIII B. On appeal, the court agreed that the State Board of Control properly denied appellants' claims but the court's conclusion rested on entirely new grounds. Thus, the judgment was reversed on a finding that appellants' petitions for writs of mandate to compel approval of appellants' claims lacked merit and should have been denied outright. The court concluded that *Cal. Const. art. XIII B, § 6* had no application to, and respondent need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations received.

**Outcome**
The judgment of the court of appeal was reversed in favor of respondent state. The court concluded that appellant county and city's reimbursement claims were both properly denied by the California State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

**Counsel:** De Witt W. Clinton, County Counsel, Paula A. Snyder, Senior Deputy County Counsel, Edward G. Pozorski, Deputy County Counsel, John W. Witt, City Attorney, Kenneth K. Y. So, Deputy City Attorney, William D. Ross, Diana P. Scott, Ross & Scott and Rogers & Wells for Plaintiffs and Appellants.

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John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Henry G. Ullerich and Martin H. Milas, Deputy Attorneys General, for Defendants and Respondents.

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**Judges:** Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.

**Opinion by:** GRODIN

## Opinion

**[*49] [**203] [***38]** We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain workers' compensation benefit payments is subject to the command of article XIII B of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated increases **[***39]** in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIII B, an initiative constitutional provision, and legislative implementing **[****3]** statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. **(1)** We conclude that when the voters adopted article XIII B, section 6, their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or **[*50]** increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by section 6.

We recognize also the potential conflict between article XIII B and the grant of plenary power over workers' **[****4]** compensation bestowed upon the Legislature by section 4 of article XIV, but in accord with established rules of construction our construction of article XIII B, section 6, harmonizes these constitutional provisions.

I

On November 6, 1979, the voters approved an initiative measure which added article XIII B to the California Constitution. That article imposed spending limits on the state and local governments and provided in section 6 (hereafter section 6): "Whenever the Legislature or any state agency mandates a new program or higher level of **[**204]** service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [para. ] (a) Legislative mandates requested by the local agency affected; [para. ] (b) Legislation defining a new crime or changing an existing definition of a crime; or [para. ] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." No **[****5]** definition of the phrase "higher level of service" was included in article XIII B, and the ballot materials did not explain its meaning. [1]

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[1] The analysis by the Legislative Analyst advised that the state would be required to "reimburse local governments for the cost of complying with 'state mandates.' 'State mandates' are requirements imposed on local governments by legislation or executive orders." Elsewhere the analysis repeats: "[The] initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates . . . .

The one ballot argument which made reference to section 6, referred only to the "new program" provision, stating, "Additionally, this measure [para. ] (1) will not allow the state government to force programs on local governments without the state paying for them."

The genesis of this action was the enactment in 1980 and 1982, after article XIII B had been adopted, of laws increasing the amounts which **[*51]** employers, **[****6]** including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly, Bill No. 2750 (Stats. 1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of *Labor Code sections 4453*, *4453.1* and *4460* increased the maximum weekly wage upon which temporary and permanent disability indemnity is computed from $ 231 per week to $ 262.50 per week. The amendment of *section 4702 of the Labor Code* increased certain death benefits from $ 55,000 to $ 75,000. No appropriation **[***40]** for increased state-mandated costs was made in this legislation. [2]

**[****7]** Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in providing an increased level of service mandated by the state pursuant to *Revenue and Taxation Code section 2207*. [3] They also sought a declaration that because the State of California and the board were obliged by article XIII B to reimburse them, they were not obligated to **[**205]** pay the increased benefits until the state provided reimbursement.

**[****8]** The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost of living raises were not expressly **[*52]** excepted from the requirement of state reimbursement in section 6 the intent of article XIII B to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost of living changes, they did not, in the view of the trial court, create an "increased level of service" in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922. p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from $ 73.50 to $ 168, and the maximum from $ 262.50 to $ 336. For permanent partial disability the weekly wage was raised from a minimum of $ 45 to $ 105, and from a maximum **[****9]** of $ 105 to $ 210, in each case for injuries occurring on or after January 1, 1984. (*Lab. Code, § 4453*.) A $ 10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed (*Lab. Code, § 4553*), and the maximum death benefit was raised from $ 75,000 to $ 85,000 for deaths in 1983, and to $ 95,000 for deaths on or after January 1, 1984. (*Lab. Code, § 4702*.)

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[notwithstanding] section 6 of Article XIIIB of the California Constitution and *section 2231* . . . of the Revenue and Taxation **[***41]** Code." (Stats. 1982, ch. 922, § 17, p. 3372.) [4]

**[****10]** Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the

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[2] The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either *Revenue and Taxation Code section 2231*, or article XIII B; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation.

Legislative history confirms only that the final version of Assembly Bill No. 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of $ 510 on which to base benefits, an unspecified appropriation was included.

[3] The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.

[4] The same section "recognized," however, that a local agency "may pursue any remedies to obtain reimbursement available to it" under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.

County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in *Revenue and Taxation Code section 2207, subdivision (a)*.

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation Code or **[*53]** section 6. The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact **[****11]** of changes in the burden of proof in some workers' compensation proceedings (*Lab. Code, § 3202.5*); a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine (*Lab. Code, §§ 3601- 3602*); and changes in death and disability benefits and in liability in serious and wilful misconduct cases. (*Lab. Code, § 4551*.)

The court also held: "[The] changes made by chapter 922, Statutes of 1982 may be excluded from state-mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego **[**206]** appeal from this latter portion of the judgment only.

II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of section 6, or are an "increased level of service" [5] described in subdivision (a) of *Revenue and Taxation Code section 2207* **[****12]** . The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of section 6 is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The Court of Appeal addressed the problem as one of defining "increased level of service."

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in *section 2231, subdivision (e) of the Revenue and Taxation Code* should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased **[****13]** level of service." The court concluded that the repeal of *section 2231* in 1975 (Stats. 1975, ch. 486, § 7, pp. 999-1000) and the failure of the Legislature by statute or the electorate in article XIII B to readopt the **[*54]** definition must be treated as reflecting an intent to change the law. ( *Eu v. Chacon (1976) 16 Cal.3d 465, 470 [128 Cal. Rptr. 1, 546 P.2d 289]*.) [6] On that basis the court **[***42]** concluded that increased costs were no longer tantamount to an increased level of service.

**[****14]** The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of living. The judgment in the second, or "Sonoma" case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter "remanded" to the board for more adequate findings, with directions. [7]

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[5] The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.

[6] The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750 (see fn. 2, *ante*). While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either section 6, adopted by the electorate in the prior year, or of *Revenue and Taxation Code section 2207, subdivision (a)* enacted in 1975. (Cf. ***California Employment Stabilization Co. v. Payne (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702]***.) There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting section 6.

The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., Stats. 1973, chs. 1021 and 1023.)

[7] We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and reconsider the claim after making the additional findings. (See *Code Civ. Proc. §*

III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining **[****15]** the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 **[**207]** was adopted. That provision used the same "increased level of service" phraseology but it also failed to include a definition of "increased level of service," providing only: "Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [para. ] (a) Any law . . . which mandates a new program or an increased level of service of an existing program." (*Rev. & Tax. Code § 2207*.) As noted, however, the definition of that term which had been **[*55]** included in *Revenue and Taxation Code section 2164.3* as part of the Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 14.7, p. 2961), had been repealed in 1975 when *Revenue and Taxation Code section 2231*, which had replaced *section 2164.3* in 1973, was repealed and a new *section 2231* enacted. (Stats. 1975. ch. 486, §§ 6 & 7, p. 999.) [8] Prior to repeal, *Revenue and Taxation Code section 2164.3* **[****16]** , and later *section 2231*, after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that ""Increased level of service' means any requirement mandated by state law or executive regulation . . . which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats. 1972, ch. 1406, § 14.7, p. 2963.)

**[****17]** **[***43]** **(2)** Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in enacting *section 2207*, explained that the provision was "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. "[I]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." ( *Lake Forest Community Assn. v. County of Orange (1978) 86 Cal. App. 3d 394, 402 [150 Cal. Rptr. 286]*; see also *Eu v. Chacon, supra, 16 Cal.3d 465, 470*.) Here, the revision was not minor: a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of *section 2207*. If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased **[****18]** level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been **[*56]** aware, we may not conclude that an intent existed to incorporate the repealed definition into section 6.

**(3)** In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. ( *ITT World Communications, Inc. v. City and County of San Francisco (1985) 37 Cal.3d 859, 866 [210 Cal. Rptr. 226, 693 P.2d 811]*.) In section 6, the electorate commands **[**208]** that the state reimburse local agencies for the cost of any "new program or higher level of service." Because workers' **[****19]** compensation is not a new program, the parties have focussed on whether providing higher benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither section 6 nor the current statutory reimbursement scheme.

**(4)** Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level

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*1094.5, subd. (f)*.)

[8] Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs (see, e.g., Stats. 1973, ch. 1021, § 4, p. 2026; ch. 1022, § 2, p. 2027; Stats. 1976, ch. 1017, § 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to *Revenue and Taxation Code sections 2218-2218.54* had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of *Revenue and Taxation Code section 2231, subdivision (a)* that "[the] state shall reimburse each local agency for all 'costs mandated by the state,' as defined in *Section 2207*" and the additional command of subdivision (b) that any statute imposing such costs "provide an appropriation therefor." ( ***County of Orange v. Flournoy (1974) 42 Cal. App. 3d 908, 913 [117 Cal. Rptr. 224]***.)

of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and **[****20]** do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them." (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments **[***44]** to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not **[*57]** for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. **[****21]** Laws of general application are not passed by the Legislature to "force" programs on localities.

The language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word "program" was being used in such a unique fashion. (Cf. *Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal.3d 1, 7 [128 Cal. Rptr. 673, 547 P.2d 449]*; *Big Sur Properties v. Mott (1976) 63 Cal. App. 3d 99, 105 [132 Cal. Rptr. 835]*.) Nothing in the history of article XIII B that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this construction or the additional indirect, but substantial impact it would have on the legislative process.

Were section 6 construed to require state subvention for the incidental cost to local governments **[****22]** of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, § 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by article XIII B. (*Rev. & Tax. Code, §§ 2255, subd. (c)*.) Revenue bills must be passed by two-thirds vote of each house of the Legislature. (Art. IV, § 12, subd. (d).) Thus, were we to construe section 6 as **[**209]** applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote. [9] Certainly no such intent is reflected in the language or history of article XIII B or section 6.

**[****23]** **(5)** We conclude therefore that section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation **[*58]** benefits that employees of private individuals or organizations receive. [10] Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See **[***45]** *Lab. Code, § 3201 et seq.*) Therefore, although the state requires that employers provide workers' compensation for nonexempt

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[9] Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question. (See ***Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 228 [149 Cal. Rptr. 239, 583 P.2d 1281]***.)

[10] The Court of Appeal reached a different conclusion in *City of Sacramento v. State of California (1984) 156 Cal. App. 3d 182 [203 Cal. Rptr. 258]*, with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as to whether the expense was a "state mandated cost," rather than as whether the provision of an employee benefit was a "program or service" within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

categories of employees, increases in the cost of providing this employee benefit are not subject **[****24]** to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.

IV

**(6)** Our construction of section 6 is further supported by the fact that it comports with controlling principles of construction which "require that in the absence of irreconcilable conflict among their various parts, [constitutional provisions] must be harmonized and construed **[****25]** to give effect to all parts. ( *Clean Air Constituency v. California State Air Resources Bd. (1974) 1 Cal.3d 801, 813-814 [114 Cal. Rptr. 577, 523 P.2d 617]*; *Serrano v. Priest (1971) 5 Cal.3d 584, 596 [96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]*; *Select Base Materials* v. *Board of Equal. (1959) 51 Cal.2d 640, 645 [335 P.2d 672]*.)" ( *Legislature v. Deukmejian (1983) 34 Cal.3d 658, 676 [194 Cal. Rptr. 781, 669 P.2d 17]*.)

Our concern over potential conflict arises because article XIV, section 4, [11] gives the **[**210]** Legislature "plenary power, unlimited by any provision of **[*59]** this Constitution" over workers' compensation. Although seemingly unrelated to workers' compensation, section 6, as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is **[****26]** intended **[***46]** to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature. The potential conflict between section 6 and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent.

**[****27]** The County of Los Angeles, while recognizing the impact of section 6 on the Legislature's power over workers' compensation, argues that the "plenary power" granted by article XIV, section 4, is power over the substance of workers' compensation legislation, and that this power would be unaffected by article XIII B if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural **[*60]** limitations on the Legislature, such as the "single subject rule" (art. IV, § 9),

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[11] Section 4: "The Legislature is hereby *expressly vested with plenary power, unlimited by any provision of this Constitution*, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed." (Italics added.)

as to which article XIV, section 4, has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If section 6 were applicable, therefore, article XIII B would restrict the power of the Legislature over workers' compensation.

The City of Sonoma **[****28]** concedes that so construed article XIII B *would* restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of article XIV, section 4, or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of section 6 permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision such as section 6 to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with **[**211]** and reflects the principle applied by this court in *Hustedt v. Workers' Comp. Appeals Bd. (1981) 30 Cal.3d 329 [178 Cal. Rptr. 801, 636 P.2d 1139]*. There, by coincidence, article XIV, section 4, was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, article **[****29]** XIV, section 4, would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, § 3.) The court was thus called upon to determine whether the adoption of article XIV, section 4, granting the Legislature plenary power over workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because article XIV, section 4, did not give the Legislature the authority to enact the statute. Article XIV, section 4, did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. "It is well established that the adoption of article XIV, section 4 'effected a repeal *pro tanto*' of any state constitutional provisions which conflicted with that **[*61]** amendment. (*Subsequent Etc. Fund. v. Ind. Acc. Com. (1952) 39 Cal.2d 83, 88 [244 P.2d 889]*; *Western Indemnity Co. v. Pillsbury (1915) 170 Cal. 686, 695, [151 P. 398]*.) **[****30]** A *pro tanto* repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization **[***47]** of the objectives of the new article. ( *Methodist Hosp. of Sacramento v. Saylor (1971) 5 Cal.3d 685, 691-692 [97 Cal. Rptr. 1, 488 P.2d 161]*; cf. *City and County of San Francisco v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 103, 115-117 [148 Cal. Rptr. 626, 583 P.2d 151]*.) Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of article XIV, section 4 are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power -- the disciplining of attorneys -- that otherwise rests exclusively with this court?" ( *Hustedt v. Workers' Comp. Appeals Bd., supra, 30 Cal.3d 329, 343*.) We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from achieving **[****31]** the objectives of article XIV, section 4, and no pro tanto repeal need be found.

**(7)** A similar analysis leads to the conclusion here that no pro tanto repeal of article XIV, section 4, was intended or made necessary here by the adoption of section 6. The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. ( *Huntington Park Redevelopment Agency v. Martin (1985) 38 Cal.3d 100, 109-110 [211 Cal. Rptr. 133, 695 P.2d 220]*.) Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage -- costs which all employers must bear -- neither threatens excessive taxation or governmental spending, **[****32]** nor shifts from the state to a local agency the expense of providing governmental services.

**[**212]** Therefore, since the objectives of article XIII B and section 6 can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, section 6 did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer

must fund the cost or increases in **[*62]** benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that section 6 has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal -- whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

V

It follows from our conclusions above, that in each of these cases the **[****33]** plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Appeal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

**Concur by:** MOSK

## Concur

**MOSK, J.** I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither *article XIII B, section 6, of the Constitution* nor *Revenue and Taxation Code sections 2207* and *2231* require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments **[****34]** because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of *section 2231, subdivision (a)*, that the state reimburse local government for "all costs mandated by the state."

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but merely to provide a cost-of-living **[*63]** adjustment. I agree with the Court of Appeal that this was permissible.

End of Document

# ATTACHMENT NO. 14

# *Long Beach Unified Sch. Dist. v. State of California*

Court of Appeal of California, Second Appellate District, Division Five

November 15, 1990

No. B033742

**Reporter**
225 Cal. App. 3d 155 *; 275 Cal. Rptr. 449 **; 1990 Cal. App. LEXIS 1198 ***

LONG BEACH UNIFIED SCHOOL DISTRICT, Plaintiff and Appellant, v. THE STATE OF CALIFORNIA et al., Defendants and Appellants; MARK H. BLOODGOOD, as Auditor-Controller, etc., et al., Defendants and Respondents

**Subsequent History: [***1]** Appellants' petitions for review by the Supreme Court were denied February 28, 1991. Lucas, C. J., did not participate therein.

**Prior History:** Superior Court of Los Angeles County, No. C606020, Robert I. Weil, Judge.

**Disposition:** We conclude that because the doctrines of collateral estoppel and waiver are inapplicable to the facts of this case, the trial court should have allowed State to challenge the decisions of the Board. However, we also determine, as a question of law, that the Executive Order requires local school boards to provide a higher level of service than is required constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to *article XIII B, section 6 of the California Constitution*. Former *Revenue and Tax Code section 2234* does not provide reimbursement of the subject claim. Based on uncontradicted evidence, we modify the decision of the trial court by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts." We also modify the judgment to include charging orders against certain funds appropriated through subsequent budget acts. We affirm the decision of the trial court that the Fines **[***2]** and Forfeitures Funds are not "reasonably available" to satisfy the Claim. Finally, we remand the matter to the trial court to determine whether at the time of its order, unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court is also directed to determine this same issue with respect to the charging order. The judgment is affirmed as modified. Each party is to bear its own costs on appeal.

## Core Terms

reimbursement, executive order, funds, costs, mandated, school district, appropriations, budget, state mandate, costs incurred, trial court, statutes, reasonably available, expenditures, requirements, sections, fiscal year, local agency, higher level of service, local government, costs mandated, programs, collateral estoppel, State-mandated, guidelines, decisions, special fund, designated, state controller, account number

## Case Summary

**Procedural Posture**
Appellant state challenged an order from the Superior Court of Los Angeles County (California) stating that it was required to reimburse cross-appellant school district for mandated expenditures to integrate the schools, and cross-appellant challenged that part of the order stating that certain funds were not available for this reimbursement.

**Overview**

The California Department of Education issued an executive order mandating expenditures to integrate the schools, and when the legislature deleted the requested funding from its budget, cross-appellant school district filed a petition to compel reimbursement after the Board of Control approved the claim. The trial court stated that appellant state was required to make these reimbursements and designated specific funds as reasonably available for the payments, but also ruled that certain funds were not available for these payments. On appeal, the court affirmed the decision as modified, holding that the doctrines of collateral estoppel and waiver were inapplicable and that the trial court should have allowed appellant to challenge the initial decisions of Board

of Control in this matter. However, the court concluded that as a matter of law the executive order was a reimbursable state mandate pursuant to *Cal. Const. art. XIII B, § 6*, not pursuant to former *Cal. Rev. & Tax. Code § 2234*. The court modified the decision by striking certain funds as sources of reimbursement and affirmed that portion of the order stating that certain funds were not available for the payments.

**Outcome**

The court affirmed the order stating that appellant state was required to reimburse cross-appellant school district for mandated expenditures to integrate the schools because the executive order was a reimbursable state mandate under the California constitution and modified the designated funds for payment. The case was remanded to determine if unexpended, unencumbered funds existed in the approved budget line item account numbers.

**Counsel:** John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Henry G. Ullerich and Martin H. Milas, Deputy Attorneys General, Joseph R. Symkowick and Joanne Lowe for Defendants and Appellants.

De Witt W. Clinton, County Counsel, and Lawrence B. Launer, Assistant County Counsel, for Defendants and Respondents.

Ball, Hunt, Hart, Brown & Baerwitz, Anthony Murray, Allan E. Tebbetts, Agnes H. Mulhearn, Ross & Scott, William D. Ross, Corin L. Kahn and Diana P. Scott for Plaintiff and Appellant.

**Judges:** Opinion by Lucas, P. J., with Ashby and Boren, JJ., concurring.

**Opinion by:** LUCAS

## Opinion

**[*163] [**454]** Introduction

Long Beach Unified School District (LBUSD) filed a claim with the Board of Control of the State of California **[***3]** (Board), asserting that certain expenditures related to its efforts to alleviate racial and ethnic segregation in its schools had been mandated by the state through regulations (Executive Order) issued by the Department of Education (DOE) and were **[*164]** reimbursable pursuant to former *Revenue and Taxation Code section 2234* and article XIII B, section 6 of the California Constitution. The Board eventually approved the claim and reported to the Legislature its recommendation that funds be appropriated to cover the statewide estimated costs of compliance with the Executive Order. When the Legislature deleted the requested funding from an appropriations bill, LBUSD filed a petition to compel reimbursement ( *Code Civ. Proc., § 1085*) and complaint for declaratory relief. The trial court held that the doctrines of administrative collateral estoppel and waiver prevented the state from challenging the decisions of the Board, and it gave judgment to LBUSD. It also ruled that certain funds previously appropriated by the Legislature were "reasonably available" for reimbursement of the claimed expenditures, subject to audit by the state Controller.

We conclude that the doctrines of collateral **[***4]** estoppel and waiver are inapplicable to the facts of this case. However, we determine as a question of law that the Executive Order requires local school boards to provide a higher level of service than is required either constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to *article XIII B, section 6 of the California Constitution*. We also decide that former *Revenue and Taxation Code section 2234* does not provide for reimbursement of the claim.

Based on uncontradicted evidence, we modify the decision of the trial court regarding which budget line item account numbers provide "reasonably available" funds to reimburse LBUSD for appropriate expenditures under the claim. We further modify the decision to include charging orders against funds appropriated by subsequent budget acts. Finally, we remand the matter to the trial court to determine whether at the time of its order unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court must resolve this same issue with respect to the charging order.

**[**455]** Background and Procedural History

The California Property **[***5]** Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 1, p. 2931) limited the power of local governmental entities to levy property taxes. It also mandated that when the state requires such entities to provide a new program or higher level of service, the state must reimburse those costs. Over time, amendments to the California Constitution and numerous legislative changes impacted both the right and procedure for obtaining reimbursement.

**[*165]** Sometime prior to September 8, 1977, LBUSD, at its option, voluntarily began to incur substantial costs to alleviate the racial and ethnic segregation of students within its jurisdiction.

On or about the above date, DOE adopted certain regulations which added sections 90 through 101 to title 5 of the California Administrative Code, effective September 16, 1977. We refer to these regulations as the Executive Order.

The Executive Order and related guidelines for implementation required in part that school districts which identified one or more schools as either having or being in danger of having segregation of its minority students "shall, no later than January 1, 1979, and each four years thereafter, develop and adopt a reasonably feasible **[***6]** plan for the alleviation and prevention of racial and ethnic segregation of minority students in the district."

On or about June 4, 1982, LBUSD submitted a "test claim" (Claim) [1] to the Board for reimbursement of $ 9,050,714 -- the total costs which LBUSD claimed it had incurred during fiscal years 1977-1978 through 1981-1982 for activities required by the Executive Order and guidelines. LBUSD cited former *Revenue and Taxation Code section 2234* as authority for the requested reimbursement, asserting that the costs had been "subsequently mandated" by the state. [2]

**[***7]** The Board denied the Claim on the grounds that it had no jurisdiction to accept a claim filed under *section 2234*. LBUSD petitioned superior court for review of the Board decision. ( *Code Civ. Proc., § 1094.5*.) That court concluded the Board had jurisdiction to accept a *section 2234* claim and ordered it to hear the matter on its merits. The Board did not appeal this decision.

On February 16, 1984, the Board conducted a hearing to consider the Claim. LBUSD presented written and oral argument that the Claim was reimbursable pursuant to *section 2234* and, in addition, under *article XIII B, section 6 of the California Constitution*. DOE and the State Department **[*166]** of Finance (Finance) participated in the hearing. [3] **[***8]** The Board concluded that the Executive Order constituted a state mandate. On April 26, 1984, the Board adopted parameters and guidelines proposed by LBUSD for reimbursement of the expenditures. No state entity either sought reconsideration of the Board decisions, **[**456]** available pursuant to former section 633.6 of the California Administrative Code, [4] or petitioned for judicial review. [5]

In December 1984, pursuant to former *section 2255*, the Board reported to the Legislature the number of mandates it had found and the estimated statewide costs of each mandate. **[***9]** With respect to the Executive Order mandate, the Board adopted an estimate by Finance that reimbursement of school districts, including LBUSD, for costs expended in compliance with the Executive Order would total $ 95 million for fiscal years 1977-1978 through 1984-1985. The Board recommended that the Legislature appropriate that amount.

Effective January 1, 1985, the Commission on State Mandates (Commission) succeeded to the functions of the Board. ( *Gov. Code, §§ 17525*, *17630*.)

On March 4, 1985, Assembly Bill No. 1301 was introduced. It included an appropriation of $ 95 million to the state controller "for payment of claims of school districts seeking reimbursable state-mandated costs incurred pursuant to [the Executive Order] . . . ." On June 27, the Assembly amended the bill by deleting this $ 95 million appropriation and adding

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[1] Former *Revenue and Taxation Code section 2218* defines "test claim" as "the first claim filed with the State Board of Control alleging that a particular statute or executive order imposes a mandated cost on such local agency or school district." (Stats. 1980, ch. 1256, § 7, p. 4249.)

[2] All statutory references are to the Revenue and Taxation Code unless otherwise stated.

Former *section 2234* provided: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for such costs incurred after the operative date of such mandate." (Stats. 1980, ch. 1256, § 11, pp. 4251-4252.)

[3] The DOE recommended that the Claim be denied on the grounds that the requirements of the Executive Order were constitutionally mandated and court ordered and because the Executive Order was effective prior to January 1, 1978 (issues discussed *post*). However, counsel for the DOE expressed dismay that school districts which had voluntarily instituted desegregation programs had been having problems receiving funding from the Legislature, while schools which had been forced to do so had been receiving "substantial amounts of money."

A spokesman from Finance recalled there had been some doubt whether the Board had jurisdiction to hear a 2234 claim. He stated that, assuming the Board did have jurisdiction, the Executive Order contained at least one state mandate, which possibly consisted of administrative kinds of tasks related to the identification of "problem areas and the like."

[4] Former section 633.6 of the California Administrative Code (now renamed California Code of Regulations) provided in relevant part: "(b) Request for Reconsideration. [para.] (1) A request for reconsideration of a Board determination on a specific test claim . . . shall be filed, in writing, with the Board of Control, no later than ten (10) days after any determination regarding the claim by the Board . . ." (Title 2, Cal. Admin. Code)

[5] Former section 2253.5 provided: "A claimant or the state may commence a proceeding in accordance with the provisions of *Section 1094.5 of the Code of Civil Procedure* to set aside a decision of the Board of Control on the grounds that the board's decision is not supported by substantial evidence. The court may order the board to hold another hearing regarding such claim and may direct the board on what basis the claim is to receive a rehearing." (Stats. 1978, ch. 794, § 8, p. 2551.)

a **[*167]** "finding" that the Executive Order did not impose a state-mandated local program. [6] On September 28, 1985, the Governor approved the bill as amended.

**[***10]** On June 26, 1986, LBUSD petitioned for writ of mandate ( *Code Civ. Proc., § 1085*) and filed a complaint for declaratory relief against defendants State of California; Commission; Finance; DOE; holders of the offices of State Controller and State Treasurer and holder of the office of Auditor-Controller of the County of Los Angeles, and their successors in interest. LBUSD requested issuance of a writ of mandate commanding the respondents to comply with *section 2234* (fn. 2, *ante*) [7] **[***11]** and, in an amended petition, its successor, *Government Code section 17565*, and with *California Constitution, article XIII B, section 6*. [8] It further requested respondents to reimburse LBUSD $ 24,164,593 for fiscal years 1977-1978 through 1982-1983, $ 3,850,276 for fiscal years 1983-1984 and 1984-1985, and accrued interest, for activities mandated by the Executive Order.

The trial court let stand the conclusion of the Board that the Executive Order constituted a reimbursable state mandate and ruled in favor of LBUSD. No party requested a statement of decision.

The judgment stated that the Executive Order constituted a reimbursable state mandate which state entities could not challenge because of the doctrines of administrative collateral estoppel and waiver. It provided that certain previously appropriated **[**457]** funds were "'reasonably available'" to reimburse LBUSD for its claimed expenditures, applicable interest, and court costs. The judgment also stated that funds denominated the "Fines and Forfeitures Funds," under the custody of the Auditor-Controller of the County of Los Angeles, were not reasonably available. The judgment further decreed **[***12]** that the State Controller retained the right to audit the claims and records of LBUSD to verify the amount of the reimbursement award sum.

**[*168]** State respondents (State) and DOE separately filed timely notices of appeal, and LBUSD cross-appealed. [9]

Discussion

State asserts that neither the doctrine of collateral estoppel nor the doctrine of waiver is applicable to this case, the costs incurred by LBUSD are not reimbursable, and the remedy authorized by the trial court is inconsistent with California law and invades the province of the Legislature, a violation of article IV, section 4 of the United States Constitution.

The **[***13]** thrust of the DOE appeal is that its budget is not an appropriate source of funding for the reimbursement.

LBUSD has argued in its cross-appeal that an additional source of funding, the "Fines and Forfeiture Funds," should be made available for reimbursement of its costs and, in supplementary briefing, requests this court to order a modification of the judgment to include as "reasonably available funding" specific line item accounts from the 1988-1989 and 1989-1990 state budgets.

*I. State Not Barred From Challenging Decisions of the Board*

*A. Administrative Collateral Estoppel*

**(1a)** State first contends that the doctrine of administrative collateral estoppel is not applicable to the facts of this case and does not prevent State from litigating whether the Board properly considered the subject claim and whether the claim is reimbursable.

**(2)** Collateral estoppel precludes a party from relitigating in a subsequent action matters previously litigated and determined. ( *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal.2d 601, 604 [25 Cal.Rptr. 559, 375 P.2d*

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[6] Former *Section 2255* provided in part: "(b) If the Legislature deletes from a local government claims bill funding for a mandate imposed either by legislation or by a regulation . . . , it may take one of the following courses of action: (1) Include a finding that the legislation or regulation does not contain a mandate . . . ." (Stats. 1982, ch. 1638, § 7, p. 6662.)

[7] The language of *Government Code section 17565* is nearly identical to that of *section 2234* (fn. 2, *ante*), and provides: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate." (Stats. 1986, ch. 879, § 10, p. 3043.)

[8] Article XIII B, section 6 provides in pertinent part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ."

[9] Although an "Amended Notice to Prepare Clerk's Transcript" filed by DOE on April 11, 1988, requests the clerk of the superior court to incorporate in the record its notice of appeal filed April 1, 1988, this latter document does not appear in the record before us, and the original apparently is lost within the court system. Respondent LBUSD received a copy of the notice on April 4, 1988.

*439]*.) The traditional elements of collateral estoppel include the requirement **[***14]** that the prior judgment be "final." (*Ibid*.)

**(3a)** Finality for the purposes of administrative collateral estoppel may be understood as a two-step process: (1) the decision must be final with **[*169]** respect to action by the administrative agency (see *Code Civ. Proc., § 1094.5, subd. (a)*); and (2) the decision must have conclusive effect ( *Sandoval v. Superior Court (1983) 140 Cal.App.3d 932, 936-937 [190 Cal.Rptr. 29]*).

A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses "no further power to reconsider or rehear the claim. [Fn. omitted.]" ( *Chas. L. Harney, Inc. v. State of California (1963) 217 Cal.App.2d 77, 98 [31 Cal.Rptr. 524]*.)

**(1b)** In the case at bar, former section 633.6 of the Administrative Code provided a 10-day period during which any party could request reconsideration of any Board determination (fn. 4, *ante*). The Board decided on February 16, 1984, that the Executive Order constituted a state mandate, and on April 26, 1984, it adopted parameters and guidelines for the reimbursement of the claimed expenditures. No party requested **[***15]** reconsideration, no statute or regulation provided for further consideration of the matter by the Board (see, e.g., *Olive Proration etc. Com. v. Agri. etc. Com. (1941) 17 Cal.2d 204, 209 [109 P.2d 918]*), and the decisions became administratively final on February **[**458]** 27, 1984, and May 7, 1984, respectively [10] ( *Ziganto v. Taylor (1961) 198 Cal.App.2d 603, 607 [18 Cal.Rptr. 229]*).

**(3b)** Next, the decision must have conclusive effect. ( *Sandoval v. Superior Court, supra, 140 Cal.App.3d 932, 936-937*.) In other words, the decision must be free from direct attack. ( *People v. Sims (1982) 32 Cal.3d 468, 486 [186 Cal.Rptr. 77, 651 P.2d 321]*.) A direct attack on an administrative decision may be made by appeal to the superior court for review **[***16]** by petition for administrative mandamus. ( *Code Civ. Proc., § 1094.5*.)

[10] We take judicial notice pursuant to *Evidence Code section 452, subdivision (h)*, that February 26, 1984, and May 6, 1984, fall on Sundays.

**(1c)** A decision will not be given collateral estoppel effect if such appeal has been taken or if the time for such appeal has not lapsed. ( *Sandoval v. Superior Court, supra, 140 Cal.App.3d at pp. 936-937*; *Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal.3d 903, 911 [226 Cal.Rptr. 558, 718 P.2d 920]*.) The applicable statute of limitations for such review in the case at bar is three years. ( *Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal.App.3d 521, 534 [234 Cal.Rptr. 795]*; *Green v. Obledo (1981) 29 Cal.3d 126, 141, fn. 10 [172 Cal.Rptr. 206, 624 P.2d 256]*.)

**(4)** A statute of limitations commences to run at the point where a cause of action accrues and a suit may be maintained thereon. ( *Dillon v. Board of Pension Comm'rs. (1941) 18 Cal.2d 427, 430 [116 P.2d 37, 136 A.L.R. 800]*.)

**(1d)** In the instant case, State's causes of action accrued when the Board made the two decisions **[***17]** adverse to State on February 16 and April 26, 1984, **[*170]** as discussed. State did not request reconsideration, and the decisions became administratively final on February 27 and May 7, 1984. [11] **[***18]** For purposes of discussion, we will assume the applicable three-year statute of limitations period for the two Board decisions commenced on February 28 and May 8, 1984, and ended on February 28 and May 8, 1987. [12] LBUSD filed its petition for ordinary mandamus ( *Code Civ. Proc., § 1085*) and complaint for declaratory relief on June 26, 1986. At that point, the limitations periods had not run against State and the Board decisions lacked the necessary finality to satisfy that requirement of the doctrine of administrative collateral estoppel. [13]

[11] We do not address the contention of LBUSD that State failed to exhaust its administrative remedies ( ***Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 292 [109 P.2d 942, 132 A.L.R. 715]***; ***Morton v. Superior Court (1970) 9 Cal.App.3d 977, 982 [88 Cal.Rptr. 533]***) and therefore State cannot assert its affirmative defenses in response to the petition and complaint of the school district. Traditionally, the doctrine has been raised as a bar only with respect to the party seeking judicial relief, not against the responding party (*ibid*.); we have found no case holding otherwise.

[12] If State had sought reconsideration and its request been denied, or if its request had been granted but the matter again decided in favor of LBUSD, the Board decision would have been final 10 days after the Board action, and at that point the statute would have commenced to run against State.

[13] State argues that its statute of limitations did not commence until the legislation was enacted without the appropriation (Sept. 28, 1985), citing ***Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at page 548***. However, *Carmel Valley* held that the *claimant* does not exhaust its administrative

**[***19] [**459]** *B. Waiver*

**(5a)** State also asserts that the doctrine of waiver is not applicable.

**(6)** A waiver occurs when there is "an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce **[*171]** a reasonable belief that it has been waived. [Citations.]" ( *Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at p. 534*.) Ordinarily, the issue of waiver is a question of fact which is binding on the appellate court if the determination is supported by substantial evidence. ( *Napa Association of Public Employees v. County of Napa (1979) 98 Cal.App.3d 263, 268 [159 Cal.Rptr. 522]*.) However, the question is one of law when the evidence is not in conflict and is susceptible of only one reasonable inference. ( *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal.App.3d 101, 151-152 [135 Cal.Rptr. 802]*.)

**(5b)** In the instant case, the right to contest the findings of the Board is at issue, and there is no dispute that **[***20]** the state was aware of the existence of this right. As discussed, the statute of limitations had not run when State raised its affirmative defenses, and during this time State could have filed a separate petition for administrative mandamus.

**(7) (See fn. 14.)**

**(5c)** State's assertion of its affirmative defenses during this period is inconsistent with an intent to waive its right to contest the Board decisions, and therefore the doctrine of waiver is not applicable. [14]

**[***21]** *II. Issue of State Mandate*

**(8)** Ordinarily, our conclusion that the trial court erred in failing to consider the merits of the State's challenge to the decisions of the Board would require that the matter be remanded to the trial court for a full hearing. However, because the question of whether a cost is state mandated is one of law in the instant case (cf. *Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at p. 536*), we now decide that the expenditures are reimbursable pursuant to *article XIII B, section 6 of the California Constitution* and that no relief is available under *section 2234*. [15]

**[***22] [*172]** *A. Recovery Under Article XIII B, Section 6*

**(9a)** On November 6, 1979, California voters passed initiative measure Proposition 4, which added article XIII B to the state Constitution. This measure, a corollary to the previously passed Proposition 13 (art. XIII A, which restricts governmental taxing authority), placed limits on the growth of state and local government appropriations. It also provided reimbursement to local governments for the costs of complying with certain requirements mandated by the state.

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remedies and cannot come under the court's jurisdiction until the legislative process is complete, which occurred in that case when the legislation was enacted without the subject appropriations. At that point, *Carmel Valley* reasoned, the state had breached its duty to reimburse, and the claimant's right of action in traditional mandamus accrued. (*Ibid*.) However, *Carmel Valley* decided, as do we in the case at bar, that the state's statute of limitations commenced on the date the Board made decisions adverse to its interests. ( ***Id. at p. 534***.)

In addition, we see no reason to permit State to rely on the fortuitous actions of the Legislature, an independent branch of government, to bail it out of obligations established in the distant past by state agents -- especially given the lengthy three-year statute of limitations. (Compare, e.g., *Gov. Code, § 11523* [mandatory time limit within which to petition for administrative mandamus can be 30 days after last day on which administrative reconsideration can be ordered]; *Lab. Code, § 1160.8*, and ***Jackson & Perkins Co. v. Agricultural Labor Relations Board (1978) 77 Cal.App.3d 830, 834 [144 Cal.Rptr. 166]*** [30 days from issuance of board order even if party has filed a motion to reconsider].)

[14] LBUSD contends that State should be equitably estopped from challenging the Board decisions. In the absence of a confidential relationship, the doctrine of equitable estoppel is inapplicable where there is a mistake of law. ( ***Gilbert v. City of Martinez (1957) 152 Cal.App.2d 374, 378 [313 P.2d 139]***; ***People v. Stuyvesant Ins. Co. (1968) 261 Cal.App.2d 773, 784 [68 Cal.Rptr. 389]***.) There is no confidential relationship herein, and since we conclude as a matter of law and contrary to the trial court that the statute of limitations does not bar State from litigating the mandate and reimbursability issues, the doctrine is inapplicable.

[15] We invited State, DOE, and LBUSD to submit additional briefing on the following issues: "1. Can it be determined as a question of law whether sections 90 through 101 of Title 5 of the California Administrative Code [Executive Order] constitute a state mandate within the meaning of *article XIII B, section 6 of the California Constitution*? 2. Do the above sections constitute such mandate?" State and LBUSD submitted additional argument; DOE declined the invitation.

LBUSD argues that section 6 of this provision is an additional ground for reimbursement.

*1. The Executive Order Requires a Higher Level of Service*

In relevant part article XIII B, section 6 (Section 6) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any **[**460]** local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ."

**(10)** The subvention requirement of Section 6 "is directed to state mandated increases in the services provided by local agencies in existing 'programs.'" ( *County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202]*.) **[***23]** "[T]he drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid*.)

**(9b)** In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly governmental function. (Cf. *Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at p. 537*.) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a "program" within the meaning of Section 6.

State argues that the Executive Order does not mandate a higher level of service -- or a new program -- because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. In support of its argument, State cites *Brown v. Board of Education (1952) 347 U.S. 483, 495 [98 L.Ed. 873, 881, 74 S.Ct. 686, 38 A.L.R.2d 1180]*; **[***24]** *Jackson v. Pasadena City School District (1963) 59 Cal.2d 876, 881 [31 Cal.Rptr. 606, 382 P.2d 878]*; *Crawford v. Board of Education (1976) 17 Cal.3d 280 [130 Cal.Rptr. 724, 551 P.2d 28]* and cases cited therein; and *National Assn. for Advancement of Colored People v. San Bernardino **[*173]** City Unified Sch. Dist. (1976) 17 Cal.3d 311 [130 Cal.Rptr. 744, 551 P.2d 48]*. These cases show that school districts do indeed have a constitutional obligation to alleviate racial segregation, and on this ground the Executive Order does not constitute a "new program." However, although school districts are required to "'take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause[]'" ( *Crawford, supra, at p. 305*, italics omitted, citing *Jackson*), the courts have been wary of requiring specific steps in advance of a demonstrated need for intervention (*Crawford, at pp. 305-306*; *Jackson, supra, at pp. 881-882*; *Swann v. Board of Education (1971) 402 U.S. 1, 18-21 [28 L.Ed.2d 554, 567-570, 91 S.Ct. 1267]*). **[***25]** On the other hand, courts have required specific factors be considered in determining whether a school is segregated ( *Keyes v. School District No. 1, Denver, Colo. (1973) 413 U.S. 189, 202-203 [37 L.Ed.2d 548, 559-560, 93 S.Ct. 2686]*; *Jackson, supra, at p. 882*).

The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. ( *County of Los Angeles v. State of California, supra, 43 Cal.3d 46, 50*.) A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. ( *Id., at pp. 54-56*.) However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. Where courts have *suggested* that certain steps and approaches may be helpful, the Executive Order and guidelines *require* specific actions. For example, school districts are to conduct mandatory biennial **[***26]** racial and ethnic surveys, develop a "reasonably feasible" plan every four years to alleviate and prevent segregation, include certain specific elements in each plan, and take mandatory steps to involve the community, including public hearings which have been advertised in a specific manner. While all these steps fit within the "reasonably feasible" description of *Jackson* and *Crawford*, the point is that these steps are no longer merely being suggested as options which the local school district may **[**461]** wish to consider but are required acts. These requirements constitute a higher level of service. We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that the Claim is reimbursable: "[O]nly those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."

*2. The Executive Order Constitutes a State Mandate*

For the sake of clarity we quote Section 6 in full: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to **[*174]** reimburse such local government for the **[***27]** costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [para.] (a) Legislative mandates requested by the local agency affected; [para.] (b) Legislation defining a new crime or changing an existing definition of a crime; or [para.]

*(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975*." (Italics added.) This amendment became effective July 1, 1980. (Art. XIII B, § 10.) Again, the Executive Order became effective September 16, 1977.

State argues there is no constitutional ground for reimbursement because (a) with reference to the language of exception (c) of Section 6, the Executive Order is neither a statute nor an executive order or regulation implementing a statute; (b) recent legislation limits reimbursement to certain costs incurred after July 1, 1980, the effective date of the constitutional amendment; and (c) LBUSD failed to exhaust administrative procedures for reimbursement of Section 6 claims ( *Gov. Code, § 17500 et seq.*). We conclude that recovery is available **[***28]** under Section 6.

(a) *Form of Mandate*

State argues the Executive Order is not a state mandate because, with reference to exception (c) of Section 6, it is neither a statute nor an executive order implementing a statute.

**(11)** In construing the meaning of Section 6, we must determine the intent of the voters by first looking to the language itself ( *County of Los Angeles v. State of California, supra, 43 Cal.3d 46, 56)*, which "'should be construed in accordance with the natural and ordinary meaning of its words.' [Citation.]" ( *ITT World Communications, Inc. v. City and County of San Francisco (1985) 37 Cal.3d 859, 865 [210 Cal.Rptr. 226, 693 P.2d 811]*.) The main provision of Section 6 states that whenever the Legislature or any state agency "mandates" a new program or higher level of service, the state must provide reimbursement.

**(12)** We understand the use of "mandates" in the ordinary sense of "orders" or "commands," concepts broad enough to include executive orders as well as statutes. As has been noted, "[t]he concern which prompted the inclusion of section 6 in article XIII B was the perceived **[***29]** attempt by the state to enact legislation *or adopt administrative orders* creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." ( *County of Los Angeles v. State of California, supra, 43 Cal.3d at p. 56*.) It is clear that the primary concern of the voters was the increased financial **[*175]** burdens being shifted to local government, not the form in which those burdens appeared.

We derive support for our interpretation by reference to the ballot summary presented to the electorate. (Cf. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281]*.) The legislative analyst determined that the amendment would limit the rate of growth of governmental appropriations, require the return of taxes which exceeded amounts appropriated, and "[r]equire the state to reimburse local governments for the costs of complying with 'state mandates.'" **[**462]** The term "state mandates" was **[***30]** defined as "requirements imposed on local governments by legislation *or executive orders*." (Italics added; Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979) p. 16.)

**(9c)** Although exception (c) of Section 6 gives the state discretion whether to reimburse pre-1975 mandates which are either statutes or executive orders implementing statutes, we do not infer from this exception that reimbursability is otherwise dependent on the form of the mandate. We conclude that since the voters provided for mandatory reimbursement except for the three narrowly drawn exceptions found in (a), (b), and (c), there was no intent to exclude recovery for state mandates in the form of executive orders. Further, as State sets forth in its brief, the adoption of the Executive Order was "arguably prompted" by the decision in *Crawford v. Board of Education, supra, 17 Cal.3d 280*, a case decided after the 1975 cutoff date of exception (c). Since case law and statutory law are of equal force, there appears to be no basis on which to exclude executive orders which implement case law or constitutional law **[***31]** while permitting reimbursement for executive orders implementing statutes. We see no relationship between the proposed distinction and the described purposes of the amendment ( *County Los Angeles v. State of California, supra, 43 Cal.3d at p. 56*; *County of Los Angeles v. Department of Industrial Relations (1989) 214 Cal.App.3d 1538, 1545 [263 Cal.Rptr. 351]*).

(b) *Recent Legislative Limits*

State contends that LBUSD cannot claim reimbursement under Section 6 because *Government Code sections 17561* (Stats. 1986, ch. 879, § 6, p. 3041) and 17514 (Stats. 1984, ch. 1459, § 1, p. 5114) limit such recovery to mandates created by statutes or executive orders implementing statutes, and only for costs incurred after July 1, 1980.

As discussed above, the voters did not intend to limit reimbursement of costs only to those incurred pursuant to statutes or executive orders implementing **[*176]** statutes

except as set forth in exception (c) of Section 6. We presume that when the Legislature passed *Government Code sections 17561* and *17514* it was aware of Section 6 as a related law and intended to maintain a consistent **[***32]** body of rules. ( *Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449]*.) As discussed above, the limitations suggested by State are confined to exception (c).

Further, the state must reimburse costs incurred pursuant to mandates enacted after January 1, 1975, although actual payments for reimbursement were not required to be made prior to July 1, 1980, the effective date of Section 6. ( *Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at pp. 547-548*; *City of Sacramento v. State of California (1984) 156 Cal.App.3d 182, 191-194 [203 Cal.Rptr. 258]*, disapproved on other grounds in *County of Los Angeles v. State of California, supra, 43 Cal.3d at p. 58, fn. 10*.)

(c) *Administrative Procedures*

The Legislature passed *Government Code section 17500 et seq.* (Stats. 1984, ch. 1459, § 1, p. 5113), effective January 1, 1985 (Stats. 1984, ch. 1459, § 1, p. 5123), to aid the implementation of Section 6 and to consolidate the procedures for reimbursement **[***33]** under statutes found in the Revenue and Taxation Code. This legislation created the Commission, which replaced the Board, and instituted a number of procedural changes. ( *Gov. Code, §§ 17525*, *17527, subd. (g)*, *17550 et seq.*) The Legislature intended the new system to provide "the sole and exclusive procedure by which a local agency or school district" could claim reimbursement. ( *Gov. Code, § 17552*.)

**(13)** State argues that since LBUSD never made its claim before the Commission, it failed to exhaust its administrative **[**463]** remedies and cannot now receive reimbursement under section 6.

As discussed, the Board decisions favorable to LBUSD became administratively final in 1984. The Commission was not in place until January 1, 1985. There is no evidence in the record that the Commission did not consider these decisions to be final.

State argues the Commission was given jurisdiction over all claims which had not been included in a local government claims bill enacted before January 1, 1985. ( *Gov. Code, § 17630*.) State is correct. However, the subject claim was included in such a bill, but the bill was signed into law after the recommended appropriation had been deleted. Under the statutory **[***34]** scheme, the only relief offered a disappointed claimant at such juncture is an action in declaratory relief to declare a subject executive order void **[*177]** (former *Rev. & Tax Code, § 2255, subd. (c)*; Stats. 1982, ch. 1638, § 7, pp. 6662-6663) or unenforceable ( *Gov. Code, § 17612, subd. (b)*; Stats. 1984, ch. 1459, § 1, p. 5121) and to enjoin its enforcement. LBUSD pursued this remedy and in addition petitioned for writ of mandate ( *Code Civ. Proc., § 1085*) to compel reimbursement. There is no requirement to seek further administrative review. Indeed, to do so after the Legislature has spoken would appear to be an exercise in futility.

We conclude that Section 6 provides reimbursement to LBUSD because the Executive Order required a higher level of service and because the Executive Order constitutes a state mandate.

*B. Section 2234*

As set forth in the procedural history of this case, the Board originally declined to consider the Claim as a claim made under *section 2234* on the ground that it lacked jurisdiction to do so. LBUSD petitioned for judicial relief, and the trial court held that the Board had jurisdiction and must consider the claim on its merits. The Board did not **[***35]** appeal that decision. State raised the jurisdiction issue as an affirmative defense to the second petition for writ of mandate filed by LBUSD and presents it again for our consideration.

**(14)** Of course, lack of subject matter jurisdiction may be raised at any time. ( *Stuck v. Board of Medical Examiners (1949) 94 Cal.App.2d 751, 755 [211 P.2d 389]*.)

Former section 2250 provided: "The State Board of Control, pursuant to the provisions of this article, shall hear and decide upon a claim by a local agency or school district that such local agency or school district has not been reimbursed for *all costs mandated by the state as required by Section 2231 or 2234*. [para.] Notwithstanding any other provision of law, this article shall provide the sole and exclusive procedure by which the Board of Control shall hear and decide upon a claim that a local agency or school district has not been reimbursed for *all costs mandated by the state as required by Section 2231 or 2234*." (Italics added; Stats. 1978, ch. 794, § 5, p. 2549.) Given the clear, unambiguous language of the statute, there is no need for construction. ( *West Covina Hospital v. Superior Court (1986) 41 Cal.3d 846, 850 [226 Cal.Rptr. 132, 718 P.2d 119, 60 A.L.R.4th 1257]*.)

**[***36]** **(15a)** We conclude that the Board had jurisdiction to consider a claim filed under former *section 2234*. However, as discussed below, the 1977 Executive Order falls outside the purview of *section 2234*.

Former section 2231 provided: "(a) . . . The state shall reimburse each school district only for those 'costs mandated by the state', as defined in **[*178]** Section 2207.5." (Stats. 1982, ch. 1586, § 3, p. 6264.) In part, former section 2207.5 defines "costs mandated by the state" as increased costs which a school district is required to incur as a result of certain new programs or certain increased program levels or services mandated by an executive order issued *after* January 1, 1978. (Stats. 1980, ch. 1256, § 5, pp. 4248-4249.) As previously stated, the Executive Order in the case at bar was issued September 8, 1977.

Former section 2234, pursuant to which LBUSD initially filed its claim, does not itself contain language indicating a time limitation: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the **[**464]** local agency or school district for such costs incurred after the operative **[***37]** date of such mandate." (Stats. 1980, ch. 1256, § 11, p. 4251.)

State asserts that the January 1, 1978, limitation of sections 2231 and 2207.5 applies to section 2234, preventing reimbursement for costs expended pursuant to the September 8, 1977, Executive Order; LBUSD argues section 2234 is self-contained and without time limitation.

**(16)** It is a fundamental rule of statutory construction that a statute should be construed with reference to the whole system of law of which it is a part in order to ascertain the intent of the Legislature. ( *Moore v. Panish (1982) 32 Cal.3d 535, 541 [186 Cal.Rptr. 475, 652 P.2d 32]*; *Pitman v. City of Oakland (1988) 197 Cal.App.3d 1037, 1042 [243 Cal.Rptr. 306]*.) The legislative history of a statute may be considered in ascertaining legislative design. ( *Walters v. Weed (1988) 45 Cal.3d 1, 10 [246 Cal.Rptr. 5, 752 P.2d 443]*.)

The earliest version of section 2234 is found in former section 2164.3, subdivision (f), which provided reimbursement to a city, county, or special district for "a service or program [provided] at its **[***38]** option which is subsequently mandated by the state . . . ." Reimbursement was limited to costs mandated by statutes or executive orders enacted or issued after January 1, 1973. (Stats. 1972, ch. 1406, § 3, pp. 2962-2963.)

In 1973, section 2164.3 was amended to provide reimbursement to school districts for costs mandated by statutes enacted after January 1, 1973 (subd. (a)), *but it expressly excluded school districts from reimbursement for costs mandated by executive orders* (subd. (d)). (Stats. 1973, ch. 208, § 51, p. 565.) Later that same year, the Legislature repealed section 2164.3 (Stats. 1973, ch. 358, § 2, p. 779) and added section 2231, which took over the pertinent **[*179]** reimbursement provisions of section 2164.3 virtually unchanged. (Stats. 1973, ch. 358, § 3, pp. 779, 783-784.)

In 1975, the Legislature removed the time limitation language from section 2231 and incorporated it into a new section, 2207. (Stats. 1975, ch. 486, § 1.8, pp. 997-998.) After this change, section 2231 then provided in pertinent part: "(a) The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207. *The state shall reimburse each school* **[***39]** *district only for those 'costs mandated by the state' specified in subdivision (a) of Section 2207* . . . ." (Italics added; Stats. 1975, ch. 486, § 7, pp. 999-1000.) Subdivision (a) of section 2207 limited reimbursement solely to costs mandated by statutes enacted after January 1, 1973.

At this same juncture, the Legislature further amended section 2231 by deleting the provision for "subsequently mandated" services or programs and incorporating that provision into a new section, 2234 (Stats. 1975, ch. 486, § 9, p. 1000), the section under which LBUSD would eventually make its claim. The substance of section 2234 (see fn. 2, *ante*) remained unchanged until its repeal in 1986. (Stats. 1977, ch. 1135, § 8.6, p. 3648; Stats. 1980, ch. 1256, § 11, pp. 4251-4252; Stats. 1986, ch. 879, § 25, p. 3045.)

Next, section 2231 was amended to show that with regard to school districts, "costs mandated by the state" were now defined by a new section, 2207.5. (Stats. 1977, ch. 1135, § 7, pp. 3647-3648.) Section 2207.5 limited reimbursement to costs mandated by statutes enacted after January 1, 1973, and *executive orders issued after January 1, 1978*. (Stats. 1977, ch. 1135, § 5, pp. **[***40]** 3646-3647.) (No further pertinent amendments to section 2231 occurred; see Stats. 1978, ch. 794, § 1.1, p. 2546; Stats. 1980, ch. 1256, § 8, pp. 4249-4250; Stats. 1982, ch. 734, § 3, p. 2912.) The distinction between statutes and executive orders was preserved when section 2207.5 was amended in 1980 (Stats. 1980, ch. 1256, § 5, pp. 4248-4249) and was in effect at the time of the Board hearing.

**(15b)** This survey teaches us that with respect to the reimbursement process, the Legislature has treated school districts differently than it has treated other local government entities. The Legislature initially did not give school districts the right to recover costs mandated by executive orders; and when this option was made available, the **[**465]** effective date differed from that applicable to other entities. The Legislature consistently limited reimbursement of costs by reference to the effective dates of statutes and executive orders and nothing indicates the state intended recovery of

costs to be open-ended.

**[*180]** Because the "subsequently mandated" provision of *section 2234* originally was contained in sections which set forth specific date limitations (former sections 2164.3 and 2231), we conclude **[***41]** the Legislature likewise intended to limit claims made pursuant to *section 2234*. The use of the language "subsequently mandated" merely describes an additional circumstance in which the state will reimburse costs, provided the claimant meets other requirements. Since the September 1977 Executive Order falls outside the January 1, 1978, limit set by *section 2207.5*, *section 2234* does not provide for reimbursement to LBUSD.

*III. The Award*

The full text of the award as provided by the judgment is set forth in an appendix to this opinion. In part, the judgment states that there are appropriated funds in budgets for the DOE, the Commission, the Reserve for Contingencies or Emergencies, and the Special Fund for Economic Uncertainties, "or similarly designated accounts" which are "'reasonably available'" to reimburse LBUSD for the state mandated costs it has incurred. (Appendix, pars. 3, 2.) The State Controller is commanded to pay the claims plus interest "at the legal rate" from the described appropriations for fiscal years 1984-1985 through 1987-1988 and "subsequently enacted State Budget Acts." (Appendix, par. 7.) The judgment declares that the deletion of funding for reimbursement **[***42]** of costs incurred in compliance with the Executive Order was invalid and unconstitutional. (Appendix, par. 12.) Finally, the Fines and Forfeiture Funds in the custody of the Auditor-Controller of Los Angeles County are held to be not reasonably available for reimbursement. (Appendix, par. 5.)

*A. State Position*

**(17a)** State contends the trial court's award is contrary to California law, asserting that it constitutes an invasion of the province of the Legislature and therefore a judicial usurpation of the republican form of government guaranteed by the United States *Constitution, Article IV, section 4*.

**(18)** A court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated. (*Cal. Const., art. III, § 3*; *art. XVI, § 7*; *Mandel v. Myers (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935]*; *Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at p. 538*.) However, no violation of the separation of powers doctrine occurs when a court orders appropriate expenditures from already existing funds. (*Mandel, at p. 540*; *Carmel Valley, at* ***[***43]*** *pp. 539-540*.) The test is whether such funds are "reasonably available for the **[*181]** expenditures in question . . . ." (*Mandel, at p. 542*; *Carmel Valley, at pp. 540-541*.) Funds are "reasonably available" for reimbursement when the purposes for which those funds were appropriated are "generally related to the nature of costs incurred . . . ." (*Carmel Valley, at p. 541*.) There is no requirement that the appropriation specifically refer to the particular expenditure (*Mandel at pp. 543-544*, *Carmel Valley at pp. 540*; *Committee to Defend Reproductive Rights v. Cory (1982) 132 Cal.App.3d 852, 857-858 [183 Cal.Rptr. 475]*), nor must past administrative practice sanction coverage from a particular fund (*Carmel Valley, at p. 540*).

**(17b)** As previously stated, the trial court found the subject funds were "reasonably available." No party requested a statement of decision, and therefore it is implied that the trial court found all facts necessary to support its judgment. (*Michael* **[**466]** *U. v. Jamie B. (1985) 39 Cal.3d 787, 792-793 [218 Cal.Rptr. 39, 705 P.2d 362]*; *Homestead Supplies, Inc. v. Executive Life Ins. Co. (1978) 81 Cal.App.3d 978, 984 [147 Cal.Rptr. 22]*.) **[***44]** We now examine the record to ascertain whether substantial evidence supports the decision of the trial court.

The Board having approved reimbursement under the Executive Order, reported to the Legislature that "[t]he categories of reimbursable costs include, but are not limited to: (1) voluntary pupil assignment or reassignment programs, (2) magnet schools or centers, (3) transportation of pupils to alternative schools or programs, (5) [*sic*, no item (4)] racially isolated minority schools, (6) costs of planning, recruiting, administration and/or evaluation, and (7) overhead costs." The guidelines set out comprehensive steps to be taken by school districts in order to be in compliance with the Executive Order.

The peremptory writ of mandate, issued the same date as the judgment, designated funds in specific account numbers and, in addition, a special fund as available for reimbursement. We take judicial notice of the relevant budget enactments and *Government Code sections 16418* and *16419* ( *Evid. Code, §§ 459, subd. (a)*, *452*) and address these designations seriatim.

The line item account numbers for the DOE for fiscal years

1984-1985 through 1987-1988 set forth in the writ are **[***45]** as follows: 6100-001-001, 6100-001-178, 6100-015-001, 6100-101-001, 6100-114-001, 6100-115-001, 6100-121-001, 6100-156-001, 6100-171-178, 6100-206-001, 6100-226-001.

An examination of the relevant budget acts Statutes 1985, chapter 111; Statutes 1986, chapter 186; Statutes 1987, chapter 135; and final budgetary changes as published by the Department of Finance for each year, shows **[*182]** that appropriations in the 11 DOE line item account numbers have supported a very broad range of activities including reimbursement of costs for both mandated and voluntary integration programs, assessment programs, child nutrition, meals for needy pupils, participation in educational commissions, administration costs of various programs, proposal review, teacher recruitment, analysis of cost data, school bus driver instructor training, shipping costs for instructional materials, local assistance for school district transportation aid, summer school programs, local assistance to districts with high concentrations of limited- and non-English-speaking children, adult education, driver training, Urban Impact Aid, and cost of living increases for specific programs. Further evidence regarding the **[***46]** uses of these funds is found in the deposition testimony of William C. Pieper, Deputy Superintendent for Administration with the State Department of Education, who stated that local school districts were being reimbursed for the costs of desegregation programs from line item account numbers 6100-114-001 and 6100-115-001 in the 1986 State Budget Act.

Comparing the requirements of the Executive Order and guidelines with the broad range of activities supported by the DOE budget, we conclude that the subject funds, although not specifically appropriated for the reimbursement in question, were generally related to the nature of the costs incurred.

With regard to the Commission, the writ sets out three line item account numbers: 8885-001-001; 8885-101-001; and 8885-101-214. A review of the relevant budget acts shows that the first line item provides funding for support of the Commission, and line item number 8885-101-001 provides funding specifically for local assistance "in accordance with the provisions of *Section 6 of Article XIII B of the California Constitution* . . . ." (Stats. 1986, ch. 186.) Line item number 8885-101-214 also provides funds for "local assistance." Since the Commission **[***47]** was created specifically to effect reimbursements for qualifying claims, we conclude there is a general relationship between the purpose of the appropriations and the requirements of the Executive Order.

Line item 9840-001-001 of the Reserve for Contingencies or Emergencies defines "contingencies" as "proposed expenditures **[**467]** arising from unexpected conditions or losses for which no appropriation, or insufficient appropriation, has been made by law and which, in the judgment of the Director of Finance, constitute cases of actual necessity." (All relevant budget acts.) In the instant case, previous to the issuance of the Executive Order, LBUSD could not have anticipated the expenditures necessary to bring it into compliance. Further, the Legislature refused to appropriate the necessary funds **[*183]** to directly reimburse the district for these expenditures. The necessity exists by virtue of the writ and judgment issued by the trial court. Therefore, this line item, and three others which also support the reserve (9840-001-494, 9840-001-988, 9840-011-001) are generally related to the costs. [16]

**[***48]** Finally the writ lists as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts . . . ." An examination of *Government Code sections 16418* and *16419* relating to the special fund shows only one use of this reserve: establishment of the Disaster Relief Fund "for purposes of funding disbursements made for response to and recovery from the earthquake, aftershocks, and any other related casualty." No evidence in the record indicates a general relationship between this purpose and the costs incurred by LBUSD. We conclude, therefore, that this source of funding cannot be used for reimbursement. This source is stricken from the judgment.

The description of further sources of funding as "similarly designated accounts" fails to sufficiently identify these sources and we therefore strike this part of the judgment.

In a supplemental brief, LBUSD requests this court to take judicial notice of the Budget Acts of 1988-1989 (Stats. 1988, ch. 313) and 1989-1990 (Stats. 1989, ch. 93) pursuant to the Evidence Code ( *Evid. Code, §§ 451, subd. (a)*, *452, subd. (a)*, *452, subd. (c)*, *459*) and to order that the amounts set forth in the judgment and writ be **[***49]** satisfied from specific line item accounts in these later budgets and from the Special Fund for Economic Uncertainties. [17]

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[16] The costs do not come within past or current definitions of "emergency," which are, respectively, as follows. "[P]roposed expenditures arising from unexpected conditions or losses for which no appropriation, or insufficient appropriation, has been made by law and which in the judgment of the Director of Finance require immediate action to avert undesirable consequences or to preserve the public peace, health or safety." (Fiscal years 1984-1985, 1985-1986.) "[E]xpenditure incurred in response to conditions of disaster or extreme peril which threaten the health or safety of persons or property within the state." (Fiscal years 1986-1987 forward.)

[17] LBUSD identifies the line items accounts as follows: DOE -- 6110-001-001, 6110-001-178, 6110-015-001, 6110-101-001, 6110-

**(19)** "An appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts. [Citation.]" ( *Carmel Valley, supra, 190 Cal.App.3d at p. 557*.)

**(17c)** We have reviewed the designated budget acts and conclude that the specified line item accounts for DOE, the Commission, **[*184]** and the Reserve for Contingencies and Emergencies provide funds for a broad range of activities similar to those set out above and therefore **[***50]** are generally related to the nature of the costs incurred. However, for the reasons previously discussed, we decline to designate the Special Fund for Economic Uncertainties as a source for reimbursement.

While we have concluded that certain line item accounts are generally related to the nature of the costs incurred, there must also be evidence that at the time of the order the enumerated budget items contained sufficient funds to cover the award. ( *Gov. Code, § 12440*; *Mandel v. Myers, supra, 29 Cal.3d at p. 543*; *Carmel Valley, supra, 190 Cal.App.3d at p. 541*; cf. *Baggett v. Dunn (1886) 69 Cal. 75, 78 [10 P. 125]*; *Marshall v. Dunn (1886) 69 Cal. 223, 225 [10 P. 399]*.) The record before **[**468]** us contains evidence regarding balances at various points in time for some of the line item accounts, but that evidence is primarily in the form of uninterpreted statistical data. We have not found a clear statement which would satisfy this requirement. Furthermore, not every line item was in existence every fiscal year. In addition, those which **[***51]** entered the budgetary process did not always survive it unscathed. Therefore, we remand the matter to the trial court to determine with regard to the line item account numbers approved above whether funds sufficient to satisfy the award were available at the time of the order. (Cf. *County of Sacramento v. Loeb (1984) 160 Cal.App.3d 446, 454-455 [206 Cal.Rptr. 626]*.) If the trial court determines that the unexhausted funds remaining in the specified appropriations are insufficient, the trial court order can be further amended to reach subsequent appropriated funds. (*County of Sacramento at p. 457*; *Serrano v. Priest (1982) 131 Cal.App.3d 188, 198 [182 Cal.Rptr. 387]*.)

**(20)** Having concluded that certain appropriations are generally available to reimburse LBUSD, we turn to an additional issue raised by State: that the "finding" by the Legislature that the Executive Order does not impose a "state-mandated local program" prevents reimbursement.

Unsupported legislative disclaimers are insufficient to defeat reimbursement. ( *Carmel Valley, supra, 190 Cal.App.3d at pp. 541-544*.) As discussed, **[***52]** LBUSD, pursuant to Section 6, has a constitutional right to reimbursement of its costs in providing an increased service mandated by the state. The Legislature cannot limit a constitutional right. ( *Hale v. Bohannon (1952) 38 Cal.2d 458, 471 [241 P.2d 4]*.)

*B. DOE Contentions*

DOE is sympathetic to LBUSD's position. On appeal, it takes no stand on the issue whether the Executive Order constitutes a state mandate within **[*185]** the meaning of Section 6.

**(21)** The thrust of its appeal is that, if there is a mandate, the DOE budget is an inappropriate source of funding in comparison with other budget line item accounts included in the order.

We conclude to the contrary because logic dictates that DOE funding be the initial and primary source for reimbursement. As discussed, the test set forth in *Mandel* and *Carmel Valley* is whether there is a general relationship between budget items and reimbursable expenditures. Since the Executive Order was issued by DOE, it is not surprising that the evidence overwhelmingly supports the finding of the trial court that this general relationship exists with regard to the DOE budget.

While we also have concluded **[***53]** that certain line item accounts for entities other than DOE are also appropriate sources of funding, the record does not provide the statistical data necessary to determine how far the order will reach with regard to these additional sources of support.

DOE also contends that reimbursement for expenditures in fiscal years 1977-1978, 1978-1979, and 1979-1980 cannot be awarded under Section 6 because the amendment was not effective until July 1, 1980. As discussed, this argument has been previously rejected. ( *Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at pp. 547-548*; *City of Sacramento v. State of California, supra, 156 Cal.App.3d 182, 191-194*, disapproved on other grounds in *County of Los Angeles v. State of California, supra, 43 Cal.3d 46, 58, fn. 10*.)

**(22)** Finally, DOE contends that interest should have been awarded at the rate of 6 percent per annum pursuant to

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114-001, 6110-115-001, 6110-121-001, 6110-156-001, 6110-171-178, 6110-226-001, 6110-230-001; Commission -- 8885-001-001, 8885-101-001, 8885-101-214; Reserve for Contingencies or Emergencies -- 9840-001-001, 9840-001-494, 9840-001-988, 9840-011-001.

*Government Code section 926.10* rather than at the legal rate provided under article XV, section 1, paragraph (2) of the California Constitution.

*Government Code section* ***[***54]*** *926.10* is part of the California Tort Claims Act ( *Gov. Code, § 900 et seq.*) which provides a statutory scheme for the filing of claims against public entities for alleged injuries; it makes no provision for claims for reimbursement **[**469]** for state mandated expenditures. In *Carmel Valley* a judgment awarding interest at the legal rate was affirmed. ( *Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at p. 553*.) We decline the invitation of DOE to apply another rule.

*C. Cross Appeal of LBUSD*

**(23)** LBUSD seeks reversal of that part of the judgment holding that monies in the Fines and Forfeitures Funds in the custody and possession of **[*186]** cross-respondent Auditor-Controller of the County of Los Angeles (County Controller) for transfer to the state treasury are not reasonably available for reimbursement of its state mandated expenditures. [18]

**[***55]** As previously stated, funds are "reasonably available" when the purposes for which those funds were appropriated are generally related to the nature of the costs incurred. ( *Carmel Valley, supra, 190 Cal.App.3d at pp. 540-541*.) LBUSD does not cite, nor have we found, any evidence in the record showing the use of those funds once they are transmitted to the state and that those funds are then "reasonably available" to satisfy the Claim. We cannot conclude as a matter of law that a general relationship exists between those funds and the nature of the costs incurred pursuant to the Executive Order. LBUSD has failed to carry its burden of proof and the trial court correctly decided these funds were not "reasonably available" for reimbursement.

Nor have we concluded that there is any ground on which the funds could be made available to LBUSD while in the possession of the county Auditor-Controller. The instant case differs from *Carmel Valley* wherein we affirmed an order which authorized a county to satisfy its claims against the state by offsetting fines and forfeitures it held which were due the state. The *Carmel Valley, supra, 190 Cal.App.3d 521*, **[***56]** holding was based on the right of offset as "a long-established principle of equity." ( *Id. at p. 550*.) That is a different standard than the standard of "generally related to the nature of costs incurred." In the case at bar there is no set-off relationship between county and LBUSD.

We conclude that because the doctrines of collateral estoppel and waiver are inapplicable to the facts of this case, the trial court should have allowed State to challenge the decisions of the Board. However, we also determine, as a question of law, that the Executive Order requires local school boards to provide a higher level of service than is required constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to *article XIII B, section 6 of the California Constitution*. Former *Revenue and Tax Code section 2234* does not provide reimbursement of the subject claim.

**[*187]** Based on uncontradicted evidence, we modify the decision of the trial court by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts." We also modify the judgment to include charging orders against **[***57]** certain funds appropriated through subsequent budget acts.

We affirm the decision of the trial court that the Fines and Forfeitures Funds are not "reasonably available" to satisfy the Claim.

Finally, we remand the matter to the trial court to determine whether at the time of its order, unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court is also directed to determine this same issue with respect to the charging order.

The judgment is affirmed as modified. Each party is to bear its own costs on appeal.

**[*188]** **[**470]** Appendix

The superior court judgment provides in pertinent part: "It Is Ordered, Adjudged and Decreed That: "1. The requirements contained in Title 5, California Administrative Code, Sections 90-101 constitute a reimbursable State-mandate which cannot be challenged by State Respondents or Respondent DOE because of the doctrines of administrative collateral estoppel and waiver.

"2. There are appropriated funds from specified line items in the 1984, 1985, 1986 and 1987 budgets which are 'reasonably available' to reimburse Petitioner for State-mandated costs it has occurred [*sic*] as **[***58]** a result of its compliance with the requirements of Title 5, California Administrative Code, Sections 90-101.

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[18] In its first amended petition, LBUSD listed the following code sections as appropriate sources of reimbursement: " *Penal Code Sections 1463.02*, *1463.03*, 1403.5A and *1464*; *Government Code Sections 13967*, *26822.3* and *72056*; *Health and Safety Code Section 11502*; and *Vehicle Code Sections 1660.7*, *42003*, and *41103.5*."

"3. The funds appropriated by the Legislature for:

"(a) the support of the Department of Education, including, but not limited, to the Department's General Fund;

"(b) the Commission on State Mandates, including, but not limited to the State Mandates Claim Fund; and

"(c) the 'Reserve for Contingencies or Emergencies', 'Special Fund for Economic Uncertainties' or similarly designated accounts, are 'reasonably available' and may properly be and should be encumbered and expended for the reimbursement of State-mandated costs in the amount of $ 28,014,869.00, plus applicable interest, as incurred by Petitioner and as computed by Petitioner in compliance with Parameters and Guidelines adopted by the State Board of Control.

"4. The law in effect at the time that Petitioner's claim was processed provided for the computation of a specific claim amount for specific fiscal years based on Parameters and Guidelines, or claiming instructions, adopted in April 1984 and a Statewide Cost Estimate adopted on August 23, 1984, both of which are administrative actions of the State Board of Control **[***59]** which have not been challenged by State Respondents. The computations made pursuant to the Parameters and Guidelines and Statewide Cost Estimate are specific and ascertainable and subject to audit by the State Controller under *Government Code section 17558*.

"5. The Court decrees that State funds entitled the 'Fines and Forfeitures Funds' under the custody and control of Respondent Bloodgood, are not reasonably available for satisfaction of Petitioner's claim for reimbursement of State-mandated costs.

"6. A peremptory writ of mandamus shall issue under the seal of this Court, commanding State Respondents and Respondent Doe to comply with Article XIIIB, Section 6 of the California Constitution and *Government Code Section 17565* and reimburse petitioner for:

"(a) State-mandated costs in the amount of $ 24,164,593.00, incurred as a result of its compliance with the requirements of Title 5, California Administrative Code, Sections 90-101 during fiscal years 1977-78 through 1982-1983, plus interest at the legal rate from September 28, 1985; and

"(b) State-mandated costs in the amount of $ 3,850,276.00, incurred as a result of Petitioner's compliance with the requirements of Title 5, California **[***60]** Administrative Code, Sections 90-101 during fiscal years 1983-84 and 1984-85, plus interest at the legal rate from September 28, 1985.

"7. Said peremptory writ shall command Respondent Gray Davis, State Controller, or his successor-in-interest, to pay the claims of Petitioner, plus interest at the legal rate from **[*189]** September 28, 1985 from the appropriations in the State Budget Acts for the 1984-85, 1985-86, 1986-87 and 1987-88 fiscal years, and the subsequently enacted State Budget Acts, which include, or will include appropriations for:

"(a) the support of the Department of Education, including, but not limited to the Department's General Fund;

"(b) the Commission on State Mandates, including, but not limited to the State Mandates Claim Fund; and

"(c) the 'Reserve for Contingencies or Emergencies', Special Fund for Economic **[**471]** Uncertainties' or similarly designated accounts, which are 'reasonably available' to be encumbered and expended for the reimbursement of State-mandated costs incurred by Petitioner and further shall compel Elizabeth Whitney, Acting State Treasurer, or her successor-in-interest, to make payments on the warrants drawn by Respondent Gray Davis, State Controller **[***61]** upon their presentation for payment by Petitioner without offset or attempt to offset against other monies due and owing Petitioner until Petitioner is reimbursed for all such costs.

"8. Said Peremptory Writ of Mandate also shall command Respondent Jesse R. Huff, Director of the State Department of Finance, to perform such actions as may be necessary to effect reimbursement required by other portions of this Judgment, including but not limited to, those actions specified in Chapter 135, Statutes of 1987, Section 2.00, pp. 549-553, or with respect to the Special Fund for Economic Uncertainties.

"9. Pending the final disposition of this proceeding, State Respondents and Respondent DOE, and each of them, their successors in office, agents, servants and employees and all persons acting in concert or participation with them, are hereby enjoined or restrained from directly or indirectly expending from the appropriations described in Paragraph No. 7 hereinabove any sums greater than that which would leave in said appropriations at the conclusion of the respective fiscal years an amount less than the reimbursement amounts claimed by Petitioner together with interest at the legal rate through **[***62]** payment of said reimbursement amount. Said amounts are hereinafter referred to collectively as the 'reimbursement award sum'.

"10. Pending the final disposition of this proceeding State Respondents and Respondent DOE, and each of them, their successors in office, agents, servants and employees, and all persons acting in concert or participation with them, are hereby enjoined and restrained from directly or indirectly

causing to revert the reimbursement award sum from the appropriations described in Paragraph No. 7 hereinabove to the general funds of the State of California and from otherwise dissipating the reimbursement award sum in a manner that would make it unavailable to satisfy this Court's judgment.

"11. The State Respondents and Respondent Doe have a continuing obligation to reimburse Petitioner for costs incurred in compliance with the requirements contained in Title 5, California Administrative Code, Section 90-101 in the fiscal years subsequent to it's [*sic*] claims for expenditures in fiscal years 1977-78 through 1984-85 as set forth in the First Amended Petition, as amended, and the accompanying Motion For the Issuance Of A Writ Of Mandate.

"12. The deletion of funding **[***63]** for reimbursement of State-mandated costs incurred in compliance with Title 5, California Administrative Code, Sections 90-101 from Chapter 1175, Statutes of 1985 was invalid and unconstitutional.

"13. Respondent Gray Davis, State Controller, shall retain the right to audit the claims and records of the Petitioner pursuant to *Government Code Section 17561(d)* to verify the actual dollar amount of the reimbursement award sum.

"14. The Court reserves and retains jurisdiction to effect any appropriate remedy at law or equity which may be necessary to enforce its judgment or order.

**[*190]** "15. Petitioner shall recover from State Respondents and Respondent DOE costs in this proceeding in the amount of 1,863.54.

*Go to table1*

**Table1 (*Return to related document text*)**

| | |
|---|---|
| "Dated: 3-2, 1988 | "/s/ Weil<br>"Robert I. Weil<br>"Judge of The Superior Court" |

**Table1 (*Return to related document text*)**

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# ATTACHMENT NO. 15

# *Kinlaw v. State of California*

Supreme Court of California

August 30, 1991

No. S014349

**Reporter**
54 Cal. 3d 326 *; 814 P.2d 1308 **; 285 Cal. Rptr. 66 ***; 1991 Cal. LEXIS 3745 ****; 91 Daily Journal DAR 10744; 91 Cal. Daily Op. Service 7086

FRANCES KINLAW et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents

**Prior History: [****1]** Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.

**Disposition:** The judgment of the Court of Appeal is reversed.

## Core Terms

funds, counties, reimbursement, local agency, state mandate, school district, costs, Medi-Cal, local government, healthcare, mandates, procedures, medically indigent, services, merits, superior court, state-mandated, effective, subvention, Institutions, programs, Finance, appropriations limit, test claim, obligations, injunction, taxpayers, provides, Italics, entity

## Case Summary

### Procedural Posture

Defendant State of California and the Director of the Department of Health Services, challenged an order of the court of appeal (California), which ruled that plaintiffs, medically indigent adults and taxpayers, had standing to seek enforcement of *Cal. Const. art., XIII B, § 6*. The court of appeal held that their class action seeking declaratory and injunctive relief was not barred by the availability of administrative remedies.

### Overview

Plaintiffs, medically indigent adults and taxpayers, filed a class-action suit against defendants, State of California and the Director of the Department of Health Services. Plaintiffs sought enforcement of *Cal. Const. art. XIII B, § 6*, which imposed on defendant state an obligation to reimburse local agencies for the cost of most programs and services they were required to provide pursuant to a state mandate. Plaintiffs requested restoration of Medi-Cal, from which they were removed under 1982 Stats. ch. 328, or reimbursement to the county for the cost of providing health care to them. The trial court granted summary judgment to defendants. On appeal, the court of appeal held that plaintiffs had standing and that the action was not barred by the availability of administrative remedies. Defendants appealed. The court reversed and concluded that plaintiffs lacked standing. The legislature adopted a comprehensive legislative scheme with the express intent of providing the exclusive remedy for a claimed violation of *art. XIII, § 6*. The administrative remedy created was adequate to fully implement *art. XIII, § 6*. Plaintiffs had no right to any reimbursement for health care services.

### Outcome

The court reversed and ruled that plaintiffs, medically indigent adults and taxpayers, lacked standing. The legislature established administrative procedures for local agencies and school districts directly affected by a state mandate to seek reimbursement for the cost of programs and services. The legislature's comprehensive scheme was the exclusive means by which the state's obligations were to be determined and enforced.

## LexisNexis® Headnotes

Governments > State & Territorial
Governments > Finance

Governments > Legislation > Initiative & Referendum

*HN1*[] **State & Territorial Governments, Finance**

*Cal. Const. art. XIII B, § 6*, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate, if the local agencies were not under a preexisting duty to fund the activity.

Governments > State & Territorial
Governments > Finance

***HN2*** **State & Territorial Governments, Finance**

See *Cal. Const. art. XIII B, § 6*.

Governments > Local Governments > Finance

Public Health & Welfare Law > Healthcare > General Overview

***HN3*** **Local Governments, Finance**

1982 Cal. Stats. ch. 328 removed medically indigent adults from the state Medi-Cal program effective January 1, 1983.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Governments > Local Governments > Claims By & Against

***HN4*** **Right to Jury Trial, Actions in Equity**

An injunction against enforcement of a state mandate is available only after the legislature fails to include funding in a local government claims bill following a determination by the Commission on State Mandates that a state mandate exists. *Cal. Gov't Code §17612*.

Administrative Law > Agency Rulemaking > State Proceedings

***HN5*** **Agency Rulemaking, State Proceedings**

The legislature enacted comprehensive administrative procedures for resolution of claims arising out of *Cal. Const. art. XIII B, § 6*. *Cal. Gov't Code § 17500*.

Administrative Law > Agency Rulemaking > State Proceedings

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > Joinder of Claims

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

***HN6*** **Agency Rulemaking, State Proceedings**

The legislature created the Commission on State Mandates (Commission), *Cal. Gov't Code § 17525*, to adjudicate disputes over the existence of a state-mandated program, *Cal. Gov't Code §§ 17551*, *17557*, and to adopt procedures for submission and adjudication of reimbursement claims. *Cal. Gov't Code § 17553*. The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and Research, and a public member experienced in public finance. *Cal. Gov't Code § 17525*. The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies, *Cal. Gov't Code § 17554*, establishes the method of payment of claims, *Cal. Gov't Code §§ 17558*, *17561*, and creates reporting procedures which enable the legislature to budget adequate funds to meet the expense of state mandates. *Cal. Gov't Code §§ 17562*, *17600*, *17612(a)*.

Administrative Law > Agency Rulemaking > State Proceedings

***HN7*** **Agency Rulemaking, State Proceedings**

Pursuant to procedures which the Commission on State Mandates (Commission) is authorized to establish, *Cal. Gov't Code § 17553*, local agencies and school districts are to file claims for reimbursement of state-mandated costs with the Commission, *Cal. Gov't Code §§ 17551*, *17560*, and reimbursement is to be provided only through this statutory procedure. *Cal. Gov't Code §§ 17550*, *17552*.

Governments > Local Governments > General Overview

***HN8*** **Governments, Local Governments**

"Local agency" means any city, county, special district, authority, or other political subdivision of the state. *Cal. Gov't Code § 17518*.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

**HN9[] Elementary & Secondary School Boards, Authority of School Boards**

"School district" means any school district, community college district, or county superintendent of schools. Cal. Gov't Code § 17519.

Administrative Law > Agency Rulemaking > State Proceedings

**HN10[] Agency Rulemaking, State Proceedings**

The first reimbursement claim filed which alleges that a state mandate is created under a statute or executive order is treated as a "test claim." Cal. Gov't Code § 17521. A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. Cal. Gov't Code § 17553. Any interested organization or individual may participate in the hearing. Cal. Gov't Code § 17555.

Administrative Law > Judicial Review > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Administrative Law > Agency Rulemaking > State Proceedings

**HN11[] Administrative Law, Judicial Review**

A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. Cal. Gov't Code § 17555. The Commission on State Mandates (Commission) must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting parameters and guidelines for reimbursement of any claims relating to that statute or executive order. Cal. Gov't Code § 17557. Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. Cal. Gov't Code § 17620 et seq. Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to Cal. Civ. Proc. Code § 1094.5. Cal. Gov't Code § 17559.

Administrative Law > Agency Rulemaking > State Proceedings

**HN12[] Agency Rulemaking, State Proceedings**

The parameters and guidelines adopted by the Commission on State Mandates must be submitted to the controller, who is to pay subsequent claims arising out of the mandate. Cal. Gov't Code § 17558. Executive orders mandating costs are to be accompanied by an appropriations bill to cover the costs if the costs are not included in the budget bill, and in subsequent years the costs must be included in the budget bill. Cal. Gov't Code § 17561(a) and (b). Regular review of the costs is to be made by the legislative analyst, who must report to the legislature and recommend whether the mandate should be continued. Cal. Gov't Code § 17562.

Administrative Law > Agency Rulemaking > State Proceedings

**HN13[] Agency Rulemaking, State Proceedings**

The Commission on State Mandates is also required to make semiannual reports to the legislature of the number of mandates found and the estimated reimbursement cost to the state. Cal. Gov't Code § 17600. The legislature must then adopt a local government claims bill. If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable, and an injunction against enforcement. Cal. Gov't Code § 17612. Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. Cal. Gov't Code § 17615 et seq.

Administrative Law > Agency Rulemaking > State Proceedings

**HN14[] Agency Rulemaking, State Proceedings**

See Cal. Gov't Code § 17552.

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

Constitutional Law > Substantive Due Process > Scope

Administrative Law > Agency Rulemaking > State Proceedings

*HN15*[] **Separation of Powers, Constitutional Controls**

Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the legislature.

Governments > Local Governments > Finance

Public Health & Welfare Law > Healthcare > General Overview

*HN16*[] **Local Governments, Finance**

*Cal. Gov't Code § 17563* gives the local agency complete discretion in the expenditure of funds received pursuant to *Cal. Const. art. XIII B, § 6*.

Governments > Local Governments > Finance

*HN17*[] **Local Governments, Finance**

See *Cal. Gov't Code § 17563*.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Finance

Public Health & Welfare Law > Healthcare > General Overview

*HN18*[] **Judgments, Declaratory Judgments**

The remedy for the failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission on State Mandates has determined that a mandate exists and the legislature has failed to include the cost in a local government claims bill, and only on petition by the county. *Cal. Gov't Code § 17612*.

## Headnotes/Syllabus

**Summary**
**CALIFORNIA OFFICIAL REPORTS SUMMARY**

Medically indigent adults and taxpayers brought an action pursuant to *Code Civ. Proc., § 526a*, against the state, alleging that it had violated *Cal. Const., art. XIII B, § 6* (reimbursement of local governments for state-mandated new programs), by shifting its financial responsibility for the funding of health care for the poor onto the county without providing the necessary funding, and that as a result the state had evaded its constitutionally mandated spending limits. The trial court granted summary judgment for the State after concluding plaintiffs lacked standing to prosecute the action. (Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.) The Court of Appeal, First Dist., Div. Two, Nos. A041426 and A043500, reversed.

The Supreme Court reversed the judgment of the Court of Appeal, holding the administrative procedures established by the Legislature (*Gov. Code, § 17500 et seq.*), which are available only to local agencies and school districts directly affected by a state mandate, were the exclusive means by which the state's obligations under *Cal. Const., art. XIII B, § 6*, were to be determined and enforced. Accordingly, the court held plaintiffs lacked standing to prosecute the action. (Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.)

**Headnotes**
**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to California Digest of Official Reports, 3d Series

*CA(1)*[] **(1)**

**State of California § 7—Actions—State-mandated Costs—Reimbursement—Exclusive Statutory Remedy.**

-- *Gov. Code, § 17500 et seq.*, creates an administrative forum for resolution of state mandate claims arising under *Cal. Const., art. XIII B, § 6*, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same

claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid. In view of the comprehensive nature of the legislative scheme, and from the expressed intent, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce *Cal. Const., art. XIII B, § 6*.

*CA(2)*[] **(2)**

**State of California § 7—Actions—State-mandated Costs—Reimbursement—Private Action to Enforce—Standing.**

--In an action by medically indigent adults and taxpayers seeking to enforce *Cal. Const., art. XIII B, § 6*, for declaratory and injunctive relief requiring the state to reimburse the county for the cost of providing health care services to medically indigent adults who, prior to 1983, had been included in the state Medi-Cal program, the Court of Appeal erred in holding that the existence of an administrative remedy ( *Gov. Code, § 17500 et seq.*) by which affected local agencies could enforce their constitutional right under art. XIII B, § 6 to reimbursement for the cost of state mandates did not bar the action. Because the right involved was given by the Constitution to local agencies and school districts, not individuals either as taxpayers or recipients of government benefits and services, the administrative remedy was adequate to fully implement the constitutional provision. The Legislature has the authority to establish procedures for the implementation of local agency rights under art. XIII B, § 6; unless the exercise of a constitutional right is unduly restricted, a court must limit enforcement to the procedures established by the Legislature. Plaintiffs' interest, although pressing, was indirect and did not differ from the interest of the public at large in the financial plight of local government. Relief by way of reinstatement to Medi-Cal pending further action by the state was not a remedy available under the statute, and thus was not one which a court may award.

[See 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 112.]

**Counsel:** Stephen D. Schear, Stephen E. Ronfeldt, Armando M. Menocal III, Lois Salisbury, Laura Schulkind and Kirk McInnis for Plaintiffs and Appellants.

Catherine I. Hanson, Astrid G. Meghrigian, Alice P. Mead, Alan K. Marks, County Counsel (San Bernardino), Paul F. Mordy, Deputy County Counsel, De Witt W. Clinton, County Counsel (Los Angeles), Robert M. Fesler, Assistant County Counsel, Frank J. DaVanzo, Deputy County Counsel, Weissburg & Aronson, Mark S. Windisch, Carl Weissburg and Howard W. Cohen as Amici Curiae on behalf of Plaintiffs and Appellants.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, Richard M. Frank, Asher Rubin and Carol Hunter, Deputy Attorneys General, for Defendants and Respondents.

**Judges:** Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.

**Opinion by:** BAXTER

## Opinion

**[*328] [**1309] [***67]** Plaintiffs, medically indigent adults and taxpayers, seek to enforce section 6 of **[****2]** article XIII B (hereafter, section 6) of the California Constitution through an action for declaratory and injunctive relief. They invoked the jurisdiction of the superior court as taxpayers pursuant to *Code of Civil Procedure section 526a* and as persons affected by the alleged failure of the state to comply with section 6. The superior court granted summary judgment for defendants State of California and Director of the Department of Health Services, after concluding that plaintiffs lacked standing to prosecute the action. On appeal, the Court of Appeal held that plaintiffs have standing and that the action is not barred by the availability of administrative remedies.

**[**1310] [***68]** We reverse. The administrative procedures established by the Legislature, which are available only to local agencies and school districts directly affected by a state mandate, are the exclusive means by which the state's obligations under section 6 are to be determined and enforced. Plaintiffs therefore lack standing.

I

State Mandates

*HN1*[] Section 6, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation **[****3]** to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate if the local agencies were not under a preexisting duty to fund the activity. It provides:

**[*329]** "*HN2*[] Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of

funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

"(a) Legislative mandates requested by the local agency affected;

"(b) Legislation defining a new crime or changing an existing definition of a crime; or

"(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

A complementary provision, section 3 of article XIII B, provides for a shift from the state to the local agency of a portion of the spending or "appropriation" limit of the state when responsibility for funding an activity is shifted to a local agency:

"The appropriations limit for any **[****4]** fiscal year . . . shall be adjusted as follows: [para.] (a) In the event that the financial responsibility of providing services is transferred, in whole or in part, . . . from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount."

II

Plaintiffs' Action

The underlying issue in this action is whether the state is obligated to reimburse the County of Alameda, and shift to Alameda County a concomitant portion of the state's spending limit, for the cost of providing health care services to medically indigent adults who prior to 1983 had been included in the state Medi-Cal program. Assembly Bill No. 799 (1981-1982 Reg. Sess.) (AB 799) (*HN3*[↑] Stats. 1982, ch. 328, p. 1568) removed medically indigent adults from Medi-Cal effective January 1, 1983. At the time section 6 was adopted, the state was funding Medi-Cal coverage for these persons without requiring any county financial contribution.

Plaintiffs initiated this action in **[****5]** the Alameda County Superior Court. They sought relief on their own behalf and on behalf of a class of similarly **[*330]** situated medically indigent adult residents of Alameda County. The only named defendants were the State of California, the Director of the Department of Health Services, and the County of Alameda.

In the complaint for declaratory and injunctive relief, plaintiffs sought an injunction compelling the state to restore Medi-Cal eligibility to medically indigent adults or to reimburse the County of Alameda for the cost of providing health care to those persons. They also prayed for a declaration that the transfer of responsibility from the state-financed Medi-Cal program to the counties without adequate reimbursement violated the California Constitution. [1]

**[****6]** **[**1311]** **[***69]** At the time plaintiffs initiated their action neither Alameda County, nor any other county or local agency, had filed a reimbursement claim with the Commission on State Mandates (Commission). [2]

Whether viewed as an action seeking restoration of Medi-Cal benefits, one to compel state reimbursement of county costs, or one for declaratory relief, therefore, the action required a determination that the enactment of AB 799 created a state **[****7]** mandate within the contemplation of section 6. Only upon resolution of that issue favorably to plaintiffs would the state have an obligation to reimburse the county for its increased expense and shift a portion of its appropriation limit, or to reinstate Medi-Cal benefits for plaintiffs and the class they seek to represent.

The gravamen of the action is, therefore, enforcement of section 6. [3]

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[1] The complaint also sought a declaration that the county was obliged to provide health care services to indigents that were equivalent to those available to nonindigents. This issue is not before us. The County of Alameda aligned itself with plaintiffs in the superior court and did not oppose plaintiffs' effort to enforce section 6.

[2] On November 23, 1987, the County of Los Angeles filed a test claim with the Commission. San Bernardino County joined as a test claimant. The Commission ruled against the counties, concluding that no state mandate had been created. The Los Angeles County Superior Court subsequently granted the counties' petition for writ of mandate ( *Code Civ. Proc., § 1094.5*), reversing the Commission, on April 27, 1989. (No. C-731033.) An appeal from that judgment is presently pending in the Court of Appeal. (*County of Los Angeles* v. *State of California*, No. B049625.)

[3] Plaintiffs argue that they seek only a declaration that AB 799 created a state mandate and an injunction against the shift of costs until the state decides what action to take. This is inconsistent with the prayer of their complaint which sought an injunction requiring defendants to restore Medi-Cal eligibility to all medically indigent adults until the state paid the cost of full health services for them. It is also unavailing.

*HN4*[↑] An injunction against enforcement of a state mandate is available only after the Legislature fails to include funding in a local government claims bill following a determination by the

**[****8]** **[*331]** III

Enforcement of Article XIII B, Section 6

In 1984, almost five years after the adoption of article XIII B, ***HN5***[↑] the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6. (*§ 17500*.) The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. The necessity for the legislation was explained in *section 17500*:

"The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under *Section 6 of Article XIII B of the California Constitution*. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary **[****9]** and, therefore, in order to relieve unnecessary congestion of the judicial system, *it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs*." (Italics added.)

In part 7 of division 4 of title 2 of the Government Code, "State-Mandated Costs," which commences with *section 17500*, ***HN6***[↑] the Legislature created the Commission (*§ 17525*), to adjudicate disputes over the existence of a state mandated program (*§§ 17551*, *17557*) and to adopt procedures for submission and adjudication of reimbursement claims (*§ 17553*). The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and **[**1312]** **[***70]** Research, and a public member experienced in public finance. (*§ 17525*.)

The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies (*§ 17554*), [4] establishes the method of **[*332]** payment of claims (*§§ 17558*, *17561*), and creates reporting procedures which enable the Legislature to budget adequate funds to meet the expense of state **[****10]** mandates (*§§ 17562*, *17600*, *17612, subd. (a)*.)

***HN7***[↑] Pursuant to procedures which the Commission was authorized to establish (*§ 17553*), local agencies [5] and school districts [6] are to file claims for reimbursement of state-mandated costs with the Commission (*§§ 17551*, *17560*), and reimbursement is to be provided **[****11]** only through this statutory procedure. (*§§ 17550*, *17552*.)

***HN10***[↑] The first reimbursement claim filed which alleges that a state mandate has been created under a statute or executive order is treated as a "test claim." (*§ 17521*.) A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. (*§ 17553*.) Any interested organization or individual may participate in the hearing. (*§ 17555*.)

***HN11***[↑] A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. (*§ 17555*.) The Commission **[****12]** must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting "parameters and guidelines" for reimbursement of any claims relating to that statute or executive order. (*§ 17557*.) Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. (*§ 17620 et seq.*)

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Commission that a state mandate exists. ( *Gov. Code, § 17612*.) Whether plaintiffs seek declaratory relief and/or an injunction, therefore, they are seeking to enforce section 6.

All further statutory references are to the Government Code unless otherwise indicated.

[4] The test claim by the County of Los Angeles was filed prior to that proposed by Alameda County. The Alameda County claim was rejected for that reason. (See *§ 17521*.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the issues the majority elects to address instead in this proceeding. Los Angeles County declined a request from Alameda County that it be included in the test claim because the two counties' systems of documentation were so similar that joining Alameda County would not be of any benefit. Alameda County and these plaintiffs were, of course, free to participate in the Commission hearing on the test claim. (*§ 17555*.)

[5] "***HN8***[↑] 'Local agency' means any city, county, special district, authority, or other political subdivision of the state." (*§ 17518*.)

[6] "***HN9***[↑] 'School district' means any school district, community college district, or county superintendant of schools." (*§ 17519*.)

Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to *Code of Civil Procedure section 1094.5*. (*§ 17559*.)

The legislative scheme is not limited to establishing the claims procedure, however. It also contemplates reporting to the Legislature and to departments and agencies of the state which have responsibilities related to funding state mandates, budget planning, and payment. ***HN12***[⬆] The parameters and guidelines adopted by the Commission must be submitted to the Controller, who is to pay subsequent claims arising out of the mandate. (*§ 17558*.) Executive orders mandating costs are to be accompanied by an appropriations **[*333]** bill to cover the costs if the costs are not included **[****13]** in the budget bill, and in subsequent years the costs must be included in the budget bill. (*§ 17561, subds. (a)* & *(b)*.) Regular review of the costs is to be made by the Legislative Analyst, who must report to the Legislature and recommend whether the mandate should be continued. (*§ 17562*.) ***HN13***[⬆] The Commission is also required to make semiannual reports to the Legislature of the number of mandates found and the estimated reimbursement cost to the state. (*§ 17600*.) The Legislature must then adopt a "local government claims bill." If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable, **[**1313]** **[***71]** and an injunction against enforcement. (*§ 17612*.)

Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. (*§ 17615 et seq.*)

***CA(1)***[⬆] **(1)** It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of section 6 lies in these procedures. The statutes create an administrative forum **[****14]** for resolution of state mandate claims, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (*§ 17612*).

The legislative intent is clearly stated in *section 17500*: "It is the intent of the Legislature in enacting this part to provide for the implementation of *Section 6 of Article XIII B of the California Constitution* and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution. . . ." And *section 17550* states: "Reimbursement of local agencies and school districts for costs mandated by the state shall be provided pursuant to this chapter."

Finally, ***HN14***[⬆] *section 17552* provides: "This chapter shall provide *the sole and exclusive procedure* by which a local agency or school district may claim reimbursement for costs mandated by the state as required by *Section 6 of Article XIII B of the California Constitution*." **[****15]** (Italics added.)

In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6.

**[*334]** IV

Exclusivity

***CA(2)***[⬆] **(2)** Plaintiffs argued, and the Court of Appeal agreed, that the existence of an administrative remedy by which affected local agencies could enforce their right under section 6 to reimbursement for the cost of state mandates did not bar this action because the administrative remedy is available only to local agencies and school districts.

The Court of Appeal recognized that the decision of the County of Alameda, which had not filed a claim for reimbursement at the time the complaint was filed, was a discretionary decision which plaintiffs could not challenge. (*Dunn v. Long Beach L. & W. Co. (1896) 114 Cal. 605, 609, 610-611 [46 P. 607]*; *Silver v. Watson (1972) 26 Cal.App.3d 905, 909 [103 Cal.Rptr. 576]*; *Whitson v. City of Long Beach (1962) 200 Cal.App.2d 486, 506 [19 Cal.Rptr. 668]*; *Elliott v. Superior Court (1960) 180 Cal.App.2d 894, 897 [5 Cal.Rptr. 116]*.) **[****16]** The court concluded, however, that public policy and practical necessity required that plaintiffs have a remedy for enforcement of section 6 independent of the statutory procedure.

The right involved, however, is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services. Section 6 provides that the "state shall provide a subvention of funds *to reimburse . . . local governments* . . . ." (Italics added.) The administrative remedy created by the Legislature is adequate to fully implement section 6. That Alameda County did not file a reimbursement claim does not establish that the enforcement remedy is inadequate. Any of the 58 counties was free to file a claim, and other counties did so. The test claim is now before the Court of Appeal. The administrative procedure has operated as intended.

The Legislature has the authority to establish procedures for the implementation of local agency rights under section 6.

*HN15*[↑] Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the Legislature. ( *People v.* ***[**1314]*** ***[***72]*** *Western Air Lines, Inc. (1954) 42 Cal.2d 621, 637 [268 P.2d 723]*; **[****17]** *Chesney v. Byram (1940) 15 Cal.2d 460, 463 [101 P.2d 1106]*; *County of Contra Costa v. State of California (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750]*.)

Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost **[*335]** of services to medically indigent adults is unpersuasive. Plaintiffs' interest, although pressing, is indirect and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind. Nothing in article XIII B or other provision of law controls the county's expenditure of the funds plaintiffs claim must be paid to the county. To the contrary, *HN16*[↑] *section 17563* gives the **[****18]** local agency complete discretion in the expenditure of funds received pursuant to section 6, providing: "*HN17*[↑] Any funds received by a local agency or school district pursuant to the provisions of this chapter may be used for any public purpose."

The relief plaintiffs seek in their prayer for state reimbursement of county expenses is, in the end, a reallocation of general revenues between the state and the county. Neither public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues. The Legislature has established a procedure by which the county may claim any revenues to which it believes it is entitled under section 6. That test-claim statute expressly provides that not only the claimant, but also "any other interested organization or individual may participate" in the hearing before the Commission (*§ 17555*) at which the right to reimbursement of the costs of such mandate is to be determined. Procedures for receiving any claims must "provide for presentation of evidence by the claimant, the Department of Finance and any other affected department or agency, *and any other interested person*." **[****19]** (*§ 17553*. Italics added.) Neither the county nor an interested individual is without an opportunity to be heard on these questions. These procedures are both adequate and exclusive. [7]

The alternative relief plaintiffs seek -- reinstatement **[****20]** to Medi-Cal pending further action by the state -- is not a remedy available under the statute, and thus is not one which this court may award. *HN18*[↑] The remedy for the failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission has determined that a mandate exists **[*336]** and the Legislature has failed to include the cost in a local government claims bill, and only on petition by the county. (*§ 17612*.) [8]

Moreover, the judicial remedy approved by the Court of Appeal permits resolution of the issues raised in a state mandate claim without the participation of those **[****21]** officers and individuals the Legislature deems necessary to a full and fair exposition and resolution of the issues. Neither the Controller nor the Director of Finance **[**1315]** **[***73]** was named a defendant in this action. The Treasurer and the Director of the Office of Planning and Research did not participate. All of these officers would have been involved in determining the question as members of the Commission, as would the public member of the Commission. The judicial procedures were not equivalent to the public hearing required on test claims before the Commission by *section 17555*. Therefore, other affected departments, organizations, and individuals had no opportunity to be heard. [9]

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[7] Plaintiffs' argument, that the Legislature's failure to make provision for individual enforcement of section 6 before the Commission demonstrates an intent to permit legal actions, is not persuasive. The legislative statement of intent to relegate all mandate disputes to the Commission is clear. A more likely explanation of the failure to provide for test cases to be initiated by individuals lies in recognition that (1) because section 6 creates rights only in governmental entities, individuals lack sufficient beneficial interest in either the receipt or expenditure of reimbursement funds to accord them standing; and (2) the number of local agencies having a direct interest in obtaining reimbursement is large enough to ensure that citizen interests will be adequately represented.

[8] Plaintiffs are not without a remedy if the county fails to provide adequate health care, however. They may enforce the obligation imposed on the county by *Welfare and Institutions Code sections 17000* and *17001*, and by judicial action. (See, e.g., ***Mooney v. Pickett (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231]***.)

[9] For this reason, it would be inappropriate to address the merits of plaintiff's claim in this proceeding. (Cf. ***Dix v. Superior Court (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063]***.) Unlike the dissent, we do not assume that in representing the state in this proceeding, the Attorney General necessarily represented the

**[****22]** Finally, since a determination that a state mandate has been created in a judicial proceeding rather than one before the Commission does not trigger the procedures for creating parameters and guidelines for payment of claims, or for inclusion of estimated costs in the state budget, there is no source of funds available for compliance with the judicial decision other than the appropriations for the Department of Health Services. Payment from those funds can only be at the expense of another program which the department is obligated to fund. No public policy supports, let alone requires, this result.

The superior court acted properly in dismissing this action.

The judgment of the Court of Appeal is reversed.

**Dissent by:** BROUSSARD

## Dissent

**ROUSSARD, J.**

I dissent. For nine years the Legislature has defied the mandate of article XIII B of the California Constitution (hereafter article XIII B). Having transferred responsibility for the care of medically indigent adults (MIA's) to county governments, the Legislature has failed to provide the counties with sufficient money to meet this responsibility, yet the **[*337]** Legislature computes its own appropriations limit as if it fully funded the program. **[****23]** The majority, however, declines to remedy this violation because, it says, the persons most directly harmed by the violation -- the medically indigent who are denied adequate health care -- have no standing to raise the matter. I disagree, and will demonstrate that (1) plaintiffs have standing as citizens to seek a declaratory judgment to determine whether the state is complying with its constitutional duty under article XIII B; (2) the creation of an administrative remedy whereby counties and local districts can enforce article XIII B does not deprive the citizenry of its own independent right to enforce that provision; and (3) even if plaintiffs lacked standing, our recent decision in *Dix v. Superior Court (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063]* permits us to reach and resolve any significant issue decided by the Court of Appeal and fully briefed and argued here. I conclude that we should reach the merits of the appeal.

On the merits, I conclude that the state has not complied with its constitutional obligation under article XIII B. To prevent the state from avoiding the spending limits imposed **[****24]** by article XIII B, section 6 of that article prohibits the state from transferring previously state-financed programs to local governments without providing sufficient funds to meet those burdens. In 1982, however, the state excluded the medically indigent from its Medi-Cal program, thus shifting the responsibility for such care to the counties. Subvention funds provided by the state were inadequate to reimburse the counties for this responsibility, and became less adequate every year. At the same time, the state continued to compute its spending limit as if it fully financed the entire program. The result is exactly what article XIII B was intended to prevent: the state enjoys a falsely inflated spending limit; the county is compelled to assume a burden it cannot afford; and the medically indigent receive inadequate health care.

I. Facts and Procedural History

Plaintiffs -- citizens, taxpayers, and persons in need of medical care -- allege that **[**1316]** **[***74]** the state has shifted its financial responsibility for the funding of health care for MIA's to the counties without providing the necessary funding and without any agreement transferring appropriation limits, and that **[****25]** as a result the state is violating article XIII B. Plaintiffs further allege they and the class they claim to represent cannot, consequently, obtain adequate health care from the County of Alameda, which lacks the state funding to provide it. The county, although nominally a defendant, aligned **[*338]** itself with plaintiffs. It admits the inadequacy of its program to provide medical care for MIA's but blames the absence of state subvention funds. [1]

At hearings below, plaintiffs presented uncontradicted evidence **[****26]** regarding the enormous impact of these statutory changes upon the finances and population of Alameda County. That county now spends about $ 40 million annually on health care for MIA's, of which the state reimburses about half. Thus, since article XIII B became effective, Alameda County's obligation for the health care of MIA's has risen from zero to more than $ 20 million per year. The county has inadequate funds to discharge its new obligation for the health care of MIA's; as a result, according to the Court of Appeal, uncontested evidence from medical

interests and views of these officials.

[1] The majority states that "Plaintiffs are not without a remedy if the county fails to provide adequate health care . . . . They may enforce the obligation imposed on the county by *Welfare and Institutions Code sections 17000* and *17001*, and by judicial action." (Maj. opn., *ante*, p. 336, fn. 8)

The majority fails to note that plaintiffs have already tried this remedy, and met with the response that, owing to the state's inadequate subvention funds, the county cannot afford to provide adequate health care.

experts presented below shows that, "The delivery of health care to the indigent in Alameda County is in a state of shambles; the crisis cannot be overstated . . . ." "Because of inadequate state funding, some Alameda County residents are dying, and many others are suffering serious diseases and disabilities, because they cannot obtain adequate access to the medical care they need . . . ." "The system is clogged to the breaking point. . . . All community clinics . . . are turning away patients." "The funding received by the county from the state for MIAs does not approach the actual cost of providing health care to the MIAs. **[****27]** As a consequence, inadequate resources available to county health services jeopardize the lives and health of thousands of people . . . ."

The trial court acknowledged that plaintiffs had shown irreparable injury, but denied their request for a preliminary injunction on the ground that they could not prevail in the action. It then granted the state's motion for summary judgment. Plaintiffs appealed from both decisions of the trial court.

The Court of Appeal consolidated the two appeals and reversed the rulings below. It concluded that plaintiffs had standing to bring this action to enforce the constitutional spending limit of article XIII B, and that the action is not barred by the existence of administrative remedies available to counties. It then held that the shift of a portion of the cost of medical indigent care by the state to Alameda County constituted a state-mandated new program under the provisions of article XIII B, which triggered that article's provisions requiring a subvention of funds by the state to reimburse Alameda **[*339]** County for the costs of such program it was required to assume. The judgments denying a preliminary injunction and granting summary judgment **[****28]** for defendants were reversed. We granted review.

II. Standing

A. *Plaintiffs have standing to bring an action for declaratory relief to determine whether the state is complying with article XIII B.*

Plaintiffs first claim standing as taxpayers under *Code of Civil Procedure section 526a*, which provides that: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county . . . , may be maintained **[**1317]** **[***75]** against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. . . ." As in *Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574, 777 P.2d 610]*, however, it is "unnecessary to reach the question whether plaintiffs have standing to seek an injunction under *Code of Civil Procedure section 526a*, because there is an independent basis for permitting them to proceed." Plaintiffs here **[****29]** seek a declaratory judgment that the transfer of responsibility for MIA's from the state to the counties without adequate reimbursement violates article XIII B. A declaratory judgment that the state has breached its duty is essentially equivalent to an action in mandate to compel the state to perform its duty. (See *California Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 9 [270 Cal.Rptr. 796, 793 P.2d 2]*, which said that a declaratory judgment establishing that the state has a duty to act provides relief equivalent to mandamus, and makes issuance of the writ unnecessary.) Plaintiffs further seek a mandatory injunction requiring that the state pay the health costs of MIA's under the Medi-Cal program until the state meets its obligations under article XIII B. The majority similarly characterize plaintiffs' action as one comparable to mandamus brought to enforce section 6 of article XIII B.

We should therefore look for guidance to cases that discuss the standing of a party seeking a writ of mandate to compel a public official to perform his or her duty. [2] Such an action may be brought by any person "beneficially **[****30]** interested" in the issuance of the writ. ( *Code Civ. Proc., § 1086*.) In *Carsten **[*340]** v. Psychology Examining Com. (1980) 27 Cal.3d 793, 796 [166 Cal.Rptr. 844, 614 P.2d 276]*, we explained that the "requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in

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[2] It is of no importance that plaintiffs did not request issuance of a writ of mandate. In ***Taschner v. City Council (1973) 31 Cal.App.3d 48, 56 [107 Cal.Rptr. 214]*** (overruled on other grounds in ***Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 596 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]***), the court said that "[a]s against a general demurrer, a complaint for declaratory relief may be treated as a petition for mandate [citations], and where a complaint for declaratory relief alleges facts sufficient to entitle plaintiff to mandate, it is error to sustain a general demurrer without leave to amend."

In the present case, the trial court ruled on a motion for summary judgment, but based that ruling not on the evidentiary record (which supported plaintiffs' showing of irreparable injury) but on the issues as framed by the pleadings. This is essentially equivalent to a ruling on demurrer, and a judgment denying standing could not be sustained on the narrow ground that plaintiffs asked for the wrong form of relief without giving them an opportunity to correct the defect. (See ***Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal.App.3d 117, 127-128 [109 Cal.Rptr. 724]***.)

common with the public at large." We quoted from Professor Davis, who said, "One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." (Pp. 796-797, quoting 3 Davis, Administrative Law Treatise (1st ed. 1958) p. 291.) Cases applying this standard include *Stocks v. City of Irvine (1981) 114 Cal.App.3d 520 [170 Cal.Rptr. 724]*, which held that low-income residents of Los Angeles had standing to challenge exclusionary zoning laws of suburban communities which prevented the plaintiffs from moving there; *Taschner* v. *City Council, supra*, 31 Cal.App.3d 48, **[****31]** which held that a property owner has standing to challenge an ordinance which may limit development of the owner's property; and *Felt v. Waughop (1924) 193 Cal. 498 [225 P. 862]*, which held that a city voter has standing to compel the city clerk to certify a correct list of candidates for municipal office. Other cases illustrate the limitation on standing: *Carsten v. Psychology Examining Com., supra, 27 Cal.3d 793*, held that a member of the committee who was neither seeking a license nor in danger of losing one had no standing to challenge **[**1318]** **[***76]** a change in the method of computing the passing score on the licensing examination; *Parker v. Bowron (1953) 40 Cal.2d 344 [254 P.2d 6]* held that a union official who was neither a city employee nor a city resident had no standing to compel a city to follow a prevailing wage ordinance; and *Dunbar v. Governing Board (1969) 275 Cal.App.2d 14 [79 Cal.Rptr. 662]* held that a member of a student organization had standing **[****32]** to challenge a college district's rule barring a speaker from campus, but persons who merely planned to hear him speak did not.

**[****33]** No one questions that plaintiffs are affected by the lack of funds to provide care for MIA's. Plaintiffs, except for plaintiff Rabinowitz, are not merely citizens and taxpayers; they are medically indigent persons living in Alameda County who have been and will be deprived of proper medical care if funding of MIA programs is inadequate. Like the other plaintiffs here, **[*341]** plaintiff Kinlaw, a 60-year-old woman with diabetes and hypertension, has no health insurance. Plaintiff Spier has a chronic back condition; inadequate funding has prevented him from obtaining necessary diagnostic procedures and physiotherapy. Plaintiff Tsosie requires medication for allergies and arthritis, and claims that because of inadequate funding she cannot obtain proper treatment. Plaintiff King, an epileptic, says she was unable to obtain medication from county clinics, suffered seizures, and had to go to a hospital. Plaintiff "Doe" asserts that when he tried to obtain treatment for AIDS-related symptoms, he had to wait four to five hours for an appointment and each time was seen by a different doctor. All of these are people personally dependent upon the quality of care of Alameda County's **[****34]** MIA program; most have experienced inadequate care because the program was underfunded, and all can anticipate future deficiencies in care if the state continues its refusal to fund the program fully.

The majority, however, argues that the county has no duty to use additional subvention funds for the care of MIA's because under *Government Code section 17563* "[a]ny funds received by a local agency . . . pursuant to the provisions of this chapter may be used for any public purpose." Since the county may use the funds for other purposes, it concludes that MIA's have no special interest in the subvention. [3]

This argument would be sound if the county were already meeting its obligations to MIA's under *Welfare **[****35]** and Institutions Code section 17000*. If that were the case, the county could use the subvention funds as it chose, and plaintiffs would have no more interest in the matter than any other county resident or taxpayer. But such is not the case at bar. Plaintiffs here allege that the county is not complying with its duty, mandated by *Welfare and Institutions Code section 17000*, to provide health care for the medically indigent; the county admits its failure but pleads lack of funds. Once the county receives adequate funds, it must perform its statutory duty under *section 17000 of the Welfare and Institutions Code*. If it refused, an action in mandamus would lie to compel performance. (See *Mooney v. Pickett (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231]*.) In fact, the county has made clear throughout this litigation that it would use the subvention funds to provide care for MIA's. The majority's conclusion that plaintiffs lack a special, beneficial interest in the state's compliance with article XIII B ignores the practical realities of health care funding.

Moreover, we have recognized an exception to the rule **[****36]** that a plaintiff must be beneficially interested. "Where the question is one of public right **[*342]** and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question **[**1319]** **[***77]** enforced." ( *Bd. of Soc. Welfare v. County of L. A. (1945) 27 Cal.2d 98, 100-101 [162 P.2d 627]*.) We explained in *Green v. Obledo (1981) 29 Cal.3d 126, 144 [172 Cal.Rptr. 206, 624 P.2d 256]*, that this "exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. . . . It has often been invoked by California courts.

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[3] The majority's argument assumes that the state will comply with a judgment for plaintiffs by providing increased subvention funds. If the state were instead to comply by restoring Medi-Cal coverage for MIA's, or some other method of taking responsibility for their health needs, plaintiffs would benefit directly.

[Citations.]"

*Green* v. *Obledo* presents a close analogy to the present case. Plaintiffs there filed suit to challenge whether a state welfare regulation limiting deductibility of work-related expenses in determining eligibility for aid to families **[****37]** with dependent children (AFDC) assistance complied with federal requirements. Defendants claimed that plaintiffs were personally affected only by a portion of the regulation, and had no standing to challenge the balance of the regulation. We replied that "[t]here can be no question that the proper calculation of AFDC benefits is a matter of public right [citation], and plaintiffs herein are certainly citizens seeking to procure the enforcement of a public duty. [Citation.] It follows that plaintiffs have standing to seek a writ of mandate commanding defendants to cease enforcing [the regulation] in its entirety." (*29 Cal.3d at p. 145*.)

We again invoked the exception to the requirement for a beneficial interest in *Common Cause v. Board of Supervisors, supra, 49 Cal.3d 432*. Plaintiffs in that case sought to compel the county to deputize employees to register voters. We quoted *Green v. Obledo, supra, 29 Cal.3d 126, 144*, and concluded that "[t]he question in this case involves a public right to voter **[****38]** outreach programs, and plaintiffs have standing as citizens to seek its vindication." (*49 Cal.3d at p. 439*.) We should reach the same conclusion here.

B. *Government Code sections 17500- 17630 do not create an exclusive remedy which bars citizen-plaintiffs from enforcing article XIII B.*

Four years after the enactment of article XIII B, the Legislature enacted *Government Code sections 17500 through 17630* to implement article XIII B, section 6. These statutes create a quasi-judicial body called the Commission on State Mandates, consisting of the state Controller, state Treasurer, state Director of Finance, state Director of the Office of Planning and Research, and one public member. The commission has authority to "hear and decide upon [any] claim" by a local government that it "is entitled to be reimbursed by the state" for costs under article XIII B. ( *Gov. Code, § 17551, **[*343]** subd. (a)*.) Its decisions are subject to review by an action for administrative mandamus in the superior court. (See *Gov. Code, § 17559*.)

The majority maintains that a proceeding before the Commission on State Mandates is the exclusive means **[****39]** for enforcement of article XIII B, and since that remedy is expressly limited to claims by local agencies or school districts ( *Gov. Code, § 17552*), plaintiffs lack standing to enforce the constitutional provision. [4] I disagree, for two reasons.

**[****40] [**1320] [***78]** First, *Government Code section 17552* expressly addressed the question of exclusivity of remedy, and provided that "[t]his chapter shall provide the sole and exclusive procedure by which *a local agency or school district* may claim reimbursement for costs mandated by the state as required by *Section 6 of Article XIII B of the California Constitution*." (Italics added.) The Legislature was aware that local agencies and school districts were not the only parties concerned with state mandates, for in *Government Code section 17555* it provided that "any other interested organization or individual may participate" in the commission hearing. Under these circumstances the Legislature's choice of words -- "the sole and exclusive procedure by which a local agency or school district may claim reimbursement" -- limits the procedural rights of those claimants only, and does not affect rights of other persons. *Expressio unius est exclusio alterius* -- "the expression of certain things in a statute necessarily involves exclusion of other things not expressed." ( *Henderson v. Mann Theatres Corp. (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266]*.) **[****41]**

The case is similar in this respect to *Common Cause v. Board of Supervisors, supra, 49 Cal.3d 432*. Here defendants

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[4] The majority emphasizes the statement of purpose of *Government Code section 17500*: "The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under *section 6 of article XIII B of the California Constitution*. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary, and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs."

The "existing system" to which *Government Code section 17500* referred was the Property Tax Relief Act of 1972 ( *Rev. & Tax. Code, §§ 2201- 2327*), which authorized local agencies and school boards to request reimbursement from the state Controller. Apparently dissatisfied with this remedy, the agencies and boards were bypassing the Controller and bringing actions directly in the courts. (See, e.g., ***County of Contra Costa v. State of California (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750]***.) The legislative declaration refers to this phenomena. It does not discuss suits by individuals.

contend that the counties' right of action under *Government Code sections 17551- 17552* impliedly excludes **[*344]** any citizen's remedy; in *Common Cause* defendants claimed the Attorney General's right of action under *Elections Code section 304* impliedly excluded any citizen's remedy. We replied that "the plain language of *section 304* contains no limitation on the right of private citizens to sue to enforce the section. To infer such a limitation would contradict our long-standing approval of citizen actions to require governmental officials to follow the law, expressed in our expansive interpretation of taxpayer standing [citations], and our recognition of a 'public interest' exception to the requirement that a petitioner for writ of mandate have a personal beneficial interest in the proceedings [citations]." (*49 Cal.3d at p. 440*, fn. omitted.) Likewise in this case the plain language of *Government Code sections 17551- 17552* contain no limitation **[****42]** on the right of private citizens, and to infer such a right would contradict our long-standing approval of citizen actions to enforce public duties.

The United States Supreme Court reached a similar conclusion in *Rosado v. Wyman (1970) 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207]*. In that case New York welfare recipients sought a ruling that New York had violated federal law by failing to make cost-of-living adjustments to welfare grants. The state replied that the statute giving the Department of Health, Education and Welfare authority to cut off federal funds to noncomplying states constituted an exclusive remedy. The court rejected the contention, saying that "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." ( P. 420 [*25 L.Ed.2d at p. 460*].) The principle is clear: the persons actually harmed by illegal state action, not only some administrator who has no personal stake in the matter, should have standing to challenge that action.

**[****43]** Second, article XIII B was enacted to protect taxpayers, not governments. Section 1 and 2 of article XIII B establish strict limits on state and local expenditures, and require the refund of all taxes collected in excess of those limits. Section 6 of article XIII B prevents the state from evading those limits and burdening county taxpayers by transferring financial responsibility for a program to a county, yet counting the cost of that program toward the limit on state expenditures.

These provisions demonstrate a profound distrust of government and a disdain for excessive government spending. An exclusive remedy under which only governments can enforce article XIII B, and the taxpayer-citizen can appear only if a government **[**1321]** **[***79]** has first instituted proceedings, is inconsistent with the ethos that led to article XIII B. The drafters of article XIII B and the voters who enacted it would not accept that the state Legislature -- the principal body regulated by the article -- could establish a procedure **[*345]** under which the only way the article can be enforced is for local governmental bodies to initiate proceedings before a commission composed largely of state **[****44]** financial officials.

One obvious reason is that in the never-ending attempts of state and local government to obtain a larger proportionate share of available tax revenues, the state has the power to coerce local governments into forgoing their rights to enforce article XIII B. An example is the Brown-Presley Trial Court Funding Act ( *Gov. Code, § 77000 et seq.*), which provides that the county's acceptance of funds for court financing may, in the discretion of the Governor, be deemed a waiver of the counties' rights to proceed before the commission on all claims for reimbursement for state-mandated local programs which existed and were not filed prior to passage of the trial funding legislation. [5] The ability of state government by financial threat or inducement to persuade counties to waive their right of action before the commission renders the counties' right of action inadequate to protect the public interest in the enforcement of article XIII B.

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[5] "(a) The initial decision by a county to opt into the system pursuant to Section 77300 *shall constitute a waiver of all claims for reimbursement for state-mandated local programs not theretofore approved by the State Board of Control, the Commission on State Mandates, or the courts to the extent the Governor, in his discretion, determines that waiver to be appropriate*; provided, that a decision by a county to opt into the system pursuant to Section 77300 beginning with the second half of the 1988-89 fiscal year shall not constitute a waiver of a claim for reimbursement based on a statute chaptered on or before the date the act which added this chapter is chaptered, which is filed in acceptable form on or before the date the act which added this chapter is chaptered. A county may petition the Governor to exempt any such claim from this waiver requirement; and the Governor, in his discretion, may grant the exemption in whole or in part. The waiver shall not apply to or otherwise affect any claims accruing after initial notification. Renewal, renegotiation, or subsequent notification to continue in the program shall not constitute a waiver. [para.] (b) The initial decision by a county to opt into the system pursuant to Section 77300 shall constitute a waiver of any claim, cause of action, or action whenever filed, with respect to the Trial Court Funding Act of 1985, Chapter 1607 of the Statutes of 1985, or Chapter 1211 of the Statutes of 1987." ( *Gov. Code, § 77203.5*, italics added.)

"As used in this chapter, 'state-mandated local program' *means any and all reimbursements owed or owing by operation of either Section 6 of Article XIII B of the California Constitution*, or *Section 17561 of the Government Code*, or both." ( *Gov. Code, § 77005*, italics added.)

**[****45]** The facts of the present litigation also demonstrate the inadequacy of the commission remedy. The state began transferring financial responsibility for MIA's to the counties in 1982. Six years later no county had brought a proceeding before the commission. After the present suit was filed, two counties filed claims for 70 percent reimbursement. Now, nine years after the 1982 legislation, the counties' claims are pending before the Court of Appeal. After that court acts, and we decide whether to review its decision, the matter may still have to go back to the commission for hearings to **[*346]** determine the amount of the mandate -- which is itself an appealable order. When an issue involves the life and health of thousands, a procedure which permits this kind of delay is not an adequate remedy.

In sum, effective, efficient enforcement of article XIII B requires that standing to enforce that measure be given to those harmed by its violation -- in this case, the medically indigent -- and not be vested exclusively in local officials who have no personal interest at stake and are subject to financial and political pressure to overlook violations.

C. *Even if plaintiffs lack standing* **[****46]** *this court should nevertheless address and resolve the merits of the appeal*.

Although ordinarily a court will not decide the merits of a controversy if the plaintiffs lack standing (see *McKinny v. Board of Trustees (1982) 31 Cal.3d 79, 90 [181 Cal.Rptr. 549, 642 P.2d 460]*), we recognized **[**1322]** **[***80]** an exception to this rule in our recent decision in *Dix v. Superior Court, supra, 53 Cal.3d 442* (hereafter *Dix*). In *Dix*, the victim of a crime sought to challenge the trial court's decision to recall a sentence under *Penal Code section 1170*. We held that only the prosecutor, not the victim of the crime, had standing to raise that issue. We nevertheless went on to consider and decide questions raised by the victim concerning the trial court's authority to recall a sentence under *Penal Code section 1170, subdivision (d)*. We explained that the sentencing issues "are significant. The case is fully briefed and all parties apparently seek a decision on the merits. Under such circumstances, we deem it appropriate to address [the victim's] sentencing **[****47]** arguments for the guidance of the lower courts. Our discretion to do so under analogous circumstances is well settled. [Citing cases explaining when an appellate court can decide an issue despite mootness.]" (*53 Cal.3d at p. 454*.) In footnote we added that "Under *article VI, section 12, subdivision (b) of the California Constitution* . . . , we have jurisdiction to 'review the *decision of a Court of Appeal* in any cause.' (Italics added.) Here the Court of Appeal's decision addressed two issues -- standing and merits. Nothing in *article VI, section 12(b)* suggests that, having rejected the Court of Appeal's conclusion on the preliminary issue of standing, we are foreclosed from 'review[ing]' the second subject addressed and resolved in its decision." (Pp. 454-455, fn. 8.)

I see no grounds on which to distinguish *Dix*. The present case is also one in which the Court of Appeal decision addressed both standing and merits. It is fully briefed. Plaintiffs and the county seek a decision on the merits. While the state does not seek a decision on the merits in this proceeding, its appeal of the superior court decision in the **[****48]** mandamus proceeding brought by the County of Los Angeles (see maj. opn., *ante*, p. 330, fn. 2) shows that it is not opposed to an appellate decision on the merits.

**[*347]** The majority, however, notes that various state officials -- the Controller, the Director of Finance, the Treasurer, and the Director of the Office of Planning and Research -- did not participate in this litigation. Then in a footnote, the majority suggests that this is the reason they do not follow the *Dix* decision. (Maj. opn., *ante*, p. 336, fn. 9.) In my view, this explanation is insufficient. The present action is one for declaratory relief against the state. It is not necessary that plaintiffs also sue particular state officials. (The state has never claimed that such officials were necessary parties.) I do not believe we should refuse to reach the merits of this appeal because of the nonparticipation of persons who, if they sought to participate, would be here merely as amici curiae. [6]

**[****49]** The case before us raises no issues of departmental policy. It presents solely an issue of law which this court is competent to decide on the briefs and arguments presented. That issue is one of great significance, far more significant than any raised in *Dix*. Judges rarely recall sentencing under *Penal Code section 1170, subdivision (d)*; when they do, it generally affects only the individual defendant. In contrast, the legal issue here involves immense sums of money and affect budgetary planning for both the state and counties.

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[6] It is true that these officials would participate in a proceeding before the Commission on State Mandates, but they would do so as members of an administrative tribunal. On appellate review of a commission decision, its members, like the members of the Public Utilities Commission or the Workers' Compensation Appeals Board, are not respondents and do not appear to present their individual views and positions. For example, in ***Lucia Mar Unified School Dist. v. Honig (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318]***, in which we reviewed a commission ruling relating to subvention payments for education of handicapped children, the named respondents were the state Superintendent of Public Instruction, the Department of Education, and the Commission on State Mandates. The individual members of the commission were not respondents and did not participate.

State and county governments need to know, as soon as possible, what their **[**1323]** **[***81]** rights and obligations are; legislators considering proposals to deal with the current state and county budget crisis need to know how to frame legislation so it does not violate article XIII B. The practical impact of a decision on the people of this state is also of great importance. The failure of the state to provide full subvention funds and the difficulty of the county in filling the gap translate into inadequate staffing and facilities for treatment of thousands of persons. Until the constitutional issues are resolved the legal uncertainties may **[****50]** inhibit both levels of government from taking the steps needed to address this problem. A delay of several years until the Los Angeles case is resolved could result in pain, hardship, or even death for many people. I conclude that, whether or not plaintiffs have standing, this court should address and resolve the merits of the appeal.

D. *Conclusion as to standing*.

As I have just explained, it is not necessary for plaintiffs to have standing for us to be able to decide the merits of the appeal. Nevertheless, I conclude **[*348]** that plaintiffs have standing both as persons "beneficially interested" under *Code of Civil Procedure section 1086* and under the doctrine of *Green v. Obledo, supra, 29 Cal.3d 126*, to bring an action to determine whether the state has violated its duties under article XIII B. The remedy given local agencies and school districts by *Government Code sections 17500- 17630* is, as *Government Code section 17552* states, the exclusive remedy by which those bodies can challenge the state's refusal to provide subvention funds, but the statute does not limit the remedies available to individual citizens. **[****51]**

III. Merits of the Appeal

A. *State funding of care for MIA's.*

*Welfare and Institutions Code section 17000* requires every county to "relieve and support" all indigent or incapacitated residents, except to the extent that such persons are supported or relieved by other sources. [7] From 1971 until 1982, and thus at the time article XIII B became effective, counties were not required to pay for the provision of health services to MIA's, whose health needs were met through the state-funded Medi-Cal program. Since the medical needs of MIA's were fully met through other sources, the counties had no duty under *Welfare and Institutions Code section 17000* to meet those needs. While the counties did make general contributions to the Medi-Cal program (which covered persons other than MIA's) from 1971 until 1978, at the time article XIII B became effective in 1980 the counties were not required to make any financial contributions to Medi-Cal. It is therefore undisputed that the counties were not required to provide financially for the health needs of MIA's when article XIII B became effective. The state funded all such needs of MIA's.

**[****52]** In 1982, the Legislature passed Assembly Bill No. 799 (1981-1982 Reg. Sess.; Stats. 1982, ch. 328, pp. 1568-1609) (hereafter AB No. 799), which removed MIA's from the state-funded Medi-Cal program as of January 1, 1983, and thereby transferred to the counties, through the County Medical Services Plan which AB No. 799 created, the financial responsibility to provide health services to approximately 270,000 MIA's. AB No. 799 required that the counties provide health care for MIA's, yet appropriated only 70 percent of what the state would have spent on MIA's had those persons remained a state responsibility under the Medi-Cal program.

Since 1983, the state has only partially defrayed the costs to the counties of providing health care to MIA's. Such state funding to counties was **[*349]** initially relatively constant, generally more than $ 400 million per year. By 1990, however, state **[***82]** funding **[**1324]** had decreased to less than $ 250 million. The state, however, has always included the full amount of its former obligation to provide for MIA's under the Medi-Cal program in the year preceding July 1, 1980, as part of its article XIII B "appropriations limit," i.e., as part **[****53]** of the base amount of appropriations on which subsequent annual adjustments for cost-of-living and population changes would be calculated. About $ 1 billion has been added to the state's adjusted spending limit for population growth and inflation *solely* because of the state's inclusion of all MIA expenditures in the appropriation limit established for its base year, 1979-1980. The state has not made proportional increases in the sums provided to counties to pay for the MIA services funded by the counties since January 1, 1983.

B. *The function of article XIII B.*

Our recent decision in *County of Fresno v. State of California (1991) 53 Cal.3d 482, 486-487 [280 Cal.Rptr. 92, 808 P.2d 235]* (hereafter *County of Fresno*), explained the function of article XIII B and its relationship to article XIII A, enacted one year earlier:

"At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition

[7] *Welfare and Institutions Code section 17000* provides that "[e]very county . . . shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."

13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new 'special taxes.' ( *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281]*.) **[****54]** The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. ( *City of Sacramento v. State of California (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522]* (*City of Sacramento*).)

"At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

"'Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes.' ( *City of Sacramento, supra, 50 Cal.3d at p. 59, fn. 1*.)

"Article XIII B of the Constitution was intended . . . to provide 'permanent protection for taxpayers from excessive taxation' and 'a reasonable way to provide discipline in tax spending at state and local levels.' (See *County of Placer v. Corin (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232]*, **[****55]** quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument **[*350]** in favor of Prop. 4, p. 18.) To this end, it establishes an 'appropriations limit' for both state and local governments (*Cal. Const., art. XIII B, § 8, subd. (h)*) and allows no 'appropriations subject to limitation' in excess thereof (*id*., § 2). [8] (See *County of Placer v. Corin, supra, 113 Cal.App.3d at p. 446*.) It defines the relevant 'appropriations subject to limitation' as 'any authorization to expend during a fiscal year the proceeds of taxes . . . .' (*Cal. Const., art. XIII B, § 8, subd. (b)*.)" ( *County of Fresno, supra, 53 Cal.3d at p. 486*.)

**[****56]** Under section 3 of article XIII B the state may transfer financial responsibility for a program to a county if the state and county mutually agree that the appropriation limit of the state will be decreased and that of the county increased by the same amount. [9] **[**1325]** **[***83]** Absent such an agreement, however, section 6 of article XIII B generally precludes the state from avoiding the spending limits it must observe by shifting to local governments programs and their attendant financial burdens which were a state responsibility prior to the effective date of article XIII B. It does so by requiring that "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the cost of such program or increased level of service . . . ." [10]

**[****57]** "Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles [*v. *State of California* (1987)] *43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202]*.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid*.; see *Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830, 836, fn. 6*.) Specifically, it was designed to protect the tax **[*351]** revenues of local governments from state mandates that would require expenditure of such revenues." ( *County of Fresno, supra, 53 Cal.3d at p. 487*.)

C. *Applicability of article XIII B to health care for MIA's.*

The state argues that care of the indigent, including medical care, has long been a county responsibility. It claims that although the state undertook to fund this responsibility from **[****58]** 1979 through 1982, it was merely temporarily (as it turned out) helping the counties meet their responsibilities, and that the subsequent reduction in state funding did not impose any "new program" or "higher level of service" on the counties within the meaning of section 6 of article XIII B. Plaintiffs respond that the critical question is

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[8] Article XIII B, section 1 provides: "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year adjusted for changes in the cost of living and population except as otherwise provided in this Article."

[9] Section 3 of article XIII B reads in relevant part: "The appropriations limit for any fiscal year . . . shall be adjusted as follows:

"(a) In the event that the financial responsibility of providing services is transferred, in whole or in part . . . from one entity of government to another, then for the year in which such transfer becomes effective the appropriation limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount. . . ."

[10] Section 6 of article XIII B further provides that the "Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." None of these exceptions apply in the present case.

not the traditional roles of the county and state, but who had the fiscal responsibility on November 6, 1979, when article XIII B took effect. The purpose of article XIII B supports the plaintiffs' position.

As we have noted, article XIII A of the Constitution (Proposition 13) and article XIII B are complementary measures. The former radically reduced county revenues, which led the state to assume responsibility for programs previously financed by the counties. Article XIII B, enacted one year later, froze both state and county appropriations at the level of the 1978-1979 budgets -- a year when the budgets included state financing for the prior county programs, but not county financing for these programs. Article XIII B further limited the state's authority to transfer obligations to the counties. Reading the two together, it seems clear **[****59]** that article XIII B was intended to limit the power of the Legislature to retransfer to the counties those obligations which the state had assumed in the wake of Proposition 13.

Under article XIII B, both state and county appropriations limits are set on the basis of a calculation that begins with the budgets in effect when article XIII B was enacted. If the state could transfer to the county a program for which the state at that time had full financial responsibility, the county could be forced to assume additional financial obligations without the right to appropriate additional moneys. The state, at the same time, would get credit toward its appropriations limit for expenditures it did not pay. County taxpayers **[**1326]** **[***84]** would be forced to accept new taxes or see the county forced to cut existing programs further; state taxpayers would discover that the state, by counting expenditures it did not pay, had acquired an actual revenue surplus while avoiding its obligation to refund revenues in excess of the appropriations limit. Such consequences are inconsistent with the purpose of article XIII B.

Our decisions interpreting article XIII B demonstrate that the state's **[****60]** subvention requirement under section 6 is not vitiated simply because the **[*352]** "program" existed before the effective date of article XIII B. The alternate phrase of section 6 of article XIII B, "'higher level of service[,]' . . . must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that *the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs*.'" ( *County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202]*, italics added.)

*Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830*, presents a close analogy to the present case. The state Department of Education operated schools for severely handicapped students, but prior to 1979 *school districts were required by statute to contribute* to education of those students from the district at the state schools. In 1979, in response to the restrictions on school district revenues **[****61]** imposed by Proposition 13, the statutes requiring such district contributions were repealed and the state assumed full responsibility for funding. The state funding responsibility continued until June 28, 1981, when *Education Code section 59300* (hereafter *section 59300*), requiring school districts to share in these costs, became effective.

The plaintiff districts filed a test claim before the commission, contending they were entitled to state reimbursement under section 6 of article XIII B. The commission found the plaintiffs were not entitled to state reimbursement, on the rationale that the increase in costs to the districts compelled by *section 59300* imposed no new program or higher level of services. The trial and intermediate appellate courts affirmed on the ground that *section 59300* called for only an "'adjustment of costs'" of educating the severely handicapped, and that "*a shift in the funding of an existing program is not a new program or a higher level of service*" within the meaning of article XIII B. ( *Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d at p. 834*, italics added.)

We reversed, **[****62]** rejecting the state's theories that the funding shift to the county of the subject program's costs does not constitute a new program. "[There can be no] doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since *at the time section 59300 became effective* they were not required to contribute to the education of students from their districts at such schools. [para.] . . . To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, which severely limited the taxing **[*353]** power of local governments. . . . [para.] The intent of the section would plainly be violated if the state could, while retaining administrative control [11] of programs

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[11] The state notes that, in contrast to the program at issue in *Lucia Mar*, it has not retained administrative control over aid to MIA's. But the quoted language from *Lucia Mar*, while appropriate to the facts of that case, was not intended to establish a rule limiting article XIII B, section 6, to instances in which the state retains administrative control over the program that it requires the counties to fund. The constitutional language admits of no such limitation,

it has supported with state **[***85]** tax money, **[**1327]** simply shift the cost of the programs to local government **[****63]** on the theory that the shift does not violate section 6 of article XIIIB because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, the result seems equally violative of the fundamental purpose underlying section 6 of that article*." ( *Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d at pp. 835-836*, fn. omitted, italics added.)

**[****64]** The state seeks to distinguish *Lucia Mar* on the ground that the education of handicapped children in state schools had never been the responsibility of the local school district, but overlooks that the local district had previously been required to contribute to the cost. Indeed the similarities between *Lucia Mar* and the present case are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-1979 the state and county shared the cost of caring for MIA's under the Medi-Cal program. In 1979, following enactment of Proposition 13, the state took full responsibility for both programs. Then in 1981 (for handicapped children) and 1982 (for MIA's), the state sought to shift some of the burden back to the counties. To distinguish these cases on the ground that care for MIA's is a county program but education of handicapped children a state program is to rely on arbitrary labels in place of financial realities.

The state presents a similar argument when it points to the following emphasized language from *Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830*: **[****65]** "[B]ecause *section 59300* shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts -- *an obligation the school districts did not have at the time article XIII B was adopted* -- it calls for plaintiffs to support a 'new program' within the meaning of section 6." (P. 836, fn. omitted, italics added.) It urges *Lucia Mar* reached its result *only* because the "program" requiring school district funding in that case *was not required by statute* at the effective date of **[*354]** article XIII B. The state then argues that the case at bench is distinguishable because it contends Alameda County had a continuing obligation *required by statute* antedating that effective date, which had only been "temporarily" [12] suspended when article XIII B became effective. I fail to see the distinction between a case -- *Lucia Mar* -- in which no existing statute as of 1979 imposed an obligation on the local government and one -- this case -- in which the statute existing in 1979 imposed no obligation on local government.

**[****66]** The state's argument misses the salient point. As I have explained, the application of section 6 of article XIII B does not depend upon when the program was created, but upon who had the burden of funding it when article XIII B went into effect. Our conclusion in *Lucia Mar* that the educational program there in issue was a "new" program as to the school districts was not based on the presence or absence of any antecedent statutory obligation therefor. *Lucia Mar* determined that whether the program was new *as to the districts* depended on *when* they were compelled to assume the obligation to partially fund an existing program which they had not funded at the time article XIII B became effective.

The state further relies on two decisions, *Madera Community Hospital v. County of Madera (1984) 155 Cal.App.3d 136 [201 Cal.Rptr. 768]* and *Cooke v. Superior Court (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706]*, which hold that the county has a statutory obligation to provide medical care for indigents, but that it need not provide precisely **[**1328]** **[***86]** the same level of **[****67]** services as the state provided under Medi-Cal. [13] Both are correct, but irrelevant to this case. [14] The county's obligation to MIA's is defined by *Welfare and Institutions Code section 17000*, not by the

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and its recognition would permit the Legislature to evade the constitutional requirement.

[12] The state's repeated emphasis on the "temporary" nature of its funding is a form of post hoc reasoning. At the time article XIII B was enacted, the voters did not know which programs would be temporary and which permanent.

[13] It must, however, provide a *comparable* level of services. (See ***Board of Supervisors v. Superior Court (1989) 207 Cal.App.3d 552, 564 [254 Cal.Rptr. 905]***.)

[14] Certain language in ***Madera Community Hospital v. County of Madera, supra, 155 Cal.App.3d 136***, however, is questionable. That opinion states that the "Legislature intended that County bear an obligation to its poor and indigent residents, *to be satisfied from county funds*, notwithstanding federal or state programs which exist concurrently with County's obligation and alleviate, to a greater or lesser extent, County's burden." (P. 151.) *Welfare and Institutions Code section 17000* by its terms, however, requires the county to provide support to residents only "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Consequently, to the extent that the state or federal governments provide care for MIA's, the county's obligation to do so is reduced pro tanto.

former Medi-Cal program. [15] If the **[*355]** state, in transferring an obligation to the counties, permits them to provide less services than the state provided, the state need only pay for the lower level of services. But it cannot escape its responsibility entirely, leaving the counties with a state-mandated obligation and no money to pay for it.

**[****68]** The state's arguments are also undercut by the fact that it continues to use the approximately $ 1 billion in spending authority, generated by its previous total funding of the health care program in question, as a portion of its initial *base spending limit* calculated pursuant to sections 1 and 3 of article XIII B. In short, the state may maintain here that care for MIA's is a county obligation, but when it computes its appropriation limit it treats the entire cost of such care as a state program.

IV. Conclusion

This is a time when both state and county governments face great financial difficulties. The counties, however, labor under a disability not imposed on the state, for article XIII A of the Constitution severely restricts their ability to raise additional revenue. It is, therefore, particularly important to enforce the provisions of article XIII B which prevent the state from imposing additional obligations upon the counties without providing the means to comply with these obligations.

The present majority opinion disserves the public interest. It denies standing to enforce article XIII B both to those persons whom it was designed to protect -- the citizens and taxpayers **[****69]** -- and to those harmed by its violation -- the medically indigent adults. And by its reliance on technical grounds to avoid coming to grips with the merits of plaintiffs' appeal, it permits the state to continue to violate article XIII B and postpones the day when the medically indigent will receive adequate health care.

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[15] The county's right to subvention funds under article XIII B arises because its duty to care for MIA's is a state-mandated responsibility; if the county had no duty, it would have no right to funds. No claim is made here that the funding of medical services for the indigent shifted to Alameda County is not a program "'mandated'" by the state; i.e., that Alameda County has any option other than to pay these costs. ( ***Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d at pp. 836-837***.)

# ATTACHMENT NO. 16

# *Department of Finance v. Commission on State Mandates*

Supreme Court of California

August 29, 2016, Filed

S214855

**Reporter**
1 Cal. 5th 749 *; 378 P.3d 356 **; 207 Cal. Rptr. 3d 44 ***; 2016 Cal. LEXIS 7123 ****

DEPARTMENT OF FINANCE et al., Plaintiffs and Respondents, v. COMMISSION ON STATE MANDATES, Defendant and Respondent; COUNTY OF LOS ANGELES et al., Real Parties in Interest and Appellants.

**Notice:** As modified Nov. 17, 2016.

**Subsequent History:** Reported at *Department of Finance v. Commission on State Mandates, 2016 Cal. LEXIS 8339 (Cal., Aug. 29, 2016)*

Time for Granting or Denying Rehearing Extended *Dept. of Finance v. Com. on State Mandates, 2016 Cal. LEXIS 7637 (Cal., Sept. 14, 2016)*

Request granted *Dep't of Fin. v. Comm'n on State Mandates L.A., 2016 Cal. LEXIS 9667 (Cal., Sept. 26, 2016)*

Modified and rehearing denied by, Request denied by *Department of Finance v. Commission on State Mandates, 2016 Cal. LEXIS 9283 (Cal., Nov. 16, 2016)*

**Prior History: [****1]** Superior Court of Los Angeles County, No. BS130730, Ann I. Jones, Judge. Court of Appeal, Second Appellate District, Division One, No. B237153.

*Department of Finance v. Commission on State Mandates, 220 Cal. App. 4th 740, 163 Cal. Rptr. 3d 439, 2013 Cal. App. LEXIS 830 (Cal. App. 2d Dist., 2013)*

## Core Terms

requirements, regional board, inspections, federal law, regulation, federal mandate, conditions, Operators, reimbursement, practicable, permit condition, pollutant, discharges, Regional, costs, maximum extent, deference, mandated, local government, trash receptacle, permits, implementing, expertise, municipal, industrial facility, storm sewer, federal regulation, state mandate, state water, facilities

## Case Summary

**Overview**

HOLDINGS: [1]-Local agencies operating storm drain systems pursuant to National Pollutant Discharge Elimination System permits issued by the State Water Resources Control Board under *33 U.S.C. § 1342(p)(3)(A)* were entitled to reimbursement from the state under *Cal. Const., art. XIII B, § 6*, for the costs of complying with permit conditions requiring the agencies to install trash receptacles and to inspect industrial facilities and construction sites because these conditions were not federal mandates under the exception in *Gov. Code, § 17556, subd. (c)*, but were imposed pursuant to *Wat. Code, §§ 13260*, *13263*, *13267, subd. (c)*, under state regulatory authority; [2]-Although federal regulations generally contemplated that storm drain operators would have street maintenance procedures and would conduct inspections, the state exercised discretion in imposing the specific conditions at issue.

**Outcome**
Reversed and remanded.

## LexisNexis® Headnotes

Administrative Law > Judicial Review > Reviewability > Questions of Law

Governments > State & Territorial Governments > Finance

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

***HN1***[] **Reviewability, Questions of Law**

A decision of the California Commission on State Mandates

is reviewed to determine whether it is supported by substantial evidence. *Gov. Code, § 17559*. Ordinarily, when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same. However, the appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions. The question whether a statute or executive order imposes a mandate is a question of law. Thus, the appellate court reviews the entire record before the Commission, which includes references to federal and state statutes and regulations, as well as evidence of other permits and the parties' obligations under those permits, and independently determines whether it supports the Commission's conclusion.

Governments > State & Territorial
Governments > Finance

***HN2***[] **State & Territorial Governments, Finance**

Cal. Const., art. XIII B, restricts the amounts state and local governments may appropriate and spend each year from the proceeds of taxes. Cal. Const., art. XIII B, is to be distinguished from Cal. Const., art. XIII A, which was adopted as Proposition 13 at the June 1978 election. Cal. Const., art. XIII A, imposes a direct constitutional limit on state and local power to adopt and levy taxes. Cal. Const., arts. XIII A, XIII B, work in tandem, together restricting California governments' power both to levy and to spend for public purposes. The concern which prompted the inclusion of *Cal. Const., art. XIII B, § 6*, was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. The reimbursement provision in *Cal. Const., art. XIII B, § 6*, was included in recognition of the fact that Cal. Const., arts. XIII A, XIII B, severely restrict the taxing and spending powers of local governments.

Governments > State & Territorial
Governments > Finance

***HN3***[] **State & Territorial Governments, Finance**

The purpose of *Cal. Const., art. XIII B, § 6*, is to prevent the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ill equipped to assume increased financial responsibilities because of the taxing and spending limitations that Cal. Const., arts. XIII A, XIII B, impose. Thus, with certain exceptions, *Cal. Const., art. XIII B, § 6*, requires the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. Reimbursement is not required if the statute or executive order imposes a requirement that is mandated by a federal law or regulation, unless the state mandate imposes costs that exceed the federal mandate. *Gov. Code, § 17556, subd. (c)*.

Governments > State & Territorial
Governments > Finance

***HN4***[] **State & Territorial Governments, Finance**

In determining whether federal law requires a specified function, the focus of the inquiry is whether the manner of implementation of the federal program was left to the true discretion of the state. If the state has adopted an implementing statute or regulation pursuant to the federal mandate and had no true choice as to the manner of implementation, the local government is not entitled to reimbursement. If, on the other hand, the manner of implementation of the federal program was left to the true discretion of the state, the local government might be entitled to reimbursement. The essential question is how the costs came to be imposed upon the agency required to bear them. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.

Governments > State & Territorial
Governments > Finance

***HN5***[] **State & Territorial Governments, Finance**

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

Evidence > Burdens of Proof > Allocation

Governments > State & Territorial
Governments > Finance

**HN6[] Burdens of Proof, Allocation**

Cal. Const., art. XIII B, § 6, establishes a general rule requiring reimbursement of all state-mandated costs. Gov. Code, § 17556, subd. (c), codifies an exception to that rule. Typically, the party claiming the applicability of an exception bears the burden of demonstrating that it applies. Thus, the state must explain why federal law mandated the requirements at issue.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN7[] Discharge Permits, Storm Water Discharges**

State law makes a regional water quality control board responsible for regulating discharges of waste within its jurisdiction. Wat. Code, §§ 13260, 13263. This regulatory authority includes the power to inspect the facilities of any person to ascertain whether waste discharge requirements are being complied with. Wat. Code, § 13267, subd. (c). Thus, state law imposes an overarching mandate that the regional board inspect facilities and sites. In addition, federal law and practice require the regional board to inspect all industrial facilities and construction sites. Under the Clean Water Act, 33 U.S.C. § 1251 et seq., the State Water Resources Control Board, as an issuer of National Pollutant Discharge Elimination System permits, is required to issue permits for storm water discharges associated with industrial activity. 33 U.S.C. § 1342(p)(3)(A). The term "industrial activity" includes construction activity. 40 C.F.R. § 122.26(b)(14)(x).

## Headnotes/Syllabus

**Summary**

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted a petition challenging a reimbursement determination by the California Commission on State Mandates (Cal. Const., art. XIII B, § 6) and ordered the Commission to issue a new statement of decision. The Commission had determined that local agencies operating storm drain systems were entitled to reimbursement from the state for the costs of complying with permit conditions requiring the agencies to install trash receptacles and to inspect industrial facilities and construction sites. (Superior Court of Los Angeles County, No. BS130730, Ann I. Jones, Judge.) The Court of Appeal, Second Dist., Div. One, No. B237153, affirmed.

The Supreme Court reversed and remanded. The court held that the agencies, which operated the storm drain systems pursuant to National Pollutant Discharge Elimination System permits issued by the State Water Resources Control Board (33 U.S.C. § 1342(p)(3)(A)), were entitled to reimbursement because the permit conditions were not federal mandates (Gov. Code, § 17556, subd. (c)), but were imposed under state regulatory authority (Wat. Code, §§ 13260, 13263, 13267, subd. (c)). Although federal regulations generally contemplate that storm drain operators will have street maintenance procedures and will conduct inspections, the state exercised discretion in imposing the specific conditions at issue. (Opinion by Corrigan, J., with Cantil-Sakauye, C. J., Werdegar, and Chin, JJ., concurring. Concurring and dissenting opinion by Cuéllar, J., with Liu, and Kruger, JJ., concurring (see p. 772).)

**Headnotes**

CALIFORNIA OFFICIAL REPORTS HEADNOTES

**CA(1)[] (1)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for State-mandated Costs.**

Cal. Const., art. XIII B, restricts the amounts state and local governments may appropriate and spend **[*750]** each year from the proceeds of taxes. Cal. Const., art. XIII B, is to be distinguished from Cal. Const., art. XIII A, which was adopted as Prop. 13 at the June 1978 election. Cal. Const., art. XIII A, imposes a direct constitutional limit on state and local power to adopt and levy taxes. Cal. Const., arts. XIII A, XIII B, work in tandem, together restricting California governments' power both to levy and to spend for public purposes. The concern which prompted the inclusion of Cal. Const., art. XIII B, § 6, was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. The reimbursement provision in Cal. Const., art. XIII B, § 6, was included in recognition of the fact that Cal. Const., arts. XIII A, XIII B, severely restrict the taxing and spending powers of local governments.

**CA(2)[] (2)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for State-mandated Costs—Federal Mandate Exception.**

The purpose of *Cal. Const., art. XIII B, § 6*, is to prevent the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ill equipped to assume increased financial responsibilities because of the taxing and spending limitations that Cal. Const., arts. XIII A, XIII B, impose. Thus, with certain exceptions, *Cal. Const., art. XIII B, § 6*, requires the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. Reimbursement is not required if the statute or executive order imposes a requirement that is mandated by a federal law or regulation, unless the state mandate imposes costs that exceed the federal mandate (*Gov. Code, § 17556, subd. (c)*).

*CA(3)*[] **(3)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for State-mandated Costs—Federal Mandate Exception.**

In determining whether federal law requires a specified function, the focus of the inquiry is whether the manner of implementation of the federal program was left to the true discretion of the state. If the state has adopted an implementing statute or regulation pursuant to the federal mandate and had no true choice as to the manner of implementation, the local government is not entitled to reimbursement. If, on the other hand, the manner of implementation of the federal program was left to the true discretion of the state, the local government might be entitled to reimbursement. The essential question is how the costs came to be imposed upon the agency required to bear them. If the state freely chose to impose the costs upon the local agency as a means of implementing a **[*751]** federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.

*CA(4)*[] **(4)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for State-mandated Costs—Federal Mandate Exception.**

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

*CA(5)*[] **(5)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for State-mandated Costs—Federal Mandate Exception.**

*Cal. Const., art. XIII B, § 6*, establishes a general rule requiring reimbursement of all state-mandated costs. *Gov. Code, § 17556, subd. (c)*, codifies an exception to that rule. Typically, the party claiming the applicability of an exception bears the burden of demonstrating that it applies. Thus, the state must explain why federal law mandated the requirements at issue.

*CA(6)*[] **(6)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for State-mandated Costs—Federal Mandate Exception—Storm Drainage Permit Conditions.**

The California Commission on State Mandates determined that National Pollutant Discharge Elimination System permit conditions requiring operators of storm drainage systems to install trash receptacles and to inspect facilities and construction sites were not federal mandates. The Commission was correct. These permit conditions were not federally mandated.

[*Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2016) ch. 31, § 31.24*.]

*CA(7)*[] **(7)**

**Pollution and Conservation Laws § 5—Water Pollution—Inspections and Permits—State and Federal Requirements.**

State law makes a regional water quality control board responsible for regulating discharges of waste within its jurisdiction (*Wat. Code, §§ 13260*, *13263*). This regulatory authority includes the power to inspect the facilities of any person to ascertain whether waste discharge requirements are being complied with (*Wat. Code, § 13267, subd. (c)*). Thus, state law imposes an overarching mandate that the regional board inspect facilities and sites. In addition, federal law and practice require the regional board to inspect all industrial facilities and construction sites. Under the Clean **[*752]** Water Act, the State Water Resources Control Board, as an issuer of National Pollutant Discharge Elimination System permits, is required to issue permits for stormwater discharges associated with industrial activity (*33 U.S.C. § 1342(p)(3)(A)*). The term “industrial activity” includes

construction activity (*40 C.F.R. § 122.26(b)(14)(x) (2001)*).

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No appearance for Defendant and Respondent.

**Judges:** Opinion by Corrigan, J., with Cantil-Sakauye C. J., Werdegar, and Chin, JJ., concurring. Concurring and dissenting opinion by Cuéllar, J., with Liu, and Kruger, JJ., concurring.

**Opinion by:** Corrigan

## Opinion

**[***49] [**360]** **CORRIGAN, J.**—Under our state

Constitution, if the Legislature or a state agency requires a local government to provide a new program or higher level of service, the local government is entitled to reimbursement from the state for the associated costs. (*Cal. Const., art. XIII B, § 6, subd. (a)*.) There are exceptions, however. Under one of them, if the new program or increased service is mandated by a federal law or regulation, **[****5]** reimbursement is not required. (*Gov. Code, § 17556, subd. (c)*.)

The services in question here are provided by local agencies that operate storm drain systems pursuant to a state-issued permit. Conditions in that permit are designed to maintain the quality of California's water, and to comply with the federal Clean Water Act (*33 U.S.C. § 1251 et seq.*). The Court of Appeal held that certain permit conditions were federally mandated, and thus not reimbursable. We reverse, concluding that no federal law or regulation imposed the conditions nor did the federal regulatory system require the state to impose them. Instead, the permit conditions were imposed as a result of the state's discretionary action.

## **[**361] I. Background**

The Regional Water Quality Control Board, Los Angeles Region (the Regional Board) is a state agency. It issued a permit authorizing Los Angeles County, the Los Angeles County Flood Control District, and 84 cities (collectively, the Operators) to operate storm drainage systems. [1] **[***50]** Permit **[*755]** conditions required that the Operators take various steps to reduce the discharge of waste and pollutants into state waters. The conditions included installing and maintaining trash receptacles at transit stops, as wells as inspecting certain commercial **[****6]** and industrial facilities and construction sites.

Some Operators sought reimbursement for the cost of satisfying the conditions. The Commission **[****7]** on State Mandates (the Commission) concluded each required condition was a new program or higher level of service, mandated by the state rather than by federal law. However, it found the Operators were only entitled to state reimbursement for the costs of the trash receptacle condition, because they could levy fees to cover the costs of the required inspections. (See discussion, *post*, at p. 761.) The trial court and the Court of Appeal disagreed, finding that all of the requirements were federally mandated.

We granted review. To resolve this issue, it is necessary to consider both the permitting system and the reimbursement obligation in some detail.

### A. *The Permitting System*

The Operators' municipal storm sewer systems discharge both waste and pollutants. [2] State law controls "waste" discharges. (*Wat. Code, § 13265*.) Federal law regulates discharges of "pollutant[s]." (*33 U.S.C. § 1311(a)*.) Both state and later-enacted federal law require a permit to operate such systems.

California's Porter-Cologne Water Quality Control Act (Porter-Cologne Act or the Act; *Wat. Code, § 13000 et seq.*) was enacted in 1969. It established the State Water Resources Control Board (State Board), along with nine regional water quality control boards, and gave those agencies "primary responsibility for the coordination and control of water quality." (*Wat. Code, § 13001*; see *City of Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 619 [26 Cal. Rptr. 3d 304, 108 P.3d 862]* (*City of Burbank*).) The State Board establishes statewide policy. The regional boards formulate and **[*756]** adopt water quality control plans and issue permits governing the discharge of waste. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 875 [22 Cal. Rptr. 3d 128]* (*Building Industry*).)

The Porter-Cologne Act requires any person discharging, or proposing to discharge, waste that could affect the quality of state waters to file a report with the appropriate regional board. ( **[***51]** *Wat. Code, § 13260, subd. (a)(1)*.) The

[1] The cities involved are the Cities of Agoura Hills, Alhambra, Arcadia, Artesia, Azusa, Baldwin Park, Bell, Bellflower, Bell Gardens, Beverly Hills, Bradbury, Burbank, Calabasas, Carson, Cerritos, Claremont, Commerce, Compton, Covina, Cudahy, Culver City, Diamond Bar, Downey, Duarte, El Monte, El Segundo, Gardena, Glendale, Glendora, Hawaiian Gardens, Hawthorne, Hermosa Beach, Hidden Hills, Huntington Park, Industry, Inglewood, Irwindale, La Cañada Flintridge, La Habra Heights, Lakewood, La Mirada, La Puente, La Verne, Lawndale, Lomita, Los Angeles, Lynwood, Malibu, Manhattan Beach, Maywood, Monrovia, Montebello, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pasadena, Pico Rivera, Pomona, Rancho Palos Verdes, Redondo Beach, Rolling Hills, Rolling Hills Estates, Rosemead, San Dimas, San Fernando, San Gabriel, San Marino, Santa Clarita, Santa Fe Springs, Santa Monica, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena, Temple City, Torrance, Vernon, Walnut, West Covina, West Hollywood, Westlake Village, and Whittier.

[2] The systems at issue here are "municipal separate storm sewer systems," sometimes referred to by the acronym "MS4." (*40 C.F.R. § 122.26(b)(19) (2001)*, italics omitted.) A "[m]unicipal separate storm sewer" is a system owned or operated by a public agency with jurisdiction over disposal of waste and designed **[****8]** or used for collecting or conveying stormwater. (*40 C.F.R. § 122.26(b)(8) (2001)*, italics omitted.) Unless otherwise indicated, all further citations to the Code of Federal Regulations are to the 2001 version.

regional board then "shall prescribe requirements as to the nature" of the discharge, implementing any applicable water quality control plans. (*Wat. Code, § 13263, subd. (a)*.) The Operators must follow **[**362]** all requirements set by the Regional Board. (*Wat. Code, §§ 13264*, *13265*.)

The federal Clean Water Act (the CWA; *33 U.S.C. § 1251 et seq.*) was enacted in 1972, **[****9]** and also established a permitting system. The CWA is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. (*City of Burbank, supra, 35 Cal.4th at p. 620*.) The CWA prohibits pollutant discharges unless they comply with (1) a permit (see *33 U.S.C. §§ 1328*, *1342*, *1344*); (2) established effluent limitations or standards (see *33 U.S.C. §§ 1312*, *1317*); or (3) established national standards of performance (see *33 U.S.C. § 1316*). (See *33 U.S.C. § 1311(a)*.) The CWA allows any state to adopt and enforce its own water quality standards and limitations, so long as those standards and limitations are not "less stringent" than those in effect under the CWA. (*33 U.S.C. § 1370*.)

The CWA created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the CWA or the EPA Administrator. (*33 U.S.C. § 1342(a)(1)*, *(2)*.) The federal system notwithstanding, a state may administer its own permitting system if authorized by the EPA. [3] If the EPA concludes a state has adequate authority to administer its proposed program, it must grant approval (*33 U.S.C. § 1342(b)*) and suspend its own issuance of permits (*33 U.S.C. § 1342(c)(1)*). [4]
**[*757]**

California was the first state authorized to issue its own pollutant discharge permits. (*California ex rel. State Water Resources Control Bd. v. Environmental Protection Agency (9th Cir. 1975) 511 F.2d 963, 970, fn. 11*, revd. on other grounds in *EPA v. State Water Resources Control Board (1976) 426 U.S. 200 [48 L.Ed.2d 578, 96 S.Ct. 2022]*.)

Shortly after the CWA's enactment, the Legislature amended the Porter-Cologne Act, adding chapter 5.5 (*Wat. Code, § 13370 et seq.*) to authorize state issuance of permits (*Wat. Code, § 13370, subd. (c)*). The Legislature explained the amendment was "in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter-Cologne Act]." (*Ibid*.) The Legislature provided that chapter 5.5 be "construed to ensure consistency" with the CWA. (*Wat. Code, § 13372, subd. (a)*.) It directed that state and regional boards issue waste discharge requirements "ensur[ing] compliance with all applicable provisions **[****11]** of the [CWA] … *together with any more stringent effluent standards or limitations* necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." **[***52]** (*Wat. Code, § 13377*, italics added.) To align the state and federal permitting systems, the legislation provided that the term "'waste discharge requirements'" under the Act was equivalent to the term "'permits'" under the CWA. (*Wat. Code, § 13374*.) Accordingly, California's permitting system now regulates discharges under both state and federal law. (*WaterKeepers Northern California v. State Water Resources Control Bd. (2002) 102 Cal.App.4th 1448, 1452 [126 Cal. Rptr. 2d 389]*; accord, *Building Industry, supra, 124 Cal.App.4th at p. 875*.)

In 1987, Congress amended the CWA to clarify that a permit is required for any discharge from a municipal storm sewer system serving a population of 100,000 or more. (*33 U.S.C. § 1342(p)(2)(C)*, *(D)*.) Under those amendments, a permit may be issued either on a system- or jurisdiction-wide basis, must effectively prohibit non-stormwater discharges into the storm sewers, and must "require controls to reduce the discharge of **[**363]** pollutants *to the maximum extent practicable*." (*33 U.S.C. § 1342(p)(3)(B)*, italics added.) The phrase "maximum extent practicable" is not further defined. How that phrase is applied, and by whom, are important aspects of this case.

EPA regulations specify the information to be included in a permit **[****12]** application. (See *40 C.F.R. § 122.26(d)(1)(i)–(vi)*, *(2)(i)–(viii)*.) Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable. (*40 C.F.R. § 122.26(d)(2)(iv)*.) The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions. (*Ibid*.)
**[*758]**

B. *The Permit in Question*

[3] For a state to acquire permitting authority, the **[****10]** governor must give the EPA a "description of the program [the state] proposes to establish," and the attorney general must affirm that the laws of the state "provide adequate authority to carry out the described program." (*33 U.S.C. § 1342(b)*.)

[4] The EPA may withdraw approval of a state's program (*33 U.S.C. § 1342(c)(3)*), and also retains some supervisory authority: States must inform the EPA of all permit applications received and of any action related to the consideration of a submitted application (*33 U.S.C. § 1342(d)(1)*).

In 2001, Los Angeles County (the County), acting for all Operators, applied for a permit from the Regional Board. The board issued a permit (the Permit), with conditions intended to "reduce the discharge of pollutants in stormwater to the Maximum Extent Practicable" in the Operators' jurisdiction. The Permit stated that its conditions implemented *both* the Porter-Cologne Act and the CWA.

Part 4 of the Permit contains the four requirements at issue. Part 4.C addresses commercial and industrial facilities, and required the Operators to inspect certain facilities twice during the five-year term of the Permit. Inspection requirements were set out in substantial detail. [5] Part 4.E of the Permit addresses construction sites. It required each Operator **[****13]** to "implement a program to control runoff from construction activity at all construction sites within its jurisdiction," and to inspect each construction **[***53]** site of one acre or greater at least "once during the wet season." [6] Finally, Part 4.F of the Permit addresses pollution from public agency activities. Among other things, it directed each Operator not otherwise regulated to "[p]lace trash receptacles at all transit stops within its jurisdiction," and to maintain them as necessary.

C. *Local Agency Claims*

1. *Applicable procedures for seeking reimbursement*

As mentioned, when the Legislature or a state agency requires a local government to provide a new program or higher level of service, the state must "reimburse that local government for the costs of the program or increased level of service." (*Cal. Const., art. XIII B, § 6, subd. (a)* (hereafter, **[*759]** *section 6*).) [7] However, reimbursement is not required if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation." (*Gov. Code, § 17556, subd. (c)*.)

**[**364]** The Legislature has enacted comprehensive procedures for the resolution of reimbursement claims (*Gov. Code, § 17500 et seq.*) and created the Commission to adjudicate them (*Gov. Code, §§ 17525*, *17551*). It also established "a test-claim procedure to expeditiously resolve disputes affecting multiple agencies." (*Kinlaw v. State of California (1991) 54 Cal.3d 326, 331 [285 Cal. Rptr. 66, 814 P.2d 1308]* (*Kinlaw*).)

The first reimbursement claim filed with the Commission is called a test claim. (*Gov. Code, § 17521*.) The Commission must hold a public hearing, at which the Department of Finance (the Department), the claimant, and any other affected department or agency may present evidence. (*Gov. Code, §§ 17551*, *17553*.) The Commission then determines "whether a state mandate exists and, if so, the amount to be reimbursed." (*Kinlaw, supra, 54 Cal.3d at p. 332*.) The Commission's decision is reviewable by writ of mandate. (*Gov. Code, § 17559*.)

2. *The test claims*

The County and other Operators filed test claims with the Commission, seeking reimbursement for the Permit's inspection and trash receptacle requirements. The Department, State Board, and Regional Board **[****16]** (collectively, the State) responded that the Operators were not entitled to reimbursement because each requirement was federally mandated.

The Department argued that the EPA had delegated its federal permitting authority to the Regional Board, which acted as an administrator for the EPA, ensuring the state's program complied with the CWA. The Department acknowledged the Regional Board had discretion to set detailed permit conditions, but urged that the challenged conditions were required for the Permit to comply with federal law.

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[5] As to commercial facilities, part 4.C.2.a required each Operator to inspect each restaurant, automotive service facility, retail gasoline outlet, and automotive dealership within its jurisdiction, and to confirm that the facility employed best management practices in compliance with state law, county and municipal ordinances, a Regional Board resolution, and the Operators' stormwater quality management program (SQMP). For each type of facility, the Permit set forth specific inspection tasks.

Part 4.C.2.b addressed industrial facilities, requiring the Operators to inspect them and confirm that each complied with county and municipal ordinances, a Regional Board resolution, and the SQMP. The Operators also **[****14]** were required to inspect industrial facilities for violations of the general industrial activity stormwater permit, a statewide permit issued by the State Board that regulates discharges from industrial facilities. (See discussion, *post*, at pp. 770–771.)

[6] Part 4.E.4 required inspections for violations of the general construction activity stormwater permit, another statewide permit issued by the State Board. (See discussion, *post*, at pp. 770–771.)

[7] "'Costs mandated by the state' means any increased costs which a local agency or school district is required **[****15]** to incur … as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of *Section 6 of Article XIII B of the California Constitution.*" (*Gov. Code, § 17514*.)

**[***54]** The State and Regional Boards argued somewhat differently. They contended the CWA required the Regional Board to impose specific permit **[*760]** controls to reduce the discharge of pollutants to the "maximum extent practicable." Thus, when the Regional Board determined the Permit's conditions, those conditions were part of the federal mandate. The State and Regional Boards also argued that the challenged conditions were "animated" by EPA regulations. In support of the trash receptacle requirement, they relied on *40 Code of Federal Regulations part 122.26(d)(2)(iv)(A)(3)*. [8] In support of the inspection requirements, they relied on *40 Code of Federal Regulations part 122.26(d)(2)(iv)(B)(1)*, [9] *(C)(1)*, [10] and *(D)(3)*. [11]

**[**365]** The Operators argued the conditions were not mandated by federal law, because nothing in the CWA or in the cited federal regulations required them to install trash receptacles or perform the required site inspections. They also submitted evidence showing that none of the challenged requirements were **[*761]** contained in their previous permits issued by the Regional Board, nor were they imposed on other municipal storm sewer systems by the EPA.

As to the inspection requirements, the Operators argued that state law required **[***55]** the *state and regional boards* to regulate discharges of waste. This regulatory authority included the power to inspect facilities and sites. The Regional Board had used the Permit conditions to shift those inspection responsibilities to them. They also presented evidence that the Regional Board was required to inspect industrial facilities and construction sites for compliance with statewide permits issued by the State Board (see *ante*, p. 758, fns. 5, 6). They urged that the Regional Board had shifted that obligation to the Operators as well. Finally, the Operators submitted a declaration **[****20]** from a county employee indicating the Regional Board had offered to pay the County to inspect industrial facilities *on behalf of* the Regional Board, but revoked that offer after including the inspection requirement in the Permit.

The EPA submitted comments to the Commission indicating that the challenged permit requirements were designed to reduce the discharge of pollutants to the "maximum extent practicable." Thus, the EPA urged the requirements fell "within the scope" of federal regulations and other EPA guidance regarding stormwater management programs. The Bay Area Stormwater Management Agencies Association, the League of California Cities, and the California State Association of Counties submitted comments urging that the challenged requirements were state, rather than federal, mandates.

3. *The commission's decision*

By a four-to-two vote, the Commission partially approved the test claims, concluding none of the challenged requirements

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[8] *Title 40 Code of Federal Regulations part 122.26(d)(2)(iv)(A)* provides that the proposed management plan in an operator's permit application must **[****17]** be based, in part, on a "description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls," and that, at a minimum, that description shall include, among other things, a "description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities." (*40 C.F.R. § 122.26(d)(2)(iv)(A)*, *(A)(3)*.)

[9] *Title 40 Code of Federal Regulations part 122.26(d)(2)(iv)(B)* provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of a program, including a schedule, to detect and remove … illicit discharges and improper disposal into the storm sewer," and that the proposed program shall include a "description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal **[****18]** separate storm sewer system." (*40 C.F.R. § 122.26(d)(2)(iv)(B)*, *(B)(1)*.)

[10] *Title 40 Code of Federal Regulations part 122.26(d)(2)(iv)(C)* provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system," and that the program shall "[i]dentify priorities and procedures for inspections and establishing and implementing control measures for such discharges." (*40 C.F.R. § 122.26(d)(2)(iv)(C)*, *(C)(1)*.)

[11] *Title 40 Code of Federal Regulations part 122.26(d)(2)(iv)(D)* provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system," which shall include, a "description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction **[****19]** activity, topography, and the characteristics of soils and receiving water quality." (*40 C.F.R. § 122.26(d)(2)(iv)(D)*, *(D)(3)*.)

were mandated by federal law. However, the Commission determined the Operators were not entitled to reimbursement for the inspection requirements because they had authority to levy fees to pay for the required inspections. Under *Government Code section 17556, subdivision (d)*, the constitutional **[****21]** reimbursement requirement does not apply if the local government has the authority to levy fees or assessments sufficient to pay for the mandated program or service.

4. *Petitions for writ of mandate*

The State challenged the Commission's determination that the requirements were state mandates. By cross-petition, the County and certain cities challenged the Commission's finding that they could impose fees to pay for the inspections.

The trial court concluded that, because each requirement fell "within the maximum extent practicable standard," they were federal mandates not **[*762]** subject to reimbursement. It granted the State's petition and ordered the Commission to issue a new statement of decision. The court did not reach the cross-claims relating to fee authority. Certain Operators appealed. [12] The Court of Appeal affirmed, concluding as a matter of law that the trash receptacle and inspection requirements were federal mandates.

## **[**366] II. Discussion**

A. *Standard of Review*

***HN1***[↑] Courts review a decision of **[****22]** the Commission to determine whether it is supported by substantial evidence. (*Gov. Code, § 17559*.) Ordinarily, when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same. (*County of Los Angeles v. Commission on State Mandates (1995) 32 Cal.App.4th 805, 814 [38 Cal. Rptr. 2d 304]* (*County of Los Angeles*).) **[***56]** However, the appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions. (*City of San Jose v. State of California (1996) 45 Cal.App.4th 1802, 1810 [53 Cal. Rptr. 2d 521]*.) The question whether a statute or executive order imposes a mandate is a question of law. (*Ibid*.) Thus, we review the entire record before the Commission, which includes references to federal and state statutes and regulations, as well as evidence of other permits and the parties' obligations under those permits, and independently determine whether it supports the Commission's conclusion that the conditions here were not federal mandates. (*Ibid*.)

B. *Analysis*

The parties do not dispute here that each challenged requirement is a new program or higher level of service. The question here is whether the requirements were mandated by a federal law or regulation.

1. *The federal mandate exception*

***CA(1)***[↑] **(1)** Voters added article XIII B to the California Constitution in 1979. Also known as the "'Gann limit,'" ***HN2***[↑] it "restricts the amounts **[****23]** state and local governments may appropriate and spend each year from the 'proceeds of taxes.'" (*City of Sacramento v. State of California (1990) 50 Cal.3d 51, 58–59 [266 Cal. Rptr. 139, 785 P.2d 522]* (*City of Sacramento*).) "Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at **[*763]** the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to *adopt and levy taxes*. Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*Id. at p. 59, fn. 1*.)

***CA(2)***[↑] **(2)** The "concern which prompted the inclusion of *section 6 in article XIII B* was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56 [233 Cal. Rptr. 38, 729 P.2d 202]*.) The reimbursement provision in *section 6* was included in recognition of the fact "that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments." (*County of San Diego v. State of California (1997) 15 Cal.4th 68, 81 [61 Cal. Rptr. 2d 134, 931 P.2d 312]* (*County of San Diego*).) ***HN3***[↑] The purpose of *section 6* is to prevent "the state from shifting financial responsibility for carrying out governmental functions to local agencies, which **[****24]** are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego, at p. 81*.) Thus, with certain exceptions, *section 6* "requires the state 'to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.'" (*County of San Diego, at p. 81*.)

As noted, reimbursement is not required if the statute or

[12] Appellants are the County and the Cities of Artesia, Azusa, Bellflower, Beverly Hills, Carson, Commerce, Covina, Downey, Monterey Park, Norwalk, Rancho Palo Verdes, Signal Hill, Vernon, and Westlake Village.

executive order imposes "a requirement that is mandated by a federal law or regulation," unless the state mandate imposes costs that exceed the federal mandate. (*Gov. Code, § 17556, subd. (c)*.) The question here is how to apply that **[***57]** exception when federal law requires a local agency to obtain a permit, authorizes the state to issue the permit, and provides the state discretion in determining which conditions are necessary to achieve a general standard established by federal law, and when state law allows the imposition of conditions that exceed the federal standard. Previous decisions **[**367]** of this court and the Courts of Appeal provide guidance.

In *City of Sacramento, supra, 50 Cal.3d 51*, this court addressed local governments' reimbursement claims for the costs of extending unemployment insurance protection **[****25]** to their employees. (*Id. at p. 59*.) Since 1935, the applicable federal law had provided powerful incentives for states to implement their own unemployment insurance programs. Those incentives included federal subsidies and a substantial federal tax credit for all corporations in states with certified federal programs. (*Id. at p. 58*.) California had implemented such a program. (*Ibid*.) In 1976, Congressional legislation required **[*764]** that unemployment insurance protection be extended to local government employees. (*Ibid*.) If a state failed to comply with that directive, it "faced [the] loss of the federal tax credit and administrative subsidy." (*Ibid*.) The Legislature passed a law requiring local governments to participate in the state's unemployment insurance program. (*Ibid*.)

Two local governments sought reimbursement for the costs of complying with that requirement. Opposing the claims, the state argued its action was compelled by federal law. This court agreed, reasoning that, if the state had "failed to conform its plan to new federal requirements as they arose, its businesses [would have] faced a new and serious penalty" of double taxation, which would have placed those businesses at a competitive disadvantage **[****26]** against businesses in states complying with federal law. (*City of Sacramento, supra, 50 Cal.3d at p. 74*.) Under those circumstances, we concluded that the "state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses." (*Ibid*.) Because "[t]he alternatives were so far beyond the realm of practical reality that they left the state '*without discretion*' to depart from federal standards," we concluded "the state acted in response to a federal 'mandate.'" (*Ibid*., italics added.)

*County of Los Angeles, supra, 32 Cal.App.4th 805*, involved a different kind of federal compulsion. In *Gideon v. Wainwright (1963) 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792]*, the United States Supreme Court held that states were required by the federal Constitution to provide counsel to indigent criminal defendants. That requirement had been construed to include "the right to the use of any experts that will assist counsel in preparing a defense." (*County of Los Angeles, at p. 814*.) The Legislature enacted *Penal Code section 987.9*, requiring local governments to provide indigent criminal defendants with experts for the preparation of their defense. (*County of Los Angeles, at p. 811, fn. 3*.) Los Angeles County sought reimbursement for the costs of complying with the statute. The state argued the statute's requirements were mandated by federal law.

The state prevailed. The Court of Appeal **[****27]** reasoned that, even without *Penal Code section 987.9*, the county would have been "responsible for providing ancillary services" under binding Supreme Court precedent. (*County of Los Angeles, supra, 32 Cal.App.4th at p. 815*.) *Penal Code section 987.9* merely codified an existing federal mandate. (*County of Los Angeles, at p. 815*.)

**[***58]** *Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564 [15 Cal. Rptr. 2d 547]* (*Hayes*) provides a contrary example. *Hayes* involved the former federal Education of the Handicapped Act (EHA; *20 U.S.C. § 1401 et seq.*). EHA was a "comprehensive measure designed to provide all handicapped children with basic educational opportunities." (*Hayes, at **[*765]** p. 1594*.) EHA required each state to adopt an implementation plan, and mandated "certain substantive and procedural requirements," but left "primary responsibility for implementation to the state." (*Hayes, at p. 1594*.)

***CA(3)***[↑] **(3)** Two local governments sought reimbursement for the costs of special education assessment hearings which were required under the state's adopted plan. The state argued the requirements imposed under its plan were federally mandated. The *Hayes* court rejected that argument. Reviewing **[**368]** the historical development of special education law (*Hayes, supra, 11 Cal.App.4th at pp. 1582–1592*), the court concluded that, so far as the state was concerned, the requirements established by the EHA were federally mandated (*Hayes, at p. 1592*). However, that conclusion "mark[ed] the starting point rather than the end of [its] consideration." **[****28]** (*Ibid*.) The court explained that, ***HN4***[↑] in determining whether federal law requires a specified function, like the assessment hearings, the focus of the inquiry is whether the "manner of implementation of the federal program was left to the *true discretion* of the state." (*Id. at p. 1593*, italics added.) If the state "has adopted an implementing statute or regulation pursuant to the federal mandate," and had "no 'true choice'" as to the manner of implementation, the local government is not entitled to reimbursement. (*Ibid*.) If, on the other hand, "the manner of implementation of the federal program was left to the true

discretion of the state," the local government might be entitled to reimbursement. (*Ibid*.)

According to the *Hayes* court, the essential question is how the costs came to be imposed upon the agency required to bear them. "If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." (*Hayes, supra, 11 Cal.App.4th at p. 1594*.) Applying those principles, the court concluded that, to the extent "the state implemented the [EHA] by freely **[****29]** choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to" reimbursement. (*Ibid*.)

CA(4)[] **(4)** From *City of Sacramento, County of Los Angeles*, and *Hayes*, we distill the following principle: HN5[] If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.

*Division of Occupational Safety & Health v. State Bd. of Control (1987) 189 Cal.App.3d 794 [234 Cal. Rptr. 661]* (*Division of Occupational Safety*) is **[*766]** instructive. The federal Occupational Safety and Health Act of 1970 (Fed. OSHA; *29 U.S.C. § 651 et seq.*) preempted states from regulating matters covered by Fed. OSHA unless a **[***59]** state had adopted its own plan and gained federal approval. (*Division of Occupational Safety, at p. 803*.) No state was obligated to adopt its own plan. But, if a state did so, the plan had to include standards at least as effective as Fed. OSHA's and extend those standards to state and local employees. California adopted its own plan, which was federally approved. **[****30]** The state then issued a regulation that, according to local fire districts, required them to maintain three-person firefighting teams. Previously, they had been permitted to maintain two-person teams. (*Division of Occupational Safety, at pp. 798–799*.) The local fire districts sought reimbursement for the increased level of service. The state opposed, arguing the requirement was mandated by federal law.

The court agreed with the fire districts. As the court explained, a Fed. OSHA regulation arguably required the maintenance of three-person firefighting teams. (*Division of Occupational Safety, supra, 189 Cal.App.3d at p. 802*.) However, that federal regulation specifically excluded local fire districts. (*Id. at p. 803*.) Had the state elected to be governed by *Fed. OSHA standards*, that exclusion would have allowed those fire districts to maintain two-person teams. (*Division of Occupational Safety, at p. 803*.) The conditions for approval of the *state's plan* required effective enforcement and coverage of public employees. But those conditions did not make the costs of complying with the state regulation federally mandated. "[T]he initial decision to establish … a federally approved [local] plan is an option which the state exercises **[**369]** freely." (*Ibid*.) In other words, the state was not "*compelled* to **[****31]** … extend jurisdiction over occupational safety to local governmental employers," which would have otherwise fallen under a federal exclusion. (*Ibid*.) Because the state "was not required to promulgate [the state regulation] to comply with federal law, the exemption for federally mandated costs does not apply." (*Id. at p. 804*.) [13]

*San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 [16 Cal. Rptr. 3d 466, 94 P.3d 589]* (*San Diego Unified*) provides another example. In *Goss v. Lopez (1975) 419 U.S. 565 [42 L. Ed. 2d 725, 95 S. Ct. 729]*, the United States Supreme Court held that if a school principal chose to recommend a student for expulsion, federal due process principles required the school district to give that student a hearing. *Education Code section 48918* provided for expulsion hearings. (*San Diego Unified, at p. 868*.) Under *Education Code section 48915*, a school principal had **[*767]** *discretion* to recommend expulsion under certain circumstances, but was compelled to recommend expulsion for a student who possessed a firearm. (*San Diego Unified, at p. 869*.) Federal law at the time did not require expulsion for a student who brought a gun to school. (*Id. at p. 883*.)

The school district argued it was entitled to reimbursement **[****32]** of *all* expulsion hearing costs. This court drew a distinction between discretionary and mandatory expulsions. We concluded the costs of hearings for *discretionary* expulsions flowed from a federal mandate. (*San Diego Unified, supra, 33 Cal.4th at pp. 884–890*.) **[***60]** [14] We declined, however, to extend that rule to the costs

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[13] In the end, the court held that the challenged state regulation did not obligate the local fire district to maintain three-person firefighting teams. Accordingly, the state regulation did not mandate an increase in costs. (***Division of Occupational Safety, supra, 189 Cal.App.3d at pp. 807–808***.)

[14] To the extent *Education Code section 48918* imposed requirements that went beyond the mandate of federal law, those requirements were merely incidental to the federal mandate, and at most resulted in "a de minimis cost." (***San Diego Unified, supra, 33 Cal.4th at p. 890***.) The State does not argue here that the costs of the challenged permit conditions were de minimis.

related to *mandatory* expulsions. Because it was *state law* that required an expulsion recommendation for firearm possession, all hearing costs triggered by the mandatory expulsion provision were reimbursable state-mandated expenses. (*San Diego Unified at pp. 881–883*.) As was the case in *Hayes*, the key factor was how the costs came to be imposed on the entity that was required to bear them. The school principal could avoid the cost of a federally mandated hearing by choosing not to recommend an expulsion. But, when a state statute *required* an expulsion recommendation, the attendant hearing costs did not flow from a federal mandate. (*San Diego Unified, supra, 33 Cal.4th at p. 881*.)

2. *Application*

Review of the Commission's **[****33]** decision requires a determination as to whether federal statutory, administrative, or case law imposed, or compelled the Regional Board to impose, the challenged requirements on the Operators.

It is clear federal law did not compel the Regional Board to impose these particular requirements. There was no evidence the state was compelled to administer its *own* permitting system rather than allowing the EPA do so under the CWA. (*33 U.S.C. § 1342(a)*.) In this respect, the case is similar to *Division of Occupational Safety, supra, 189 Cal.App.3d 794*. Here, as in that case, the State chose to administer its own program, finding it was "in the interest of the people of the state, *in order to avoid direct regulation by the federal government* of persons already subject to regulation" under state law. (*Wat. Code, § 13370, subd. (c)*, italics added.) Moreover, the Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum **[**370]** extent practicable. But the EPA's regulations gave the board discretion to determine which **[*768]** specific controls were necessary to meet that standard. (*40 C.F.R. § 122.26(d)(2)(iv)*.) This case is distinguishable from *City of Sacramento, supra, 50 Cal.3d 51*, where the state risked the loss of subsidies **[****34]** and tax credits for all its resident businesses if it failed to comply with federal legislation. Here, the State was not compelled by federal law to impose any particular requirement. Instead, as in *Hayes, supra, 11 Cal.App.4th 1564*, the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.

The State argues the Commission failed to account for the flexibility in the CWA's regulatory scheme, which conferred discretion on the State and regional boards in deciding what conditions were necessary to comply with the CWA. In exercising that discretion, those agencies were required to rely on their scientific, technical, and experiential knowledge. Thus, the 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, and the Commission should have deferred to **[***61]** the board's determination of what conditions federal law required.

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 **[****35]** more exacting than federal law required. (*City of Burbank, supra, 35 Cal.4th at pp. 627–628*.) It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.

We also disagree that the Commission should have deferred to the Regional Board's conclusion that the challenged requirements were federally mandated. That determination is largely a question of law. Had the Regional Board found, when imposing the disputed permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate. The board's legal authority to administer the CWA and its technical experience in water quality control would call on sister agencies as well as courts to defer to that finding.[15] The State, however, provides no authority for the proposition that, absent such a finding, the Commission should defer to a state agency as to whether requirements were state or federally mandated. Certainly, in a trial court action challenging the *board's authority* to impose specific permit conditions, the board's findings regarding what conditions satisfied the federal standard would be **[****36]** entitled to deference. (See, e.g., *City of Rancho Cucamonga v. Regional Water Quality Control Bd. (2006) 135 Cal.App.4th 1377, 1384 [38 Cal. Rptr. 3d 450]*, citing *Fukuda v. City of Angels (1999) 20 Cal.4th 805, 817–818 [85 Cal. Rptr. 2d 696, **[*769]** 977 P.2d 693]*.) Resolution of those questions would bring into play the particular technical expertise possessed by members of the regional board. In those circumstances, the party challenging the board's decision would have the burden of demonstrating its findings were not supported by substantial evidence or that the board otherwise abused its discretion. (*Rancho Cucamonga, at p. 1387*; *Building Industry, supra, 124 Cal.App.4th at pp. 888–889*.)

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

[15] Of course, this finding would be case specific, based among other things on local factual circumstances.

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.

HN6[↑] CA(5)[↑] **(5)** *Section 6* establishes a general rule requiring reimbursement of all state-mandated costs. *Government Code section 17556, subdivision (c)*, codifies an exception to that **[**371]** rule. Typically, the party claiming the applicability of an exception bears the burden of demonstrating that it applies. (See *Simpson Strong-Tie Co., Inc. v. Gore (2010) 49 Cal.4th 12, 23 [109 Cal. Rptr. 3d 329, 230 P.3d 1117]*; see also *Long Beach Police Officers Assn. v. City of Long Beach (2014) 59 Cal.4th 59, 67 [172 Cal. Rptr. 3d 56, 325 P.3d 460]*.) Here, the State must explain why **[****37]** federal law mandated these requirements, rather than forcing the Operators to prove the opposite. 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 **[***62]** intent in creating the Commission.

Moreover, the policies supporting article XIII B of the California Constitution and *section 6* would be undermined if the Commission were required to defer to the Regional Board on the federal mandate question. The central purpose of article XIII B is to rein in local government spending. (*City of Sacramento, supra, 50 Cal.3d at pp. 58–59*.) The purpose of *section 6* is to protect local governments from state attempts to impose or shift the costs of new programs or increased levels of service by entitling local governments to reimbursement. (*County of San Diego, supra, 15 Cal.4th at p. 81*.) Placing the burden on the State to demonstrate that a requirement is federally mandated, and thus excepted from reimbursement, serves those purposes.

CA(6)[↑] **(6)** Applying the standard of review described above, we evaluate the entire record and independently review the Commission's determination the challenged conditions were not federal mandates. We conclude the Commission was correct. These permit conditions were not **[****38]** federally mandated.
**[*770]**

(a) *The inspection requirements*

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. The CWA makes no mention of inspections. (*33 U.S.C. § 1342(p)(3)(B)(iii)*.) The regulations required the Operators to include in their permit application a description of priorities and procedures for inspecting certain industrial facilities and construction sites, but suggested that the Operators would have discretion in selecting which facilities to inspect. (See *40 C.F.R. § 122.26(d)(2)(iv)(C)(1)*.) The regulations do not mention commercial facility inspections at all.

HN7[↑] CA(7)[↑] **(7)** Further, as the Operators explained, state law made the *Regional Board* responsible for regulating discharges of waste within its jurisdiction. (*Wat. Code, §§ 13260*, *13263*.) This regulatory authority included the power to "inspect the facilities of any person to ascertain whether … waste discharge requirements are being complied with." (*Wat. Code, § 13267, subd. (c)*.) Thus, state law imposed an overarching mandate that the Regional Board inspect the facilities and sites.

In addition, federal law and practice required the Regional Board to inspect all industrial facilities and **[****39]** construction sites. Under the CWA, the State Board, as an issuer of NPDES permits, was required to issue permits for stormwater discharges "associated with industrial activity." (*33 U.S.C. § 1342(p)(3)(A)*.) The term "industrial activity" includes "construction activity." (See *40 C.F.R. § 122.26(b)(14)(x)*.) The Operators submitted evidence that the State Board had satisfied its obligation by issuing a general industrial activity stormwater permit and a general construction activity stormwater permit. Those statewide permits imposed controls designed to reduce pollutant discharges from industrial facilities and construction sites. Under the CWA, those facilities and sites could operate under the statewide permits rather than obtaining site-specific pollutant discharge permits.

The Operators showed that, in those statewide permits, the State Board had placed responsibility for inspecting facilities and sites on the *Regional Board*. The Operators submitted letters from the EPA indicating the State and regional boards were responsible for enforcing the terms of the statewide permits. The Operators also noted the State Board was authorized **[***63]** to charge a fee to facilities and sites that subscribed to the statewide permits (*Wat. Code, § 13260, subd. (d)*), **[**372]** and that a portion of **[****40]** that fee was earmarked to pay the Regional Board for "inspection and regulatory compliance issues." (*Wat. Code, § 13260, subd. (d)(2)(B)(iii)*). Finally, there was evidence the Regional Board offered to pay the County to inspect industrial facilities. There would have been little reason to make that offer if federal law required the County to inspect those facilities.
**[*771]**

This record demonstrates that the Regional Board had primary responsibility for inspecting these facilities and sites. It

shifted that responsibility to the Operators by imposing these Permit conditions. The reasoning of *Hayes, supra, 11 Cal.App.4th 1564*, provides guidance. There, the EHA required the state to provide certain services to special education students, but gave the state discretion in implementing the federal law. (*Hayes, at p. 1594*.) The state exercised its "true discretion" by selecting the specific requirements it imposed on local governments. As a result, the *Hayes* court held the costs incurred by the local governments were state-mandated costs. (*Ibid*.) Here, state and federal law required the Regional Board to conduct inspections. The Regional Board exercised its discretion under the CWA, and shifted that obligation to the Operators. That the Regional Board did so while exercising its **[****41]** permitting authority under the CWA does not change the nature of the Regional Board's action under *section 6*. Under the reasoning of *Hayes*, the inspection requirements were not federal mandates.

The State argues the inspection requirements were federally mandated because the CWA required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required. That 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. [16] As explained, the evidence before the Commission showed the opposite to be true.

(b) *The trash receptacle reqiurement*

The Commission concluded the trash receptacle requirement was not a federal mandate **[****42]** because neither the CWA nor the regulation cited by the State explicitly required the installation and maintenance of trash receptacles. The State contends the requirement was mandated by the CWA and by the EPA regulation that directed the Operators to include in their application a "description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems." (*40 C.F.R. § 122.26(d)(2)(iv)(A)(3)*.)

The Commission's determination was supported by the record. 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 **[*772]** those practices conditions of the permit. (*40 C.F.R. § 122.26(d)(2)(iv)*.) No regulation cited by the State required trash receptacles at **[***64]** transit stops. In addition, there was evidence that the EPA had issued permits to other municipal storm sewer systems in Anchorage, Boise, Boston, Albuquerque, and Washington, D.C., that did not require trash receptacles at transit stops. The fact the EPA itself had issued permits in other cities, but did not include the trash receptacle condition, undermines the argument **[****43]** that the requirement was federally mandated.

(c) *Conclusion*

Although we have upheld the Commission's determination on the federal mandate question, the State raised other arguments in its writ petition. Further, the issues presented in the Operators' cross-petition were not addressed by either the trial court or the Court of Appeal. We remand the matter so those issues can be addressed in the first instance.

**[**373] III. Disposition**

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with our opinion.

Cantil-Sakauye, C. J., Werdegar, J., and Chin, J., concurred.

**Concur by:** Cuellar (In Part)

**Dissent by:** Cuellar (In Part)

## Dissent

**CUÉLLAR, J.,** Concurring and Dissenting.—A local government is entitled to reimbursement from the state when the Legislature or a state agency requires it to provide new programs or increased service. (*Cal. Const., art. XIII B, § 6, subd. (a)*.) But one crucial exception coexists with this rule. It applies where the new program or increased service is mandated by a federal statute or regulation. (*Gov. Code, § 17556, subd. (c)*.) We consider in this case whether certain conditions to protect water quality included in a permit from the Regional Water Quality Control Board, Los Angeles Region (Regional Board or Board)—specifically, installation and maintenance of trash receptacles **[****44]** at transit stops, as well as inspections of certain commercial and industrial facilities and construction sites—constitute state mandates subject to reimbursement, or federal mandates within the statutory reimbursement exception.

What the majority concludes is that federal law did not

[16] The State also relied on a 2008 letter from the EPA indicating that the requirements to inspect industrial facilities and construction sites fell within the maximum extent practicable standard under the CWA. That letter, however, does not indicate that federal law required municipal storm sewer system operators to inspect all industrial facilities and construction sites within their jurisdictions.

compel imposition of the conditions, and that the local agencies would not necessarily have been required to comply with them had they not been imposed by the state. In doing so, the majority upholds and treats as correct a decision by the Commission on State Mandates (the Commission) that is flawed in its approach and far too parsimonious in its analysis. This is no small feat: not **[*773]** only must the majority discount any expertise the Regional Board might bring to bear on the mandate question (see maj. opn., *ante*, at pp. 768–769), but it must also overlook the Commission's reliance on an overly narrow analytical framework and prop up the Commission's decision with evidence on which the agency *could have relied*, rather than that on which it did (see *id*. at pp. 770–772).

Moreover, when the majority considers whether the permit conditions are indeed federally mandated, it purports to apply de novo review to the Commission's legal **[****45]** determination. (See maj. opn., *ante*, at pp. 762, 768, 770.) What it actually applies seems far more deferential to the Commission's decision—something akin to substantial evidence review—despite the Commission's own failure in affording deference **[***65]** to the Regional Board and, more generally, its reliance on the wrong decisionmaking framework. (Cf. *People v. Barnwell (2007) 41 Cal.4th 1038, 1052 [63 Cal. Rptr. 3d 82, 162 P.3d 596]* ["A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question"].) Indeed, what the majority overlooks is that the Commission itself should have considered the effect of the evidence on which the majority now relies in deciding whether the challenged permit conditions were necessary to comply with federal law. And in doing so, the Commission should have extended a measure of deference to the Regional Board's expertise in administering the statutory scheme. (See *County of Los Angeles v. State Water Resources Control Bd. (2006) 143 Cal.App.4th 985, 997 [50 Cal. Rptr. 3d 619]* (*State Water Board*).)

Because the Commission failed to do so, and because the Commission's interpretation of the federal Clean Water Act (the CWA; *33 U.S.C. § 1251 et seq.*) failed to account for the **[****46]** complexities of the statute, I would reverse the Court of Appeal's judgment and remand with instructions for the Commission to reconsider its decision. So I concur in the majority's judgment reversing the Court of Appeal, but dissent from its conclusion upholding the Commission's decision rather than remanding the matter for further proceedings.

**I.**

To determine whether it is the state rather than local governments that should bear **[**374]** the entirety of the financial burden associated with a new program or increased service, the Commission must examine the nature of the federal scheme in question. That scheme is the CWA, a statute Congress amended in 1972 to establish the National Pollutant Discharge Elimination System (the NPDES) as a means of achieving and enforcing limitations on **[*774]** pollutant discharges. (See *EPA v. State Water Resources Control Board (1976) 426 U.S. 200, 203–204 [48 L.Ed.2d 578, 96 S.Ct. 2022]*.) The role envisioned for the states under the NPDES is a major one, encompassing both the opportunity to assume the primary responsibility for the implementation and enforcement of federal effluent discharge limitations by issuing permits as well as the discretion to enact requirements that are more onerous than the federal standard. (See *33 U.S.C. §§ 1251(b)*, *1342(b)*.)

But states undertaking such implementation **[****47]** must do so in a manner that complies with regulations promulgated by the Environmental Protection Agency (the EPA), as well as the CWA's broad provisions (including the "maximum extent practicable" standard (*33 U.S.C. § 1342(p)(3)(B)(iii)*)), and subject to the EPA's continuing revocation authority (see *id*., *§ 1342(c)(3)*). Despite the breadth of the requirements the statute imposes on states assuming responsibility for permitting enforcement and the expansive nature of the EPA's revocation authority, neither the statute nor its implementing regulations include a safe harbor provision establishing a minimum level of compliance with the federal standard—an absence the majority tacitly acknowledges. (See maj. opn., *ante*, at p. 767 ["the Regional Board was not required by federal law to impose any specific permit conditions"].) Instead, implementation of the federal mandate requires the state agency—here, the Regional Board—to exercise technical judgments about the feasibility of alternative permitting conditions **[***66]** necessary to achieve compliance with the federal statute.

With no statutory safe harbor that the Regional Board could have relied on to ensure the EPA's approval of the state permitting process, the Board interpreted **[****48]** the federal standard in light of the statutory text, implementing regulations, and its technical appraisal of potential alternatives. In discharging its own role, the Commission was then bound to afford the Regional Board a measure of "sister-agency" deference. (See *Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 7 [78 Cal. Rptr. 2d 1, 960 P.2d 1031]* [explaining that "the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation"].) In this case, the Regional Board informed

localities that, in its view, the various permit conditions it imposed would satisfy the maximum extent practicable standard. The EPA agreed the requirements were within the scope of the federal standard. The Regional Board's judgment that these conditions will control pollutant discharges to the extent required by federal law is at the core of the agency's institutional expertise. That expertise merits a measure of deference because the Regional Board's ken includes not only its greater familiarity with the CWA (relative to other entities), but also technical knowledge relevant to judgments about the water quality consequences **[****49]** of particular permitting conditions relevant to the provisions of the **[*775]** CWA. (See, e.g., *33 U.S.C. § 1342(p)(3)(B)(iii)* [requiring that permits include "management practices, control techniques and system, design and engineering methods, and such other provisions as … the State determines appropriate for the control of such pollutants"].) Casting aside the Regional Board's expertise on the issue at hand, the majority nonetheless upholds the Commission's ruling.

Remand to the Commission would have been the more appropriate course for multiple reasons. First, the Commission applied the wrong framework for its analysis. It failed to consider all the evidence relevant to whether the permit conditions were necessary for compliance with federal law. The Commission compounded its error by relying on an interpretation of the CWA that misconstrues the federal statutory scheme governing the state permitting process.

**[**375]** In particular, the Commission treated the problem as essentially a simple matter of searching the statutory text and regulations for precisely the same terms used by the Regional Board's permit conditions. Unless the requirement in question is referenced explicitly in a federal statutory or regulatory provision, **[****50]** the Commission's analysis suggests, the requirement cannot be a federal mandate. With respect to trash receptacles, the Commission stated: "Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that 'mandate costs that exceed the mandate in the federal law or regulation.' " And with respect to industrial facility inspections, the Commission said this: "Inasmuch as the federal regulation (*40 CFR § 122.26 (c)*) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (*40 CFR § 122.26 (d)(2)(iv)(D)*) does not expressly require those inspections to be performed by the county or cities (or the 'owner or operator of the discharge') the Commission finds that the state has freely chosen to impose **[***67]** these activities on the permittees." (Fn. omitted.)

Existing law does not support this method of determining what constitutes a federal mandate. Instead, our past decisions emphasize the need to consider the implications of multiple statutory provisions and broader statutory context when interpreting federal law **[****51]** to determine if a given condition constitutes a federal mandate. (See *City of Sacramento v. State of California (1990) 50 Cal.3d 51, 76 [266 Cal. Rptr. 139, 785 P.2d 522]* (*City of Sacramento*); see also *San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859, 890 [16 Cal. Rptr. 3d 466, 94 P.3d 589]* ["challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, *in context*, de minimis—should be treated as part and parcel of the underlying federal mandate" (italics added)].) In contrast, **[*776]** the Commission's overly narrow approach to determining what constitutes a federal mandate risks creating a standard that will never be met so long as the state retains any shred of discretion to implement a federal program. It cannot be that so long as a federal statute or regulation does not expressly require every permit term issued by a state agency, then the permit is a state, rather than a federal, mandate. But this is precisely how the Commission analyzed the issue—an analysis that, remarkably, the majority does not even question. Instead, the majority combs the record for evidence that could have supported the result the Commission reached. In so doing, the majority implicitly acknowledges that the Commission's approach to resolving the question at the heart of this case was deficient.

But if the Commission applied the wrong framework **[****52]** for its analysis, the right course is to remand. Doing so would obviate the need to cobble together scattered support for a decision by the Commission that was premised, in the first instance, on the Commission's own misconstrual of the inquiry before it. Instead, we should give the Commission an opportunity to reevaluate its conclusion in light of the entire record and to, where appropriate, solicit further information from the parties to shed light on what permit conditions are necessary for compliance with federal law.

The potential consequences of allowing the Commission to continue on its present path are quite troubling. For if the law were as the Commission suggests, the state would be unduly discouraged from participating in federal programs like the NPDES—even though participation might otherwise be in California's interest—if the state knows ex ante that it will be unable to pass along the expenses to the local areas that experience the most costs and benefits from the mandate at issue. Our law on unfunded mandates does not compel such a result. Nor is there an apparent prudential rationale in support of it.

The Commission's approach also fails to appreciate the EPA's

role **[****53]** in implementing (through its interpretation and enforcement of the CWA) statutory requirements that the CWA describes in relatively broad terms. Indeed, what may be "practicable" in Los Angeles **[**376]** may not be in San Francisco, much less in Kansas City or Detroit. (See *Building Industry Assn. of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 889 [22 Cal. Rptr. 3d 128]* (*Building Industry Assn.*) [explaining that "the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness"].) It also suggests a lack of understanding of two interrelated matters on which the Regional **[***68]** Board likely has expertise: the consequences of the measures included as permit conditions relative to any **[*777]** alternatives and the interpretation of a complex federal statute governing regulation of the environment.

Second, beyond failing to consider all the relevant evidence bearing on the necessity of the imposed permit conditions, the Commission failed to extend any meaningful deference to the Regional Board's conclusions—even though such deference was warranted given that the nature of the decisions involved in interpreting the CWA included evaluating **[****54]** appropriate alternatives and determining which of those were necessary to satisfy the federal standard. (See *State Water Board, supra, 143 Cal.App.4th at p. 997* ["we defer to the regional board's expertise in construing language which is not clearly defined in statutes involving pollutant discharge into storm drain sewer systems"]; *City of Rancho Cucamonga v. Regional Water Quality Control Bd. (2006) 135 Cal.App.4th 1377, 1384 [38 Cal. Rptr. 3d 450]* (*Rancho Cucamonga*) ["consideration [should be] given to the [regional board's] interpretations of its own statutes and regulations"]; *Building Industry Assn., supra, 124 Cal.App.4th at pp. 879–880, fn. 9* ["we do consider and give due deference to the Water Boards' statutory interpretations [of the CWA] in this case"]; see also *Building Industry Assn. v. Bay Area Air Quality Management Dist. (2015) 62 Cal.4th 369, 389–390 [196 Cal. Rptr. 3d 94, 362 P.3d 792]* [explaining that "an agency's expertise and technical knowledge, especially when it pertains to a complex technical statute, is relevant to the court's assessment of the value of an agency interpretation"].) In the direct challenge to the permit at issue here, the local agencies argued that the Regional Board exceeded even those requirements associated with the maximum extent practicable standard, an argument the appellate court rejected in an unpublished section of its opinion. Because of its failure to afford any deference to the Regional Board or to conduct an analysis more consistent with the relevant standard of review, the Commission essentially **[****55]** forces the Board to defend its decision twice: once on direct challenge and a second time before the Commission.

Conditions as prosaic as trash receptacle requirements initially may not seem to implicate the Regional Board's expertise. Yet its unique experience and technical competence matter even with respect to these conditions, because the use of such conditions implicates a decision not to use alternatives that might require greater conventional expert judgment to evaluate. Moreover, the Regional Board is likely to accumulate a distinct and greater degree of knowledge regarding issues such as the reactions of stakeholders to different requirements, and related factors relevant to determining which conditions are necessary to satisfy the CWA's maximum extent practicable standard.

The Commission acknowledged that the State Water Resources Control Board—as well as the EPA—believed the permit requirements did not exceed **[*778]** this federal standard. "The comments of the State Water Board and U.S. EPA," the Commission noted, "assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations." But the Commission afforded these conclusions **[****56]** no clear deference in determining whether the requirements were state mandates.

Nor is the majority correct in suggesting that the Commission had only a limited responsibility, if it had one at all, to extend any deference to the Regional Board. (See maj. opn., *ante*, at pp. 768–769.) **[***69]** The Regional Board's judgment as to whether the imposed permit **[**377]** conditions were necessary to comply with federal law was a prerequisite to the Commission's own task, which was to review the Board's determination in light of all the relevant evidence. To the extent ambiguity exists as to whether the Regional Board's conclusions incorporated any findings that these conditions were necessary to meet the federal standard (see *id.* at pp. 768–769), remand to clarify the Board's position is in order. By instead simply upholding the Commission's conclusion without remand, the majority displaces any meaningful role for the Regional Board's expert judgment.

The majority does so even though courts have routinely emphasized the pivotal role regional boards play in interpreting the CWA's intricate mandate. (See *State Water Board, supra, 143 Cal.App.4th at p. 997*; *Rancho Cucamonga, supra, 135 Cal.App.4th at p. 1384*.) And for good reason: If the Regional Board's judgment is that the trash receptacle and inspection requirements are necessary **[****57]** to control pollutant discharges to the maximum extent practicable, such a conclusion is well within the purview of its expertise. Unsurprisingly, then, we have never concluded that the technical knowledge relevant to

interpreting the requirements of the CWA—a statute that lacks a safe harbor and where discerning what phrases such as maximum extent practicable mean given existing conditions and technology is complex—lies beyond the ambit of the Regional Board's expertise, or otherwise proves distinct from the sort of expertise that merits deference.

Third, the Commission devoted insufficient attention in its analysis to the role of states in implementing the CWA, and to how that role can be harmonized with the significant protections against unfunded mandates that the state Constitution provides. (See *Cal. Const., art. XIII B, § 6, subd. (a)*.) By allowing states to assume such an important role in implementing its provisions, the CWA reflects principles of cooperative federalism. (See *33 U.S.C. §§ 1251(b)*, *1342(b)*; see also *Boise Cascade Corp. v. EPA (9th Cir. 1991) 942 F.2d 1427, 1430* ["The federal-state relationship established by the [Clean Water] Act is … illustrated in Congress' goal of encouraging states to 'assume the major role in the operation of the NPDES program' "].) In accordance with the CWA's **[****58]** express provisions, California chose to assume **[*779]** the responsibility for implementation of the NPDES program in the state—a role that requires further specification of permitting conditions. (See *33 U.S.C. § 1342(c)(3)* [states must administer permitting programs "in accordance with requirements of this section," including compliance with the maximum extent practicable standard].) In the process, the state must comply with the constitutional protections against unfunded mandates requiring reimbursement of localities if permit conditions exceed what is necessary to comply with the relevant federal mandate. But given the nature of the relevant CWA provisions—and particularly the maximum extent practicable standard—it is wrong to assume that the conditions at issue in this case exceed what is necessary to comply with the CWA simply because neither the statute nor its regulations explicitly mention those conditions. The consequence of that assumption, moreover, risks discouraging the state from assuming cooperative federalism responsibilities—and may even encourage the state to withdraw from administering the NPDES. Indeed, counsel for the state indicated at oral argument that if the Commission's reasoning **[****59]** were upheld—and the state were required to foot the bill for any **[***70]** conditions not expressly mentioned in the applicable federal statutes or regulations—it might think twice about entering into such arrangements of cooperative federalism.

In light of these concerns with the Commission's approach to this case, it is difficult to see the basis for—or utility of—upholding the Commission's decision, even under the inscrutable standard of review the majority employs. (See *California Youth Authority v. State Personnel Bd. (2002) 104 Cal.App.4th 575, 586 [128 Cal. Rptr. 2d 514]* [substantial evidence review requires that all evidence be considered, including evidence that does not support the agency's decision]; see also *Sierra Club v. U.S. Army Corps of Engineers (2d Cir. 1983) 701 F.2d 1011, 1030* ["the court may properly be skeptical as to whether an [agency report's] conclusions have a substantial basis in fact if the responsible agency has **[**378]** apparently ignored the conflicting views of other agencies having pertinent expertise"].) The better course, in my view, would be for us to articulate the appropriate standard for evaluating the question whether these permit conditions are state mandates and then remand for the Commission to apply it in the first instance.

**II.**

The Commission relied on a narrow approach that only compares the terms of a permit with the text of the CWA **[****60]** and its implementing regulations. Instead, the Commission should have employed a more flexible methodology in determining whether the permit conditions were federally mandated. Such a flexible approach accords with our prior case law. (See *City of Sacramento, supra, 50 Cal.3d at p. 76* [whether local government appropriations are **[*780]** federally mandated and therefore exempt from taxing and spending limitations under *§ 9, subd. (b), of art. XIII B of the Cal. Const.* depends on, inter alia, the nature and purpose of the federal program, whether its design suggests an intent to coerce, when state or local participation began, and the legal and practical consequences of nonparticipation or withdrawal].) Moreover, it would have the added benefit of not discouraging the state from participating in ventures of cooperative federalism.

The majority may be correct that the facts of *City of Sacramento* are distinguishable. (See maj. opn., *ante*, at p. 768.) In that case, the state risked forsaking subsidies and tax credits for its resident businesses if it failed to comply with federal law requiring that unemployment insurance protection be extended to local government employees. (*Id.* at p. 764.) Here, in contrast, the negative consequences of failing to comply with federal law may seem less severe, at least **[****61]** in fiscal terms: the EPA may determine that the state is not in compliance with the CWA and reassert authority over permitting. (See *33 U.S.C. § 1342(c)(3)*.) But *City of Sacramento* nonetheless remains relevant, even though a precisely comparable level of coercion may not exist here. The flexible approach we articulated in that case remains the best way to ensure that some weight is given to the Regional Board's technical expertise, and the conclusions resulting therefrom, while also taking account of the cooperative federalism arrangements built into the CWA.

So instead of adopting an approach foreign to our precedent, the Commission should have begun its analysis with the statutory and regulatory text—and then it should have considered other relevant materials and record evidence bearing on whether the permit conditions are necessary **[***71]** to satisfy federal law. Crucially, such evidence includes how the federal regulatory scheme operates in practice. The Commission could have examined, for instance, previous permits issued by the EPA in similarly situated jurisdictions, comparing them to the inspection and trash receptacle requirements the Regional Board imposed here and giving due consideration to the EPA's **[****62]** conclusion that the maximum extent practicable standard is applied in a highly site-specific and flexible manner in order to account for unique local challenges and conditions. (See *64 Fed.Reg. 68722, 68754 (Dec. 8, 1999)*.) The Commission could also have considered whether, instead of identifying permitting conditions necessary to comply with the CWA, the state shifted onto local governments responsibility to conduct inspections or provide trash receptacles. The majority wisely notes that these are factors the Commission *could* have examined. (See maj. opn., *ante*, at pp. 770–772.) But the Commission mentioned this evidence only briefly, failing to grapple in any meaningful way with its implications for the issue at hand. We should allow the Commission an opportunity to do so in the first instance.
**[*781]**

The Commission should have also accorded appropriate deference to the Regional Board's conclusions regarding how best to comply with the federal maximum extent practicable standard. One way to ensure that such deference is given would be to place on the party seeking reimbursement the burden of demonstrating that the challenged permit conditions clearly exceed the federal standard, or that they were otherwise unnecessary **[**379]** to reduce **[****63]** pollutant discharges to the maximum extent practicable. Doing so would make sense where the state is implementing a federal program that envisions routine state participation, the federal program does not itself define the minimum degree of compliance required, and the state's implementing agency reasonably determines in its expertise that certain conditions are necessary to comply with the applicable federal standard.

* * *

The Commission's decision—and the approach that produced it—fails to accord with existing law and with the nature of the applicable federal scheme. The state is not responsible for reimbursing localities for permit conditions that are necessary to comply with federal law, a circumstance that renders interpretation of the CWA central to this case. A core principle of the CWA is to facilitate cooperative federalism, by allowing states to take on a critical responsibility in exchange for compliance with a set of demanding standards overseen by a federal agency capable of withdrawing approval for noncompliance. (See *Arkansas v. Oklahoma (1992) 503 U.S. 91, 101 [117 L.Ed.2d 239, 112 S.Ct. 1046]* ["The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain **[****64]** the chemical, physical, and biological integrity of the Nation's waters' "]; *Shell Oil Co. v. Train (9th Cir. 1978) 585 F.2d 408, 409* ["Shell's complaint must be read against the background of the cooperative federal-state scheme for the control of water pollution"].) The Commission failed to interpret the statute in light of nuances in its text and structure. And it failed to offer even a modicum of deference to the Regional Board's interpretation, despite the Board's clear expertise that the technical nature of the questions necessary to interpret the scope of the CWA demands.

Accordingly, I would remand the matter to the Court of Appeal with directions that it instruct the Commission to reconsider its decision. On reconsideration, the Commission should appropriately defer to the **[***72]** Regional Board, consider all relevant evidence bearing on the question at hand, and ensure the evidence clearly shows the challenged permit conditions were not necessary to comply with the federal mandate. This is the standard that most **[*782]** thoroughly reflects our existing law and the nature of the CWA. Any dilution of it exacerbates the risk of undermining the nuanced federal-state arrangement at the heart of the CWA.

Liu, J., and Kruger, J., concurred.

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# ATTACHMENT NO. 17

Neutral
As of: January 2, 2018 9:15 PM Z

# *Department of Finance v. Commission on State Mandates*

Court of Appeal of California, Third Appellate District

December 19, 2017, Opinion Filed

C070357

**Reporter**
2017 Cal. App. LEXIS 1134 *

DEPARTMENT OF FINANCE et al., Plaintiffs and Respondents, v. COMMISSION ON STATE MANDATES, Defendant; COUNTY OF SAN DIEGO et al., Real Parties in Interest and Appellants.

**Prior History: [*1]** APPEAL from a judgment of the Superior Court of Sacramento County, No. 34-2010-80000604-CU-WM-GDS. Allen Sumner, Judge.

*County of Los Angeles v. Commission on State Mandates, 150 Cal. App. 4th 898, 58 Cal. Rptr. 3d 762, 2007 Cal. App. LEXIS 711 (Cal. App. 2d Dist., May 10, 2007)*

**Disposition:** Reversed with directions.

## Core Terms

requirements, regional board, regulation, permittees, practicable, federal mandate, pollutants, federal law, maximum extent, conditions, runoff, state mandate, regional, management program, permit condition, permit application, permit requirement, discharges, watershed, controls, mandated, urban, reimbursement, subvention, programs, management practices, collaborate, inspections, stormwater, permits

## Case Summary

**Overview**

HOLDINGS: [1]-Because no federal law, regulation, or administrative case authority expressly mandated a regional water quality control board to impose the specific requirements it included in a municipal storm water discharge permit, the requirements were not federal mandates under *Gov. Code, § 17556, subd. (c)*, but were state mandates under *Cal. Const., art. XIII B, § 6, subd. (a)*, requiring the state to provide a subvention of funds to reimburse the permittees for the costs of compliance; [2]-Although the board made a finding that the permit requirements were necessary to reduce pollutant discharge to the maximum extent practicable, thus meeting a standard imposed by the Clean Water Act, *33 U.S.C. § 1251 et seq.*, the board imposed requirements in excess of those expressly required by federal law and thereby exercised its discretion.

**Outcome**
Reversed and remanded.

## LexisNexis® Headnotes

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

***HN1*** **Congressional Duties & Powers, Spending & Taxation**

When the Legislature or a state agency requires a local government to provide a new program or higher level of service, the state must reimburse that local government for the costs of the program or increased level of service. *Cal. Const., art. XIII B, § 6, subd. (a)*.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Governments > State & Territorial
Governments > Finance

***HN2*** **Congressional Duties & Powers, Spending & Taxation**

Under an exception to the subvention requirement of *Cal. Const., art. XIII B, § 6, subd. (a)*, reimbursement is not required if a statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in

costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. *Gov. Code, § 17556, subd. (c)*.

Administrative Law > Judicial Review > Reviewability > Questions of Law

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

***HN3*** **Reviewability, Questions of Law**

The question whether a statute or executive order imposes a mandate for purposes of *Cal. Const., art. XIII B, § 6, subd. (a)*, is a question of law. Thus, the appellate court reviews the entire administrative record and independently determines whether it supports a conclusion as to whether conditions were federal mandates. The court must determine whether federal statutory, administrative, or case law imposed, or compelled the imposition of, the challenged requirements.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

***HN4*** **Congressional Duties & Powers, Spending & Taxation**

Certain regulatory standards imposed by the federal government under cooperative federalism schemes are federal mandates and not reimbursable under *Cal. Const., art. XIII B, § 6*.

Business & Corporate Compliance > ... > Clean Water Act > Enforcement > Discharge Permits

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Evidence > Burdens of Proof > Allocation

***HN5*** **Enforcement, Discharge Permits**

To determine whether a requirement imposed under the Clean Water Act, *33 U.S.C. § 1251 et seq.*, and state law on a National Pollutant Discharge Elimination System permit is a federal mandate, a court applies the following test: If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a true choice, the requirement is not federally mandated. If the state in opposition to a petition asserting that the requirement is a compensable state mandate under *Cal. Const., art. XIII B, § 6*, contends its requirements are federal mandates, it has the burden to establish the requirements are in fact mandated by federal law.

Business & Corporate Compliance > ... > Clean Water Act > Enforcement > Discharge Permits

***HN6*** **Enforcement, Discharge Permits**

The "maximum extent practicable" standard of the Clean Water Act, *33 U.S.C. § 1251 et seq.*, by its nature is discretionary and does not by itself impose a federal mandate for purposes of *Cal. Const., art. XIII B, § 6*. The United States Environmental Protection Agency's regulations give a regional water quality control board discretion to determine which specific controls are necessary to meet that standard. *40 C.F.R. § 122.26(d)(2)(iv)*.

Business & Corporate Compliance > ... > Clean Water Act > Enforcement > Discharge Permits

***HN7*** **Enforcement, Discharge Permits**

*40 C.F.R. § 122.26 (d)(2)(iv)* implies a regional water quality control board has wide discretion to determine how best to condition a permit in order to meet the "maximum extent practicable" standard.

Business & Corporate Compliance > ... > Clean Water Act > Enforcement > Discharge Permits

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

***HN8*** **Enforcement, Discharge Permits**

To be a federal mandate for purposes of *Cal. Const., art. XIII B, § 6*, a federal law or regulation must expressly or explicitly require the specific condition imposed in a permit. The "maximum extent practicable" standard of the Clean Water Act, *33 U.S.C. § 1251 et seq.*, does not preclude the state from making a choice; rather, it gives the state discretion to make a choice.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN9[] Discharge Permits, Storm Water Discharges**

Except where a regional water quality control board finds the conditions imposed are the only means by which the "maximum extent practicable" standard of the Clean Water Act, *33 U.S.C. § 1251 et seq.*, can be met, the state exercises a true choice by determining what controls are necessary to meet the standard. That a board found the permit requirements necessary to meet the standard establishes only that the board exercised its discretion, absent a finding its conditions are the only means by which the permittees can meet the standard. Its use of the word "necessary" does not equate to finding the permit requirement is the only means of meeting the standard. It is not the case that, because a condition is in the permit, it is, ipso facto, required by federal law. By law, a regional board cannot issue a National Pollutant Discharge Elimination System permit to a municipal separate storm sewer system without finding it has imposed conditions necessary to carry out the provisions of the Clean Water Act. *33 U.S.C. § 1342(a)(1)*. That requirement includes imposing conditions necessary to meet the "maximum extent practicable" standard.

Business & Corporate Compliance > ... > Clean Water Act > Enforcement > Discharge Permits

**HN10[] Enforcement, Discharge Permits**

The case law has rejected an argument that a permit application somehow limits a regional water quality control board's discretion or denies it a true choice. While the operators are 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. *40 C.F.R. § 122.26(d)(2)(iv)*.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN11[] Discharge Permits, Storm Water Discharges**

The United States Environmental Protection Agency's regulations require permittees to describe in their permit application their practices for operating and maintaining streets and procedures for reducing the impact of discharges from storm sewer systems. 40 C.F.R. § 122.26(d)(2)(iv)(A)(3). This regulation does not expressly require the scope and detail of street sweeping and facility maintenance.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN12[] Discharge Permits, Storm Water Discharges**

The United States Environmental Protection Agency's regulations require a permit applicant to include in its application a description of planning procedures to develop and enforce controls to reduce the discharge of pollutants from municipal separate storm sewer systems which receive discharges from areas of new development and significant redevelopment. *40 C.F.R. § 122.26(d)(2)(iv)(A)(2)*. This regulation does not require a hydromodification plan. Nor does it restrict a regional water quality control board from exercising its discretion to require a specific type of plan to address the impacts from new development.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN13[] Discharge Permits, Storm Water Discharges**

Federal regulations require a permit application for a municipal separate storm sewer system to include descriptions of proposed educational activities to reduce pollutants associated with the application of pesticides, herbicides and fertilizer, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(A)(6); to facilitate the proper management and disposal of used oil and toxic materials under *§ 122.26(d)(2)(iv)(B)(6)*; and to reduce pollutants in storm runoff from construction sites. *§ 122.26(d)(2)(iv)(D)(4)*.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN14[] Discharge Permits, Storm Water Discharges**

*40 C.F.R. § 122.26(d)(2)(iv)* authorizes permit applicants to propose a program that imposes controls beyond a single jurisdiction. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN15[] Discharge Permits, Storm Water Discharges**

40 C.F.R. § 122.26(d)(2)(iv) does not mandate watershed and regional management requirements. It leaves to the regional water quality control board the discretion to require controls on a systemwide, watershed, or jurisdictional basis.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN16[] Discharge Permits, Storm Water Discharges**

Federal regulations require a permit application to include, as part of assessing the effectiveness of controls, estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water. 40 C.F.R. § 122.26(d)(2)(v). The regulations also require the operator of a municipal separate storm sewer system to submit a status report annually. The report must include: (1) the status of implementing the components of the storm water management program that are established as permit conditions; (2) proposed changes to the storm water management programs that are established as permit conditions; (3) revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application; (4) a summary of data, including monitoring data, that is accumulated throughout the reporting year; (5) annual expenditures and budget for year following each annual report; (6) a summary describing the number and nature of enforcement actions, inspections, and public education programs; and (7) identification of water quality improvements or degradation. 40 C.F.R. § 122.42(c).

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN17[] Discharge Permits, Storm Water Discharges**

The United States Environmental Protection Agency's regulations require permittees, as part of their application, to show they have legal authority, either by statute, ordinance, or contract, to control through interagency agreements among themselves the contribution of pollutants from a portion of a municipal separate storm sewer system to another portion in a different jurisdiction. 40 C.F.R. § 122.26(d)(2)(i)(D).

## Headnotes/Syllabus

**Summary**

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted writ relief, concluding that the Commission on State Mandates had erred in determining that conditions imposed by a regional water quality control board on a municipal storm water discharge permit were reimbursable state mandates (Cal. Const., art. XIII B, § 6, subd. (a)). (Superior Court of Sacramento County, No. 34-2010-80000604-CU-WM-GDS. Allen Sumner, Judge.)

The Court of Appeal reversed and remanded. The court held that because no federal law, regulation, or administrative case authority expressly mandated the board to impose the specific requirements it included in the permit, the requirements were not federal mandates (Gov. Code, § 17556, subd. (c)) but were state mandates requiring the state to provide a subvention of funds to reimburse the permittees for the costs of compliance. Although the board made a finding that the permit requirements were necessary to reduce pollutant discharge to the maximum extent practicable, thus meeting a standard imposed by the Clean Water Act (33 U.S.C. § 1251 et seq.), the board imposed requirements in excess of those expressly required by federal law and thereby exercised its discretion. (Opinion by Nicholson, J., with Blease, Acting P. J., and Butz, J., concurring.)

**Headnotes**

CALIFORNIA OFFICIAL REPORTS HEADNOTES

**CA(1)[] (1)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for Mandated Costs.**

When the Legislature or a state agency requires a local government to provide a new program or higher level of service, the state must reimburse that local government for the costs of the program or increased level of service (Cal. Const., art. XIII B, § 6, subd. (a)).

**CA(2)[] (2)**

**State of California § 11—Fiscal Matters—Reimbursing Local**

**Governments for Mandated Costs—Federal Mandate Exception.**

Under an exception to the subvention requirement of *Cal. Const., art. XIII B, § 6, subd. (a)*, reimbursement is not required if a statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation (*Gov. Code, § 17556, subd. (c)*).

***CA(3)*** **(3)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for Mandated Costs—Federal Mandate Exception.**

Certain regulatory standards imposed by the federal government under cooperative federalism schemes are federal mandates and not reimbursable under *Cal. Const., art. XIII B, § 6*.

***CA(4)*** **(4)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for Mandated Costs—Federal Mandate Exception—Clean Water Act Permit Requirements.**

To determine whether a requirement imposed under the Clean Water Act (*33 U.S.C. § 1251 et seq.*) and state law on a National Pollutant Discharge Elimination System permit is a federal mandate, a court applies the following test: If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a true choice, the requirement is not federally mandated. If the state in opposition to a petition asserting that the requirement is a compensable state mandate (*Cal. Const., art. XIII B, § 6*) contends its requirements are federal mandates, it has the burden to establish the requirements are in fact mandated by federal law.

***CA(5)*** **(5)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for Mandated Costs—Federal Mandate Exception—Clean Water Act Permit Requirements.**

The "maximum extent practicable" standard of the Clean Water Act (*33 U.S.C. § 1251 et seq.*) by its nature is discretionary and does not by itself impose a federal mandate for purposes of *Cal. Const., art. XIII B, § 6*. The United States Environmental Protection Agency's regulations give a regional water quality control board discretion to determine which specific controls are necessary to meet that standard (*40 C.F.R. § 122.26(d)(2)(iv)*).

***CA(6)*** **(6)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

*40 C.F.R. § 122.26 (d)(2)(iv)* implies a regional water quality control board has wide discretion to determine how best to condition a permit in order to meet the "maximum extent practicable" standard.

***CA(7)*** **(7)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for Mandated Costs—Federal Mandate Exception—Clean Water Act Permit Requirements.**

To be a federal mandate for purposes of *Cal. Const., art. XIII B, § 6*, a federal law or regulation must expressly or explicitly require the specific condition imposed in a permit. The "maximum extent practicable" standard of the Clean Water Act (*33 U.S.C. § 1251 et seq.*) does not preclude the state from making a choice; rather, it gives the state discretion to make a choice.

***CA(8)*** **(8)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

Except where a regional water quality control board finds the conditions imposed are the only means by which the "maximum extent practicable" standard of the Clean Water Act (*33 U.S.C. § 1251 et seq.*) can be met, the state exercises a true choice by determining what controls are necessary to meet the standard. That a board found the permit requirements necessary to meet the standard establishes only that the board exercised its discretion, absent a finding its conditions are the only means by which the permittees can meet the standard. Its use of the word "necessary" does not equate to finding the permit requirement is the only means of meeting the standard. It is not the case that, because a condition is in the permit, it is, ipso facto, required by federal law. By law, a regional board cannot issue a National Pollutant Discharge Elimination

System permit to a municipal separate storm sewer system without finding it has imposed conditions necessary to carry out the provisions of the Clean Water Act (*33 U.S.C. § 1342(a)(1)*). That requirement includes imposing conditions necessary to meet the "maximum extent practicable" standard.

***CA(9)***[] **(9)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

The case law has rejected an argument that a permit application somehow limits a regional water quality control board's discretion or denies it a true choice. While the operators are 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 (*40 C.F.R. § 122.26(d)(2)(iv)*).

***CA(10)***[] **(10)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

The United States Environmental Protection Agency's regulations require permittees to describe in their permit application their practices for operating and maintaining streets and procedures for reducing the impact of discharges from storm sewer systems (*40 C.F.R. § 122.26(d)(2)(iv)(A)(3)*). This regulation does not expressly require the scope and detail of street sweeping and facility maintenance.

***CA(11)***[] **(11)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

The United States Environmental Protection Agency's regulations require a permit applicant to include in its application a description of planning procedures to develop and enforce controls to reduce the discharge of pollutants from municipal separate storm sewer systems which receive discharges from areas of new development and significant redevelopment (*40 C.F.R. § 122.26(d)(2)(iv)(A)(2)*). This regulation does not require a hydromodification plan. Nor does it restrict a regional water quality control board from exercising its discretion to require a specific type of plan to address the impacts from new development.

***CA(12)***[] **(12)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

Federal regulations require a permit application for a municipal separate storm sewer system to include descriptions of proposed educational activities to reduce pollutants associated with the application of pesticides, herbicides and fertilizer (*40 C.F.R. § 122.26(d)(2)(iv)(A)(6)*); to facilitate the proper management and disposal of used oil and toxic materials (*§ 122.26(d)(2)(iv)(B)(6)*); and to reduce pollutants in storm runoff from construction sites (*§ 122.26(d)(2)(iv)(D)(4)*).

***CA(13)***[] **(13)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

*40 C.F.R. § 122.26(d)(2)(iv)* authorizes permit applicants to propose a program that imposes controls beyond a single jurisdiction. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls.

***CA(14)***[] **(14)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

*40 C.F.R. § 122.26(d)(2)(iv)* does not mandate watershed and regional management requirements. It leaves to the regional water quality control board the discretion to require controls on a systemwide, watershed, or jurisdictional basis.

***CA(15)***[] **(15)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

Federal regulations require a permit application to include, as part of assessing the effectiveness of controls, estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water (*40 C.F.R. § 122.26(d)(2)(v)*). The regulations also require the operator of a municipal separate storm sewer system to submit a status report annually. The report must

include: (1) the status of implementing the components of the storm water management program that are established as permit conditions; (2) proposed changes to the storm water management programs that are established as permit conditions; (3) revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application; (4) a summary of data, including monitoring data, that is accumulated throughout the reporting year; (5) annual expenditures and budget for year following each annual report; (6) a summary describing the number and nature of enforcement actions, inspections, and public education programs; and (7) identification of water quality improvements or degradation (*40 C.F.R. § 122.42(c)*).

*CA(16)*[] **(16)**

**Pollution and Conservation Laws § 5—Water Pollution—Clean Water Act Permit Requirements.**

The United States Environmental Protection Agency's regulations require permittees, as part of their application, to show they have legal authority, either by statute, ordinance, or contract, to control through interagency agreements among themselves the contribution of pollutants from a portion of a municipal separate storm sewer system to another portion in a different jurisdiction (40 C.F.R. § 122.26(d)(2)(i)(D)).

*CA(17)*[] **(17)**

**State of California § 11—Fiscal Matters—Reimbursing Local Governments for Mandated Costs—Federal Mandate Exception—Clean Water Act Permit Requirements.**

There was no federal law, regulation, or administrative case authority that expressly mandated a regional water quality control board to impose the specific requirements it included in a municipal storm water discharge permit. The imposition of the requirements thus resulted in state mandates, and *Cal. Const., art. XIII B, § 6*, required the state to provide subvention to reimburse the permittees for the costs of complying with the requirements.

[Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2017) ch. 31, § 31.24.]

**Counsel:** Thomas E. Montgomery, County Counsel, Timothy M. Barry, Chief Deputy County Counsel, James R. O'Day, Deputy County Counsel, Office of the County Counsel, County of San Diego; Best Best & Krieger, Shawn Hagerty; Lounsbery Ferguson Altona & Peak and Helen Holmes Peak for Real Parties in Interest and Appellants.

Shanda M. Beltran and Andrew W. Henderson for Building Industry Legal Defense Foundation as Amicus Curiae on behalf of Real Parties in Interest and Appellants.

Somach Simmons & Dunn, Theresa A. Dunham and Nicholas A. Jacobs for the California Stormwater Quality Association as Amicus Curiae on behalf of Real Parties in Interest and Appellants.

Morrison & Foerster and Robert L. Falk for Santa Clara Valley Urban Runoff Pollution Prevention Program as Amicus Curiae on behalf of Real Parties in Interest and Appellants.

Pamela J. Walls, County Counsel, Karin Watts-Bazan, Principal Deputy County Counsel, Office of the County Counsel, County of Riverside, for Riverside County Flood Control and Water Conservation District and County of Riverside as Amici Curiae on behalf **[*2]** of Real Parties in Interest and Appellants.

Meyers Nave Riback Silver & Watson and Gregory J. Newmark for Alameda Countywide Clean Water Program as Amicus Curiae on behalf of Real Parties in Interest and Appellants.

Kamala D. Harris and Xavier Becerra, Attorneys General, Douglas J. Woods, Assistant Attorney General, Peter K. Southworth, Nelson R. Richards and Kathleen A. Lynch, Deputy Attorneys General, for Plaintiffs and Respondents.

No appearance for Defendant.

**Judges:** Opinion by Nicholson, J., with Blease, Acting P. J., and Butz, J., concurring.

**Opinion by:** Nicholson, J.

## Opinion

**NICHOLSON, J.**—The California Constitution requires the state to provide a subvention of funds to compensate local governments for the costs of a new program or higher level of service the state mandates. (*Cal. Const., art. XIII B, § 6* (*section 6*).) Subvention is not available if the state imposes a requirement that is mandated by the federal government, unless the state order mandates costs that exceed those incurred under the federal mandate. (*Gov. Code, § 17556, subd. (c)*.) The Commission on State Mandates (the Commission) adjudicates claims for subvention.

In *Department of Finance v. Commission on State Mandates (2016) 1 Cal.5th 749 [207 Cal. Rptr. 3d 44, 378 P.3d 356]* (*Department of Finance*), the California Supreme Court upheld a Commission ruling that certain conditions a regional

water quality control **[*3]** board imposed on a stormwater discharge permit issued under federal and state law required subvention and were not federal mandates. The high court found no federal law, regulation, or administrative case authority expressly required the conditions. It ruled the federal requirement that the permit reduce pollution impacts to the "maximum extent practicable" was not a federal mandate, but rather vested the regional board with discretion to choose which conditions to impose to meet the standard. The permit conditions resulting from the exercise of that choice were state mandates.

In this appeal, we face the same issue. The parties and the permit conditions are different, but the legal issue is the same—whether the Commission correctly determined that conditions imposed on a federal and state stormwater permit by a regional water quality control board are state mandates. The Commission reached its decision by applying the standard the Supreme Court later adopted in *Department of Finance*. The trial court, reviewing the case before *Department of Finance* was issued, concluded the Commission had applied the wrong standard, and it remanded the matter to the Commission for further proceedings. **[*4]**

Following the analytical regime established by *Department of Finance*, we reverse the trial court's judgment. We conclude the Commission applied the correct standard and the permit requirements are state mandates. We reach this conclusion on the same grounds the high court in *Department of Finance* reached its conclusion. No federal law, regulation, or administrative case authority expressly required the conditions. The requirement to reduce pollution impacts to the "maximum extent practicable" was not a federal mandate, but instead vested the regional board with discretion to choose which conditions to impose to meet the standard. The permit conditions resulting from the exercise of that choice in this instance were state mandates.

We remand the matter so the trial court may consider other issues the parties raised in their pleadings but the court did not address.

BACKGROUND

In *Department of Finance*, the Supreme Court explained the stormwater discharge permitting system and the constitutional reimbursement system in detail. We quote from the opinion at length:

A. *The stormwater discharge permitting system*

"The Operators' municipal storm sewer systems discharge both waste and pollutants. **[*5]** [1] State law controls 'waste' discharges. (*Wat. Code, § 13265*.) Federal law regulates discharges of 'pollutant[s].' (*33 U.S.C. § 1311(a)*.) Both state and later-enacted federal law require a permit to operate such systems.

"California's Porter-Cologne Water Quality Control Act (*Porter-Cologne Act or the Act; Wat. Code, § 13000 et seq.*) was enacted in 1969. It established the State Water Resources Control Board (State Board), along with nine regional water quality control boards, and gave those agencies 'primary responsibility for the coordination and control of water quality.' (*Wat. Code, § 13001*; see *City of Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 619 [26 Cal. Rptr. 3d 304, 108 P.3d 862]* (*City of Burbank*).) The State Board establishes statewide policy. The regional boards formulate and adopt water quality control plans and issue permits governing the discharge of waste. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 875 [22 Cal. Rptr. 3d 128]* (*Building Industry*).)

"The *Porter-Cologne Act* requires any person discharging, or proposing to discharge, waste that could affect the quality of state waters to file a report with the appropriate regional board. (*Wat. Code, § 13260, subd. (a)(1)*.) The regional board then 'shall prescribe requirements as to the nature' of the discharge, implementing any applicable water quality control plans. (*Wat. Code, § 13263, subd. (a)*.) The Operators must follow all requirements set by the Regional Board. (*Wat. Code, §§ 13264*, *13265*.)

"The federal *Clean Water Act* (the CWA; **[*6]** *33 U.S.C. § 1251 et seq.*) was enacted in 1972, and also established a permitting system. The CWA is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. (*City of Burbank, supra, 35 Cal.4th at p. 620*.) The CWA prohibits pollutant discharges unless they comply with (1) a permit (see *33 U.S.C. §§ 1328*, *1342*, *1344*); (2) established effluent limitations or standards (see *33 U.S.C. §§ 1312*, *1317*); or (3) established national standards of performance (see *33 U.S.C. § 1316*). (See *33 U.S.C. § 1311(a)*.) The CWA allows any state to adopt and enforce its own water quality standards and

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[1] "The systems at issue here are 'municipal separate storm sewer systems,' sometimes referred to by the acronym 'MS4.' (*40 C.F.R. § 122.26(b)(19) (2001)* … .) A '[m]unicipal separate storm sewer' is a system owned or operated by a public agency with jurisdiction over disposal of waste and designed or used for collecting or conveying stormwater. (*40 C.F.R. § 122.26(b)(8) (2001)* … .) Unless otherwise indicated, all further citations to the Code of Federal Regulations are to the 2001 version."

limitations, so long as those standards and limitations are not 'less stringent' than those in effect under the CWA. (33 U.S.C. § 1370.)

"The CWA created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the CWA or the EPA Administrator. (33 U.S.C. § 1342(a)(1), (2).) The federal system notwithstanding, a state may administer its own permitting system if authorized by the EPA.[2] If the EPA concludes a state has adequate authority to administer its proposed program, it must grant approval (33 U.S.C. § 1342(b)) and suspend its own issuance of permits (33 U.S.C. § 1342(c)(1)).[3]

"California was the first **[*7]** state authorized to issue its own pollutant discharge permits. (California ex rel. State Water Resources Control Bd. v. Environmental Protection Agency (9th Cir. 1975) 511 F.2d 963, 970, fn. 11, revd. on other grounds in EPA v. State Water Resources Control Board (1976) 426 U.S. 200 [48 L.Ed.2d 578, 96 S.Ct. 2022].) Shortly after the CWA's enactment, the Legislature amended the Porter-Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was 'in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter-Cologne Act].' (*Ibid.*) The Legislature provided that chapter 5.5 be 'construed to ensure consistency' with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements 'ensur[ing] compliance with all applicable provisions of the [CWA] … *together with any more stringent effluent standards or limitations* necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.' (Wat. Code, § 13377, italics added.)[4] To align the state and federal permitting systems, the legislation provided that the term '"waste discharge requirements"' under the Act was equivalent to the term '"permits"' under the CWA. (Wat. Code, § 13374.) Accordingly, California's permitting system now regulates discharges **[*8]** under both state and federal law. (*WaterKeepers Northern California v. State Water Resources Control Bd. (2002) 102 Cal.App.4th 1448, 1452 [126 Cal. Rptr. 2d 389]*; accord, *Building Industry, supra, 124 Cal.App.4th at p. 875*.)

"In 1987, Congress amended the CWA to clarify that a permit is required for any discharge from a municipal storm sewer system serving a population of 100,000 or more. (33 U.S.C. § 1342(p)(2)(C), (D).) Under those amendments, a permit may be issued either on a system- or jurisdiction-wide basis, must effectively prohibit non-stormwater discharges into the storm sewers, and must 'require controls to reduce the discharge of pollutants *to the maximum extent practicable*.' (33 U.S.C. § 1342(p)(3)(B), italics added.) The phrase 'maximum extent practicable' is not further defined. How that phrase is applied, and by whom, are important aspects of this case.

"EPA regulations specify the information to be included in a permit application. (See 40 C.F.R. § 122.26(d)(1)(i)–(vi), (2)(i)–(viii).) Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable. (40 C.F.R. § 122.26(d)(2)(iv).) The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions. (*Ibid.*)" (Department of Finance, supra, 1 Cal.5th at pp. 755–757, original italics.)[5]

B. *The permit before us*

In 2007, **[*9]** the Regional Water Quality Control Board, San Diego Region (the San Diego Regional Board), issued a permit to real parties in interest and appellants, the County of San Diego and the cities located in the county (the "permittees" or "copermittees").[6] The permit was actually a renewal of a nation pollutant discharge elimination system (NPDES) permit first issued in 1990 and renewed in 2001.

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[2] "For a state to acquire permitting authority, the governor must give the EPA a 'description of the program [the state] proposes to establish,' and the attorney general must affirm that the laws of the state 'provide adequate authority to carry out the described program.' (33 U.S.C. § 1342(b).)"

[3] "The EPA may withdraw approval of a state's program (33 U.S.C. § 1342(c)(3)), and also retains some supervisory authority: States must inform the EPA of all permit applications received and of any action related to the consideration of a submitted application (33 U.S.C. § 1342(d)(1))."

[4] The federal CWA does not prevent states from imposing any permit requirements that are more stringent than the CWA requires. (33 U.S.C. § 1370.)

[5] Using the Porter-Cologne Act's name for a permit application, the NPDES permit application in California is referred to as a report of waste discharge.

[6] Real parties in interest and appellants are the County of San Diego and the Cities of Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

The San Diego Regional Board stated the new permit "specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP)." The San Diego Regional Board found that although the permittees had generally been implementing the management programs required in the 2001 permit, "urban runoff discharges continue to cause or contribute to violations of water quality standards. This [permit] contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards."

The permit requires the permittees to implement various programs to manage their urban runoff that were not required in the 2001 permit. It requires the permittees to implement programs in their own **[*10]** jurisdictions. It requires the permittees in each watershed to collaborate to implement programs to manage runoff from that watershed, and it requires all of the permittees in the region to collaborate to implement programs to manage regional runoff. The permit also requires the permittees to assess the effectiveness of their programs and collaborate in their efforts.

The specific permit requirements involved in this case require the permittees to do the following:

(1) As part of their jurisdictional management programs:

(a) Sweep streets at certain times, depending on the amount of debris they generate, and report the number of curb miles swept and tons of material collected;

(b) Inspect, maintain, and clean catch basins, storm drain inlets, and other stormwater conveyances at specified times and report on those activities;

(c) Collaboratively develop and individually implement a hydromodification management plan to manage increases in runoff discharge rates and durations;[7]

(d) Collectively update the best management practices requirements listed in their local standard urban stormwater mitigation plans (SUSMP's) and add low impact development best management practices for new real property **[*11]** development and redevelopment;

(e) Individually implement an education program using all media to inform target communities about municipal separate storm sewer systems (MS4's) and impacts of urban runoff, and to change the communities' behavior and reduce pollutant releases to municipal separate storm sewer systems (MS4's);

(2) As part of their watershed management programs, collaboratively develop and implement watershed water quality activities and education activities within established schedules and by means of frequent regularly scheduled meetings;

(3) As part of their regional management programs:

(a) Collaboratively develop and implement a regional urban runoff management program to reduce the discharge of pollutants from MS4's to the maximum extent practicable;

(b) Collaboratively develop and implement a regional education program focused on residential sources of pollutants;

(4) Annually assess the effectiveness of the jurisdictional, watershed, and regional urban runoff management programs, and collaboratively develop a long-term effectiveness assessment to assess the effectiveness of all of the urban runoff management programs; and

(5) Jointly execute a memorandum of understanding, joint powers authority, or other formal **[*12]** agreement that defines the permittees' responsibilities under the permit and establishes a management structure, standards for conducting meetings, guidelines for workgroups, and a process to address permittees' noncompliance with the formal agreement.

The permittees estimated complying with these conditions would cost them more than $66 million over the life of the permit.

C. *Reimbursement for state mandates*

*HN1*[↑] *CA(1)*[↑] **(1)** "[W]hen the Legislature or a state agency requires a local government to provide a new program or higher level of service, the state must 'reimburse that local government for the costs of the program or increased level of service.' (*Cal. Const., art. XIII B, § 6, subd. (a)* (hereafter, *section 6*).)[8] " (*Department of Finance, supra, 1 Cal.5th at pp 758–759*.)

[7] Hydromodification is the "change in the natural watershed hydrologic processes and runoff characteristics … caused by urbanization or other land use changes that result in increased stream flows and sediment transport."

[8] "'"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur … as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of *Section 6 of Article XIII B of the California Constitution*.' (*Gov. Code, § 17514*.)"

"Voters added article XIII B to the California Constitution in 1979. Also known as the '"Gann limit,"' it 'restricts the amounts state and local governments may appropriate and spend each year from the "proceeds of taxes."' (*City of Sacramento v. State of California (1990) 50 Cal.3d 51, 58–59 [266 Cal. Rptr. 139, 785 P.2d 522]* (*City of Sacramento*).) 'Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to *adopt and levy taxes*. Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and **[*13]** to spend for public purposes.' (*Id. at p. 59, fn. 1.*)

"The 'concern which prompted the inclusion of *section 6 in article XIII B* was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.' (*County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56 [233 Cal. Rptr. 38, 729 P.2d 202]*.) The reimbursement provision in *section 6* was included in recognition of the fact 'that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments.' (*County of San Diego v. State of California (1997) 15 Cal.4th 68, 81 [61 Cal. Rptr. 2d 134, 931 P.2d 312]* (*County of San Diego*).) The purpose of *section 6* is to prevent 'the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are "ill equipped" to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.' (*County of San Diego, at p. 81.*) Thus, with certain exceptions, *section 6* 'requires the state "to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies."' (*County of San Diego, at p. 81.*)" (*Department of Finance, supra, 1 Cal.5th at pp. 762–763*, original italics.)

***CA(2)***[↑] **(2)** A significant exception to *section 6*'s subvention requirement is at issue here. **[*14]** ***HN2***[↑] Under that exception, "reimbursement is not required if '[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.' (*Gov. Code, § 17556, subd. (c)*.)

"The Legislature has enacted comprehensive procedures for the resolution of reimbursement claims (*Gov. Code, § 17500 et seq.*) and created the Commission to adjudicate them (*Gov. Code, §§ 17525*, *17551*). It also established 'a test-claim procedure to expeditiously resolve disputes affecting multiple agencies.' (*Kinlaw v. State of California (1991) 54 Cal.3d 326, 331 [285 Cal. Rptr. 66, 814 P.2d 1308]* (*Kinlaw*).)

"The first reimbursement claim filed with the Commission is called a test claim. (*Gov. Code, § 17521*.) The Commission must hold a public hearing, at which the Department of Finance (the Department), the claimant, and any other affected department or agency may present evidence. (*Gov. Code, §§ 17551*, *17553*.) The Commission then determines 'whether a state mandate exists and, if so, the amount to be reimbursed.' (*Kinlaw, supra, 54 Cal.3d at p. 332*.) The Commission's decision is reviewable by writ of mandate. (*Gov. Code, § 17559*.)" (*Department of Finance, supra, 1 Cal.5th at pp. 758–759*.)

D. *The test claim and the writ petition*

In 2008, the permittees filed a test claim with the Commission. They contended the permit requirements mentioned above **[*15]** constituted new or modified requirements that were compensable state mandates under *section 6*. The state, the San Diego Regional Board and the Department of Finance (collectively the "State") claimed the requirements were not compensable because they were mandated by the federal Clean Water Act's (CWA) NPDES permit requirements.

In 2010, the Commission ruled all of the targeted requirements were state mandates and not federal mandates. The Commission found the requirements were not federal mandates because they were not expressly specified in, or they exceeded the scope of, federal regulations. The Commission determined the permittees were entitled to subvention by the state for all of the requirements except two. The Commission ruled the requirements to develop a hydromodification plan and to include low impact development practices in the SUSMP's were not entitled to subvention because the permittees had authority to impose fees to recover the costs of those requirements.

The State petitioned the trial court for a writ of administrative mandate. It contended the Commission erred because the permit requirements are federal mandates and are not a new program or higher level of service. It also contended the Commission **[*16]** erred in concluding the County of San Diego did not have fee authority to pay for all of the permit conditions.

The County of San Diego filed a cross-petition for writ of mandate to challenge the Commission's decision that the conditions requiring a hydromodification plan and low impact development practices were not reimbursable.

The trial court granted the State's petition in part and issued a writ of mandate. It concluded the Commission applied an incorrect standard when it determined the permit conditions were not federal mandates. It held the Commission was required to determine whether any of the permit requirements exceeded the "maximum extent practicable" standard imposed by the CWA. "The Commission never undertook this inquiry," the court stated. "Instead, it simply asked whether the permit conditions are expressly specified in federal regulations or guidelines. This is not the test. The fact that a permit condition is not specified in a federal regulation or guideline does not determine whether the condition is 'practicable,' and thus required by federal law. The mere fact that a permit condition is not promulgated as a federal regulation does not mean it exceeds the federal **[*17]** standard."

The trial court remanded the matter to the Commission to reconsider its decision in light of the court's ruling. The court did not address the fee issues raised by the petition and cross-petition.

The permittees appeal from the trial court's judgment.[9, 10]

DISCUSSION

I

*Standard of Review*

While this appeal was pending, the Supreme Court issued *Department of Finance.* There, the high court had to answer the same question we must answer: are certain requirements imposed by the San Diego Regional Board in an NPDES permit federal mandates and not reimbursable state mandates? Although the high court reviewed conditions different from those before us, it established the law we must apply to resolve this appeal.[11]

As to the standard of review, ***HN3***[↑] "[t]he question whether a statute or executive order imposes a mandate is a question of law. [*City of San Jose v. State of California (1996) 45 Cal.App.4th 1802, 1810 [53 Cal. Rptr. 2d 521]*.] Thus, we review the entire record before the Commission, which includes references to federal and state statutes and regulations, as well as evidence of other permits and the parties' obligations under those permits, and independently determine whether it supports the Commission's conclusion that the conditions here were **[*18]** not federal mandates. (*Ibid.*)" (*Department of Finance, supra, 1 Cal.5th at p. 762*.) To do this, we must determine "whether federal statutory, administrative, or case law imposed, or compelled the [San Diego] Regional Board to impose, the challenged requirements on the [permittees]." (*Id. p. 767*.)

II

*Analysis*

Under the test announced in *Department of Finance*, we conclude federal law did not compel imposition of the permit requirements, and they are subject to subvention under *section 6*. This is because the requirement to reduce pollutants to the "maximum extent practicable" was not a federal mandate for purposes of *section 6*. Rather, it vested the San Diego Regional Board with discretion to choose how the permittees must meet that standard, and the exercise of that discretion resulted in imposing a state mandate. We also find no federal law, regulation, or administrative case authority that, under the test provided by *Department of Finance*, expressly required the conditions the San Diego Regional Board imposed.

A. *The* Department of Finance *decision*

***CA(3)***[↑] **(3)** We first describe *Department of Finance*, its context, its holding, and its analysis. Prior to its *Department of Finance* decision, the California Supreme Court declared in *City of Sacramento, supra, 50 Cal.3d 51* that ***HN4***[↑] "certain regulatory standards imposed by **[*19]** the federal government under 'cooperative federalism' schemes" are federal mandates and not reimbursable under *section 6*. (*City of Sacramento, at pp. 73–74*.) In that case, the court held federal legislation requiring local governments to provide unemployment insurance protection to their employees was a

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[9] The permittees request we take judicial notice of the NPDES permit the San Diego Regional Board issued to them in 2013 that allegedly contains less specific conditions. The State requests we take judicial notice of an NPDES permit issued by the EPA in 2011 to the District of Columbia that includes a condition similar to one above. We deny both of these requests. Neither document was before the Commission or the trial court at the time those bodies ruled in this matter, and no exceptional circumstances justify deviating from that rule. (***Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal.4th 434, 444, fn. 3 [58 Cal. Rptr. 2d 899, 926 P.2d 1085]***.) The State has also requested we take judicial notice of the NPDES permit at issue in *Department of Finance* pursuant to *subdivisions (c)* and *(d) of Evidence Code section 452*. We grant that request.

[10] Building Industry Legal Defense Foundation and the California Stormwater Quality Association et al. filed amicus curiae briefs in support of the permittees.

[11] At our request, the parties briefed the effect of *Department of Finance* on this appeal.

federal mandate. It was a federal mandate because failing to extend the protection would have resulted in the state's businesses facing additional unemployment taxation and penalties by both state and federal governments. (*Id. at p. 74.*) "[T]he state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (*Ibid.*)

The *City of Sacramento* court refused to announce a "final test" for determining whether a requirement imposed under a cooperative federal-state program was a federal mandate. (*City of Sacramento, supra, 50 Cal.3d at p. 76.*) Instead, it required courts to determine whether a requirement was a federal mandate on a case-by-case basis. It stated: "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with **[*20]** federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of *article XIII B, section 9[, subd.] (b)* [of the California Constitution]: neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary." (*City of Sacramento, supra, at p. 76.*)

*CA(4)*[↑] **(4)** In *Department of Finance*, the Supreme Court changed course and announced a test for determining whether a requirement imposed on a permit under a cooperative federal-state program is a federal mandate. *HN5*[↑] To determine whether a requirement imposed under the CWA and state law on an NPDES permit is a federal mandate, a court applies the following 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 **[*21]** 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." (*Department of Finance, supra, 1 Cal.5th at p. 765.*) If the state in opposition to the petition contends its requirements are federal mandates, it has the burden to establish the requirements are in fact mandated by federal law. (*Id. at p. 769.*)

In *Department of Finance*, the high court held conditions imposed on an NPDES permit issued by the Regional Water Quality Control Board, Los Angeles Region (the Los Angeles Regional Board), to Los Angeles County and various cities were not federal mandates and were subject to subvention under *section 6*. The permit conditions required the permittees to install and maintain trash receptacles at transit stops, and to inspect certain commercial and industrial facilities and construction sites. (*Department of Finance, supra, 1 Cal.5th at p. 755.*) The Commission determined each of the conditions was a compensable state mandate, and the Supreme Court, reversing the Court of Appeal, upheld the Commission's decision.

The high court ruled federal law did not compel the conditions to be imposed. The court stated: "It is clear federal law did not compel the [Los Angeles] Regional Board to impose **[*22]** these particular requirements. There was no evidence the state was compelled to administer its *own* permitting system rather than allowing the EPA do so under the CWA. (*33 U.S.C. § 1342(a)*.) … [T]he State chose to administer its own program, finding it was 'in the interest of the people of the state, *in order to avoid direct regulation by the federal government* of persons already subject to regulation' under state law. (*Wat. Code, § 13370, subd. (c)*, italics added.) Moreover, the [Los Angeles] Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (*40 C.F.R. § 122.26(d)(2)(iv)*.) This case is distinguishable from *City of Sacramento, supra, 50 Cal.3d 51*, where the state risked the loss of subsidies and tax credits for all its resident businesses if it failed to comply with federal legislation. Here, the State was not compelled by federal law to impose any particular requirement. Instead, … the [Los Angeles] Regional Board had discretion to fashion requirements which it determined would meet **[*23]** the CWA's maximum extent practicable standard." (*Department of Finance, supra, 1 Cal.5th at pp. 767–768*, original italics.)

The State contended the Commission decided the existence of a federal mandate on grounds that were too rigid. It argued the Commission should have accounted for the flexibility in the CWA's regulatory scheme and the "maximum extent practicable" standard. It also should have deferred to the terms of the permit as the best expression of what federal law required in that instance since the terms were based on the agencies' scientific, technical, and experiential knowledge.

The Supreme Court rejected both arguments. The court stated: "We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the

Permit. In issuing the Permit, the [Los Angeles] Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. (*City of Burbank, supra, 35 Cal.4th at pp. 627–628*.) It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.

"We also disagree that the Commission should have deferred to the [Los Angeles] Regional Board's conclusion that the challenged requirements were federally mandated. That determination **[*24]** is largely a question of law. Had the [Los Angeles] Regional Board found, when imposing the disputed permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate. The board's legal authority to administer the CWA and its technical experience in water quality control would call on sister agencies as well as courts to defer to that finding. The State, however, provides no authority for the proposition that, absent such a finding, the Commission should defer to a state agency as to whether requirements were state or federally mandated. Certainly, in a trial court action challenging the *board's authority* to impose specific permit conditions, the board's findings regarding what conditions satisfied the federal standard would be entitled to deference. (See, e.g., *City of Rancho Cucamonga v. Regional Water Quality Control Bd. (2006) 135 Cal.App.4th 1377, 1384 [38 Cal. Rptr. 3d 450]*, citing *Fukuda v. City of Angels (1999) 20 Cal.4th 805, 817–818 [85 Cal. Rptr. 2d 696, 977 P.2d 693]*.) Resolution of those questions would bring into play the particular technical expertise possessed by members of the regional board. In those circumstances, the party challenging the board's decision would have the burden of demonstrating its findings were not supported **[*25]** by substantial evidence or that the board otherwise abused its discretion. (*Rancho Cucamonga, at p. 1387*; *Building Industry, supra, 124 Cal.App.4th at pp. 888–889*.)

"Reimbursement proceedings before the Commission are different. The question here was not whether the [Los Angeles] 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." (*Department of Finance, supra, 1 Cal.5th at pp. 768–769*, original italics.)

Addressing the permit's specific requirements, the Supreme Court determined they were not mandated by federal law but instead were imposed pursuant to the State's discretion. Regarding the site inspection requirements, the court found neither the CWA's "maximum extent practicable" standard, the CWA itself, nor the Environmental Protection Agency (EPA) regulations "expressly required" the inspection conditions. (*Department of Finance, supra, 1 Cal.5th at p. 770*.) The court also determined that in this instance, state and federal law required the Los Angeles Regional Board to conduct the inspections. By exercising its discretion and shifting **[*26]** responsibility for the inspections onto the permittees as a condition of the permit, the Los Angeles Regional Board imposed a state mandate. (*Id. at pp. 770–771*.)

The State argued the inspection requirements were federal mandates because EPA regulations contemplated that some kind of operator inspections would be required. The court was not persuaded: "That the EPA regulations contemplated some form of inspections … does not mean that federal law required the scope and detail of inspections required by the Permit conditions." (*Department of Finance, supra, 1 Cal.5th at p. 771*, fn. omitted.)

As for the trash receptacle requirement, the Supreme Court agreed with the Commission that it was not a federal mandate because neither the CWA nor the federal regulation cited by the state "explicitly required" the installation and maintenance of trash receptacles. (*Department of Finance, supra, 1 Cal.5th at p. 771*.)

The State argued the condition was mandated by the EPA regulations that required the permittees to include in their application a description of practices for operating roads and procedures for reducing the impact of discharges from MS4's. The Supreme Court rejected this argument: "While the Operators were required to include a description of practices and procedures in their permit application, **[*27]** the issuing agency has discretion whether to make those practices conditions of the permit. (*40 C.F.R. § 122.26(d)(2)(iv)*.) No regulation cited by the State required trash receptacles at transit stops." (*Department of Finance, supra, 1 Cal.5th at pp. 771–772*.)

In addition, the court found evidence the EPA had issued NPDES permits in other cities that did not require trash receptacles at transit stops. "The fact the EPA itself had issued permits in other cities, but did not include the trash receptacle condition, undermines the argument that the requirement was federally mandated." (*Department of Finance, supra, 1 Cal.5th at p. 772*.)

B. *Applying Department of Finance to this appeal*

Having reviewed *Department of Finance*, we now turn to apply its ruling and analysis to the permit requirements before

us. Again, our task is two fold. We must determine first whether the CWA, its regulations and guidelines, and any other evidence of federal mandate such as similar permits issued by the EPA, required each condition. If they did, we conclude the requirement is a federal mandate and not entitled to subvention under section 6. Second, if the condition was not "expressly required" by federal law but was instead imposed pursuant to the State's discretion, we conclude the requirement is not federally mandated and subvention is required. **[*28]** The State has the burden to establish the requirements were imposed by federal law. It has not met its burden here.

1. *The "maximum extent practicable" standard*

CA(5)[↑] **(5)** The State contends the permit requirements were federal mandates because it had no discretion but to impose conditions that satisfied the "maximum extent practicable" standard. We disagree with the State's interpretation of its discretion. HN6[↑] The "maximum extent practicable" standard by its nature is discretionary and does not by itself impose a federal mandate for purposes of section 6. Before *Department of Finance* was issued, the State argued here that the CWA's "maximum extent practicable" standard was a federal mandate because it is flexible and contemplates that specific measures will be implemented to meet the unique requirements of any particular waterway and water quality. *Department of Finance* rejected this argument for purposes of subvention under section 6. "The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard. **[*29]** (40 C.F.R. § 122.26(d)(2)(iv).)" (Department of Finance, supra, 1 Cal.5th at pp. 767–768.)

There is no dispute the CWA and its regulations grant the San Diego Regional Board discretion to meet the "maximum extent practicable" standard. The CWA requires NPDES permits for MS4's to "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions *as the Administrator or the State determines appropriate* for the control of such pollutants." (33 U.S.C.S. § 1342(p)(3)(B)(iii), italics added.)

CA(6)[↑] **(6)** EPA regulations also describe the discretion the State will exercise to meet the "maximum extent practicable" standard. The regulations require a permit application by an MS4 to propose a management program. This program "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. … Proposed programs *will be considered by the Director when developing permit conditions* to reduce pollutants **[*30]** in discharges to the maximum extent practicable." (40 C.F.R. § 122.26 (d)(2)(iv)(2017),italics added.) HN7[↑] This regulation implies the San Diego Regional Board has wide discretion to determine how best to condition the permit in order to meet the "maximum extent practicable" standard.

Yet the State argues the San Diego Regional Board really did not exercise discretion in imposing the challenged requirements. It contends the Supreme Court in *Department of Finance* did not look for differences between federal law and the terms of the permit. Rather, the court allegedly searched the record to see if the Los Angeles Regional Board exercised a true choice in imposing permit conditions or if it instead imposed requirements necessary to satisfy federal law. Applying that test here, the State asserts the San Diego Regional Board in this case did not exercise a true choice in imposing any of the permit requirements because it was required to impose requirements that satisfied the "maximum extent practicable" standard. Indeed, 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* ***[*31]*** *of Finance* did not expressly make.

The State also contends the San Diego Regional Board did not make a true choice because the permittees in their permit application proposed methods of compliance, and the San Diego Regional Board made modifications "so those methods would achieve the federal standard." The State asserts the permit requirements were not state mandates because they were based on the proposals in the application, "not the [San Diego] Regional Board's preferences for how the copermittees should comply."

CA(7)[↑] **(7)** The State misconstrues *Department of Finance* in numerous respects. First, the Supreme Court did in fact look for differences between federal law and the terms of the permit to determine if the condition was a federal mandate. The high court stated that, HN8[↑] to be a federal mandate for purposes of section 6, the federal law or regulation must "expressly" or "explicitly" require the specific condition imposed in the permit. (Department of Finance, supra, 1 Cal.5th at pp. 770–771.)

CA(8)[↑] **(8)** Second, the Supreme Court found the

"maximum extent practicable" did not preclude the State from making a choice; rather, it gave the State discretion to make a choice. "The federal CWA broadly directed the board to issue permits with conditions designed to reduce **[*32]** pollutant discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (*40 C.F.R. § 122.26(d)(2)(iv)*.)" (*Department of Finance, supra, 1 Cal.5th at pp. 767–768*.) As the high court stated, ***HN9***[↑] except where a regional board finds the conditions are the only means by which the "maximum extent practicable" standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard. (*Id. at p. 768*.)

That the San Diego Regional Board found the permit requirements were "necessary" to meet the standard establishes only that the San Diego Regional Board exercised its discretion. Nowhere did the San Diego Regional Board find its conditions were the only means by which the permittees could meet the standard. Its use of the word "necessary" did not equate to finding the permit requirement was the *only* means of meeting the standard. "It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law." (*Department of Finance, supra, 1 Cal.5th at p. 768*.)

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 **[*33]** "necessary to carry out the provisions of [the *Clean Water Act*]." (*33 U.S.C. § 1342(a)(1)*.) That requirement includes imposing conditions necessary to meet the "maximum extent practicable" standard, and the regional board in *Department of Finance* found the conditions it imposed had done so. The Los Angeles Regional Board stated: "This permit is intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the U.S. subject to the Permittees' jurisdiction." It further stated: "[T]his Order requires that the [Storm Water Quality Management Plan] specify BMPs [best management practices] that will be implemented to reduce the discharge of pollutants in storm water to the maximum extent practicable."

***CA(9)***[↑] **(9)** Third, ***HN10***[↑] 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 **[*34]** agency has discretion whether to make those practices conditions of the permit. (*40 C.F.R. § 122.26(d)(2)(iv)*.)" (*Department of Finance, supra, 1 Cal.5th at pp. 771–772*.)

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 maximum extent practicable. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates.

2. *No express demand by federal law*

The State contends federal law nonetheless required the conditions it imposed. It relies on regulations broadly describing what must be included in an NPDES permit application by an MS4 instead of express mandates directing the San Diego Regional Board to impose the requirements it imposed. To be a federal mandate for purposes of *section 6*, however, the federal law or regulation must "expressly" or "explicitly" require the condition imposed in the permit. (*Department of Finance, supra, 1 Cal.5th at pp. 770–771*.) This is the standard the Commission applied and found the State's claims unwarranted. We do as well. The State cites to no law, regulation, or EPA case authority presented to the Commission or the trial court that expressly required any of the challenged permit requirements. We briefly review the requirements.

a. *Street **[*35]** sweeping and cleaning stormwater conveyances*

***CA(10)***[↑] **(10)** The State contends the requirements for street sweeping and cleaning of the storm sewer system are federal mandates because ***HN11***[↑] EPA regulations required the permittees to describe in their permit application their practices for operating and maintaining streets and procedures for reducing the impact of discharges from storm sewer systems. (*40 C.F.R. § 122.26(d)(2)(iv)(A)(3) (2017)*.) This regulation does not expressly require the scope and detail of street sweeping and facility maintenance the permit imposes. Because the State imposed those specific requirements, they are not federal mandates and must be compensated under *section 6*.

The permit requires the permittees to sweep streets a certain number of times depending on how much trash and debris they generate. Streets that consistently generate the highest volume of trash must be swept at least twice per month. Streets that generate moderate volumes of trash must be swept at least monthly, and those that generate low volumes of trash must be swept at least annually. Permittees must annually report the total distance of curb miles swept and the tons of

material collected.

The permit also requires the permittees to implement a schedule of maintenance **[*36]** activities for their storm sewer systems and facilities, such as catch basins, storm drain inlets, open channels, and the like. At a minimum, the permittees must inspect all facilities at least annually and must inspect facilities that receive high volumes of trash at least once a year between May 1 and September 30. The permit requires any catch basin or storm drain inlet that has accumulated trash greater than 33 percent of its design capacity to be cleaned in a timely manner. Any facility designed to be self-cleaning must be cleaned immediately of any accumulated trash. The permittees must keep records of their maintenance and cleaning activities.

We see nothing in the regulation requiring permittees to describe in their application their street and facility maintenance practices a mandate to impose the specific requirements actually imposed in the permit.

b. *Hydromodification plan*

***CA(11)***[↑] **(11)** The State claims the requirement to develop a hydromodification plan (HMP) arises from ***HN12***[↑] EPA regulations requiring the permit applicant to include in its application a description of planning procedures to develop and enforce controls "to reduce the discharge of pollutants from [MS4's] which receive discharges **[*37]** from areas of new development and significant redevelopment." (*40 C.F.R. § 122.26(d)(2)(iv)(A)(2) (2017)*.) The permit requires the HMP to establish standards of runoff flow for channel segments that receive runoff from new development. It must require development projects to implement control measures so that the flows from the completed project generally do not exceed the flows before the project was built. The HMP must include other performance criteria as well as a description of how the permittees will incorporate the HMP requirements into their local approval process.

The regulation cited by the State does not require an HMP. Nor does it restrict the San Diego Regional Board from exercising its discretion to require a specific type of plan to address the impacts from new development. The San Diego Regional Board admittedly exercised its discretion on this condition. It determined the permittees' application was insufficient and it required them to collaborate to develop an HMP. The requirement is thus a state mandate subject to subvention.

c. *Low impact development practices in the SUSMP*

The State relies upon the same regulation to support the low impact development requirements as it did for the HMP. (*40 C.F.R. § 122.26(d)(2)(iv)(A)(2) (2017)*.) The permit requires **[*38]** the permittees to implement specified low impact development best management practices at most new development and redevelopment projects. These practices include designing the projects to drain runoff into previous areas on site and using permeable surfaces for low traffic areas. The practices also require projects to conserve natural areas and minimize the project's impervious footprint where feasible.

The permit also requires the permittees to develop a model SUSMP to establish low impact development best management practices that meet or exceed the requirements just mentioned. The model must include siting, design, and maintenance criteria for each low impact development best management practice listed in the model SUSMP. Again, nothing in the application regulation required the San Diego Regional Board to impose these specific requirements. As a result, they are state mandates subject to *section 6*.

d. *Jurisdictional and regional education programs*

***CA(12)***[↑] **(12)** The State claims regulations requiring the permittees to describe in their permit application the educational programs they will conduct to increase the public's knowledge of stormwater pollution imposed a federal mandate. (*40 C.F.R. § 122.26(d)(2)(iv)(A)(6)*, *(B)(6)*, *(D)(4) (2017)*.) ***HN13***[↑] The regulations **[*39]** require the application to include descriptions of proposed educational activities to reduce pollutants associated with the application of pesticides, herbicides and fertilizer (*40 C.F.R. § 122.26(d)(2)(iv)(A)(6) (2017)*), to facilitate the proper management and disposal of used oil and toxic materials (*40 C.F.R. § 122.26(d)(2)(iv)(B)(6) (2017)*), and to reduce pollutants in storm runoff from construction sites. (*40 C.F.R. § 122.26(d)(2)(iv)(D)(4) (2017)*.)

The permit requires each permittee to do much more. Each must implement an education program using all media as appropriate to "measurably increase" the knowledge of MS4's, impacts of urban runoff, and potential best management practices, and to "measurably change" people's behaviors. The program must address at a minimum five target communities: municipal departments and personnel; construction site owners and developers; industrial owners and operators; commercial owners and operators; and the residential community, the general public, and school children. The program must educate each target community where appropriate on a number of specified topics. It must educate them on federal, state, and local water quality laws and regulations, including the stormwater discharge permitting system. It must address general runoff concepts, such as the impacts **[*40]** of urban runoff on receiving waters, the distinctions between MS4's and sanitary sewers,

types of best management practices, water quality impacts associated with urbanization, and nonstormwater discharge prohibitions. It must discuss specific best management practices for such activities as good housekeeping, proper waste disposal, methods to reduce the impacts from residential and charity car washing, nonstormwater disposal alternatives, preventive maintenance, and equipment and vehicle maintenance and repair. The program must also address public reporting mechanisms, illicit discharge detection, dechlorination techniques, integrated pest management, the benefits of native vegetation, water conservation, alternative materials and designs to maintain peak runoff values, traffic reduction, and alternative fuel use. The permit also requires additional specific topics to be addressed that are relevant to each particular target community.

The San Diego Regional Board imposed an educational program and a list of topics that surpasses what the regulations required the permittees to propose in their application. Nothing in the regulations required the San Diego Regional Board to impose **[*41]** the educational requirements in the scope and detail it did. As a result, they are state mandates subject to *section 6*.

e. *Regional and watershed urban runoff management programs*

*CA(13)*[↑] **(13)** To claim the requirements to develop regional and watershed urban runoff management programs are federal mandates, the State relies on the regulation requiring permit applications to propose a management program as part of their application. *HN14*[↑] The regulation authorizes the applicants to propose a program that imposes controls beyond a single jurisdiction: "Proposed programs *may* impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls." (*40 C.F.R. § 122.26(d)(2)(iv) (2017)*, italics added.)

The permit *requires* the permittees to collaborate, develop, and implement watershed and regional urban runoff management programs. As part of the watershed management program, the permittees must, among other things, annually assess the water quality of receiving waters and identify the water quality problems attributable to MS4 discharges. They must develop and implement a list of water quality activities and education activities and submit the list for approval by the San Diego Regional Board. The permit describes what **[*42]** information must be included on the list for each activity, and it requires the permittees to implement each of them.

The permit requires the permittees, as part of developing a regional management program, to implement a residential education program as described above, develop standardized fiscal analysis of the programs in their jurisdictions, and facilitate the assessment of the jurisdictional, watershed, and regional programs' effectiveness.

*HN15*[↑] *CA(14)*[↑] **(14)** The regulation relied upon by the State does not mandate any of these watershed and regional management requirements. It clearly leaves to the San Diego Regional Board the discretion to require controls on a systemwide, watershed, or jurisdictional basis. The State exercised that discretion in imposing the controls it imposed. They thus are state mandates subject to *section 6*.

f. *Program effectiveness assessments*

*HN16*[↑] *CA(15)*[↑] **(15)** Federal regulations require a permit application to include, as part of assessing the effectiveness of controls, "[e]stimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also **[*43]** identify known impacts of storm water controls on ground water." (*40 C.F.R. § 122.26(d)(2)(v) (2017)*.)

The regulations also require the operator of an MS4 to submit a status report annually. The report must include: "(1) The status of implementing the components of the storm water management program that are established as permit conditions; [¶] (2) Proposed changes to the storm water management programs that are established as permit conditions … ; … [¶] (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application … ; [¶] (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; [¶] (5) Annual expenditures and budget for year following each annual report; [¶] (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; [and] [¶] (7) Identification of water quality improvements or degradation." (*40 C.F.R. § 122.42(c) (2017)*.)

The State contends these regulations mandated the San Diego Regional Board to impose the assessment requirements the permit contains, but the permit imposes additional obligations. The permit requires the permittees to assess, among other things, the effectiveness of each significant **[*44]** jurisdictional activity or best management practice and each watershed water quality activity and the implementation of the jurisdictional and watershed runoff management plans. They must identify and utilize "measurable targeted outcomes, assessment measures, and assessment methods" for each of these items. They must utilize certain predefined "outcome levels" to assess the effectiveness of each of the items. They must also collaborate

to develop a long-term effectiveness assessment based on the same outcome levels.

While the regulations required estimated reductions in the amount of pollutants and a report on the status of implementing controls and their effectiveness, the San Diego Regional Board exercised its discretion to mandate how and to what degree of specificity those assessments would occur. The regulations did not require the San Diego Regional Board to impose the assessment systems and procedures it actually imposed. Accordingly, those systems and procedures are state mandates subject to *section 6*.

g. *Permittee collaboration*

*HN17*[↑] *CA(16)*[↑] **(16)** EPA regulations require the permittees, as part of their application, to show they have legal authority, either by statute, ordinance, or contract, to control **[*45]** through interagency agreements among themselves the contribution of pollutants from a portion of the municipal system to another portion in a different jurisdiction. (*40 C.F.R. § 122.26(d)(2)(i)(D) (2017)*.) The State claims this regulation mandated the San Diego Regional Board to require the permittees to collaborate and, in particular, execute an agreement that establishes a management structure. Under the terms of the permit, the management structure must, among other things, define the permittees' responsibilities; promote consistency, development, and implementation of regional activities; establish standards for conducting meetings, making decisions and sharing costs; and establish a process for addressing noncompliance with the agreement.

The EPA regulation did not impose on the San Diego Regional Board a mandate to define the terms and organization of a management structure that would allow the permittees to control pollutants that cross borders. The regulation required the San Diego Regional Board to assure itself the permittees had the authority to address runoff pollution regionally, but it did not require the San Diego Regional Board to define how the permittees would organize themselves to do so. The conditions **[*46]** of the San Diego Regional Board went beyond what was federally required, and are thus state mandates subject to *section 6*.

*CA(17)*[↑] **(17)** In short, there is no federal law, regulation, or administrative case authority that expressly mandated the San Diego Regional Board to impose any of the challenged requirements discussed above. As a result, their imposition are state mandates, and *section 6* requires the State to provide subvention to reimburse the permittees for the costs of complying with the requirements.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are awarded to real parties in interest and appellants. (*Cal. Rules of Court, rule 8.278(a)*.)

Blease, Acting P. J., and Butz, J., concurred.

End of Document

# ATTACHMENT NO. 18

# *Mission Springs Water Dist. v. Verjil*

Court of Appeal of California, Fourth Appellate District, Division Two

August 7, 2013, Opinion Filed

E055176

**Reporter**
218 Cal. App. 4th 892 *; 160 Cal. Rptr. 3d 524 **; 2013 Cal. App. LEXIS 625 ***; 2013 WL 4009261

MISSION SPRINGS WATER DISTRICT, Plaintiff and Respondent, v. KARI VERJIL, as Registrar of Voters, etc., Defendant; TIM RADIGAN BROPHY et al., Real Parties in Interest and Appellants.

**Subsequent History:** Review denied by *Mission Springs Water Dist. v. Verjil, 2013 Cal. LEXIS 8230 (Cal., Oct. 16, 2013)*

**Prior History: [***1]** APPEAL from the Superior Court of Riverside County, No. INC1105569, Harold W. Hopp, Judge.

**Disposition:** Affirmed.

## Core Terms

initiative, Proponents, voters, election, CPI, preelection, invalid, ballot, charges, declaratory relief action, water district, probability, challenges, prevailing, initiative power, water rate, rate increase, delegation, protected activity, statutes, rates, government entity, vagueness, enact, initiative measure, costs, proposed initiative, right of petition, anti-SLAPP, electorate

## Case Summary

**Procedural Posture**

Appellants, proponents of an initiative to roll back water and sewer rate increases, sought review of an order from the Superior Court of Riverside County (California), which denied their special motion to strike pursuant to *Code Civ. Proc., § 425.16*, respondent water district's declaratory relief action challenging the initiatives.

**Overview**

The district presented uncontradicted evidence that the initiatives, if enacted, would set water rates too low to pay the district's costs. The court held that a declaratory relief action concerning the validity of an initiative arose out of protected activity, within the meaning of *§ 425.16, subd. (b)(1)*, because such an action implicated the personal constitutional rights of the initiative's proponents under *Cal. Const., art. II, § 8*. The district properly brought a declaratory relief action under *Code Civ. Proc., § 1060*, rather than a challenge to the ballot material under *Elec. Code, § 9380*, because the district was not a voter or elections official and was challenging the initiatives, not the ballot material. The exclusive delegation rule did not preclude basing future rate increases on the consumer price index, nor was this provision vague because the applicable index could be ascertained. The district showed a probability of prevailing on its claim that the initiatives were invalid because they would set rates lower than permitted by *Wat. Code, § 31007*, which was not a permissible use of the local initiative power to reduce fees under Cal. Const., art. XIII C, § 3.

**Outcome**
The court affirmed the order.

## LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

*HN1*[] **Defenses, Demurrers & Objections, Motions to Strike**

See *Code Civ. Proc., § 425.16, subd. (b)(1)*.

Civil Procedure > ... > Defenses, Demurrers &

Objections > Motions to Strike > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

**HN2[] Defenses, Demurrers & Objections, Motions to Strike**

The analysis of a SLAPP motion involves two steps. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

**HN3[] Standards of Review, De Novo Review**

An appellate court reviews an order granting or denying a motion to strike under *Code Civ. Proc., § 425.16*, de novo.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

**HN4[] Defenses, Demurrers & Objections, Motions to Strike**

To meet its burden under *Code Civ. Proc., § 425.16*, a defendant must present a prima facie showing that the plaintiff's causes of action arise from acts of the defendant taken to further the defendant's rights of free speech or petition in connection with a public issue. The mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such. In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity. The anti-SLAPP statute's definitional focus is not on the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability — and whether that activity constitutes protected speech or petitioning.

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Governments > Legislation > Initiative & Referendum

**HN5[] Standing, Personal Stake**

In the preelection setting, when a proposed initiative measure has not yet been adopted as state law, the official proponents of an initiative measure who intervene or appear as real parties in interest are properly viewed as asserting their own personal rights and interests — under *Cal. Const., art. II, § 8*, and the California statutes relating to initiative proponents — to propose an initiative measure and have the measure submitted to the voters for approval or rejection. In preelection cases, the official initiative proponents possess a distinct interest in defending the proposed initiative because they are acting to vindicate their own rights under the relevant California constitutional and statutory provisions to have their proposed measure — a measure they have submitted to the Attorney General, have circulated for signature, and have the exclusive right to submit to the Secretary of State after signatures have been collected — put to a vote of the people.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Governments > Legislation > Initiative & Referendum

**HN6[] Defenses, Demurrers & Objections, Motions to Strike**

When a proponent of an initiative is a party to preelection litigation challenging the initiative, the litigation arises out of the proponent's exercise of the constitutional right of petition. This is true even when the plaintiff is a governmental entity

requesting guidance regarding the constitutionality of the proposed initiative. Initiative proponents have a constitutional stake in preelection litigation over their initiative that is distinct from the general public's stake in postenactment litigation over a statute. Moreover, there is an inherent conflict of interest between the proponent of an initiative and the affected governmental entity. The initiative process is specifically intended to enable the people to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question. Whenever the affected governmental entity files a declaratory relief action in which it seeks to keep an initiative off the ballot, the action arises out of the proponent's right of petition, in the context of a motion to strike under *Code Civ. Proc., § 425.16*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

***HN7***[] **Defenses, Demurrers & Objections, Motions to Strike**

A SLAPP motion, like a summary judgment motion, pierces the pleadings and requires an evidentiary showing. Although by its terms *Code Civ. Proc., § 425.16, subd. (b)(1)*, calls upon a court to determine whether the plaintiff has established that there is a probability that the plaintiff will prevail on the claim, cases interpreting this provision establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities. The court's responsibility is to accept as true the evidence favorable to the plaintiff. The defendant's evidence is considered with a view toward whether it defeats the plaintiff's showing as a matter of law, such as by establishing a defense or the absence of a necessary element.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

***HN8***[] **Declaratory Judgments, State Declaratory Judgments**

An anti-SLAPP motion may lie against a complaint for declaratory relief. Moreover, the mere existence of a controversy is insufficient to overcome an anti-SLAPP motion against a claim for declaratory relief. To defeat an anti-SLAPP motion, the plaintiff must also make a prima facie evidentiary showing to sustain a judgment in the plaintiff's favor. In other words, for a declaratory relief action to survive an anti-SLAPP motion, the plaintiff must introduce substantial evidence that would support a judgment of relief made in the plaintiff's favor.

Governments > Local Governments > Elections

Governments > Legislation > Initiative & Referendum

***HN9***[] **Local Governments, Elections**

*Elec. Code, § 9380*, provides that, once the text of a proposed ordinance and the arguments for and against it have been submitted, there is a 10-day window during which any voter of the jurisdiction in which the election is being held, or the elections official, himself or herself, seek a writ of mandate or an injunction requiring any material to be amended or deleted. *§ 9380, subd. (b)(1)*. A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with this chapter. *§ 9380, subd. (b)(2)*.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

Governments > Local Governments > Elections

Governments > Legislation > Initiative & Referendum

***HN10***[] **State Declaratory Judgments, Scope of Declaratory Judgments**

*Elec. Code, § 9380*, is not an appropriate vehicle for public entities to challenge the constitutionality of initiatives. An action under *§ 9380* can be brought only by a voter or by the elections official. Moreover, a party asserting such a challenge is not arguing that the ballot material regarding the

initiatives is false, misleading, or inconsistent with the Elections Code; it is arguing that the initiatives themselves are unconstitutional and invalid. *Section 9380* and similar provisions are not the sole avenue of relief for a party who seeks to demonstrate that a proposed ballot measure is beyond the powers of the voters to adopt. Rather, such a question of law may be raised by a nonvoter seeking declaratory relief under *Code Civ. Proc., § 1060*, as to the respective rights and duties of the parties and the construction of a written instrument, where the validity of a ballot measure is concerned.

Governments > Local Governments > Finance

Governments > Legislation > Initiative & Referendum

***HN11*** **Local Governments, Finance**

See Cal. Const., art. XIII C, § 3.

Energy & Utilities Law > Utility Companies > Rates > General Overview

Governments > Local Governments > Finance

Governments > Legislation > Initiative & Referendum

***HN12*** **Utility Companies, Rates**

Under Cal. Const., art. XIII C, § 3, local voters by initiative may reduce a public agency's water rate and other delivery charges, but this section does not authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior voter approval. Although this power-sharing arrangement has the potential for conflict, courts must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. It is to be presumed that local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and that the board, whose members are elected, will give appropriate consideration and deference to the voters' expressed wishes for affordable water service.

Governments > Legislation > Initiative & Referendum

Governments > State & Territorial
Governments > Relations With Governments

***HN13*** **Legislation, Initiative & Referendum**

Under the exclusive delegation rule, if the Legislature statutorily delegates the exercise of certain authority exclusively to the governing body of a local governmental entity, that implicitly precludes the exercise of the same authority by initiative. The California Supreme Court has recognized certain guidelines for determining whether the exclusive delegation rule applies. The paramount factors are: (1) statutory language, with reference to "legislative body" or "governing body" deserving of a weak inference that the Legislature intended to restrict the initiative and referendum power, and reference to "city council" and/or "board of supervisors" deserving of a stronger one; and (2) the question whether the subject at issue was a matter of statewide concern or a municipal affair, with the former indicating a greater probability of intent to bar initiative and referendum.

Energy & Utilities Law > ... > Rates > Ratemaking Factors > General Overview

Governments > Local Governments > Finance

Governments > Public Improvements > Sanitation & Water

***HN14*** **Rates, Ratemaking Factors**

See *Wat. Code, § 31007*.

Governments > Legislation > Initiative & Referendum

Governments > State & Territorial
Governments > Relations With Governments

***HN15*** **Legislation, Initiative & Referendum**

A state statutory scheme does not restrict or preempt the power of an initiative simply because the initiative includes some elements of statewide concern. Rather, there must be a clear showing of the Legislature's intent to exclude the operation of the initiative power.

Governments > Legislation > Vagueness

**HN16[] Legislation, Vagueness**

The underlying concern of a vagueness challenge is the core due process requirement of adequate notice. Statutes or ordinances that are not clear as to the regulated conduct are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers; and (3) to avoid any chilling effect on the exercise of First *Amendment, U.S. Const., 1st* Amend., freedoms. Where the provisions are not penal and do not restrict speech, vagueness review is at its lowest ebb, assuming it applies at all. When assessing a facial challenge to a statute on vagueness grounds, courts should where possible construe the statute in favor of its validity and give it a reasonable and practical construction in accordance with the probable intent of the Legislature; a statute will not be declared void for vagueness or uncertainty if any reasonable and practical construction can be given its language. A statute not sufficiently clear may be made more precise by judicial construction and application of the statute in conformity with the legislative objective.

Governments > Legislation > Interpretation

**HN17[] Legislation, Interpretation**

Where more than one statutory construction is arguably possible, a court favors the construction that leads to the more reasonable result. Thus, the court's task is to select the construction that comports most closely with the drafters' apparent intent, with a view to promoting rather than defeating the statute's general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.

Governments > Legislation > Initiative & Referendum

**HN18[] Legislation, Initiative & Referendum**

An initiative must enact a statute; it cannot merely state policies and direct the governmental entity to enact unspecified laws pursuant to those policies.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Governments > Legislation > Initiative & Referendum

**HN19[] Appellate Jurisdiction, State Court Review**

It is usually more appropriate to review challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity. However, this general rule applies primarily when a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative, and the rule does not preclude preelection review when the challenge is based upon a claim, for example, that the proposed measure may not properly be submitted to the voters because the measure is not legislative in character or because it amounts to a constitutional revision rather than an amendment. Preelection review of an initiative measure may be appropriate when the challenge is not based on a claim that the substantive provisions of the measure are unconstitutional, but rests instead on a contention that the measure is not one that properly may be enacted by initiative. A measure may be kept off the ballot if it represents an effort to exercise a power which the electorate does not possess.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Governments > Legislation > Initiative & Referendum

**HN20[] Appellate Jurisdiction, State Court Review**

When an initiative is challenged on multiple grounds, some of which may be heard preelection and others which, at least ordinarily, may not, a court may proceed to resolve all the challenges on a preelection basis. There is an analogy to the federal concept of pendent jurisdiction. That is, if a court may conduct a preelection review of a particular measure on the issue of the electorate's power, there is no logical reason why the court should be prohibited from reaching all the challenges raised to the measure. A contrary rule would encourage multiple litigation of the most mischievous sort. Having found no ultra vires impropriety, a court would be compelled to permit a measure to be submitted to the voters without addressing even the most patent issues of substantive invalidity. The voters, having been apparently assured that the measure would be effective if approved, would not unreasonably feel betrayed when the court later entertained a new challenge which proved successful.

Energy & Utilities Law > Utility Companies > Rates > General Overview

Governments > Legislation > Initiative & Referendum

Governments > Public Improvements > Sanitation & Water

*HN21*[] **Utility Companies, Rates**

Cal. Const., art. XIII C, § 3, provides that local governmental charges can be reduced or repealed by initiative. This is totally irreconcilable with any statutory rule that a water district cannot set its charges by initiative. However, it is not similarly irreconcilable with a statutory rule that a water district must set its charges high enough to cover its costs. The local electorate's right to initiative is generally co-extensive with the legislative power of the local governing body. There is a constitutionally based presumption that the local electorate can legislate by initiative on any subject on which the local governing body could also legislate. Thus, if the state Legislature has restricted the legislative power of a local governing body, that restriction applies equally to the local electorate's power of initiative. Cal. Const., art. XIII C, § 3, does not alter this traditional limitation on the initiative power. It presupposes an otherwise valid use of the initiative power. The voters of a local water district simply lack the initiative power to exempt themselves from *Wat. Code, § 31007*.

## Headnotes/Syllabus

**Summary**

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied a special motion to strike (*Code Civ. Proc., § 425.16*) filed by initiative proponents in a water district's declaratory relief action challenging their initiatives to roll back water and sewer rate increases. The district presented uncontradicted evidence that the initiatives, if enacted, would set water rates too low to pay the district's costs. (Superior Court of Riverside County, No. INC1105569, Harold W. Hopp, Judge.)

The Court of Appeal affirmed the order. The court held that a declaratory relief action concerning the validity of an initiative arises out of protected activity (*§ 425.16, subd. (b)(1)*) because such an action implicates the personal constitutional rights of the initiative's proponents (*Cal. Const., art. II, § 8*). The district properly brought a declaratory relief action (*Code Civ. Proc., § 1060*), rather than a challenge to the ballot material (*Elec. Code, § 9380*), because the district was not a voter or elections official and was challenging the initiatives, not the ballot material. The exclusive delegation rule did not preclude basing future rate increases on the consumer price index, nor was this provision vague because the applicable index could be ascertained. The district showed a probability of prevailing on its claim that the initiatives were invalid because they would set rates lower than permitted by state law (*Wat. Code, § 31007*), which was not a permissible use of the local initiative power to reduce fees (Cal. Const., art. XIII C, § 3). (Opinion by Richli, J., with Ramirez, P. J., and Miller, J., concurring.) **[*893]**

**Headnotes**

CALIFORNIA OFFICIAL REPORTS HEADNOTES

*CA(1)*[] **(1)**

**Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Analysis.**

The analysis of a SLAPP motion involves two steps. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.

*CA(2)*[] **(2)**

**Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Protected Activity.**

To meet its burden under *Code Civ. Proc., § 425.16*, a defendant must present a prima facie showing that the plaintiff's causes of action arise from acts of the defendant taken to further the defendant's rights of free speech or petition in connection with a public issue. The mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such. In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity. The anti-SLAPP statute's definitional focus is not on the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.

*CA(3)*[] **(3)**

**Initiative and Referendum § 1—Actions Challenging Proposed Measures—Standing of Proponents.**

In the preelection setting, when a proposed initiative measure has not yet been adopted as state law, the official proponents of an initiative measure who intervene or appear as real parties in interest are properly viewed as asserting their own personal rights and interests—under *Cal. Const., art. II, § 8*, and the California statutes relating to initiative proponents—to propose an initiative measure and have the measure submitted to the voters for approval or rejection. In preelection cases, the official initiative proponents possess a distinct interest in defending the proposed initiative because they are acting to vindicate their own rights under the relevant California constitutional and statutory provisions to have their proposed measure—a measure they have submitted to the Attorney General, have circulated **[*894]** for signature, and have the exclusive right to submit to the Secretary of State after signatures have been collected—put to a vote of the people.

*CA(4)*[] **(4)**

**Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Protected Activity—Proponent of Initiative.**

When a proponent of an initiative is a party to preelection litigation challenging the initiative, the litigation arises out of the proponent's exercise of the constitutional right of petition. This is true even when the plaintiff is a governmental entity requesting guidance regarding the constitutionality of the proposed initiative. Initiative proponents have a constitutional stake in preelection litigation over their initiative that is distinct from the general public's stake in postenactment litigation over a statute. Moreover, there is an inherent conflict of interest between the proponent of an initiative and the affected governmental entity. The initiative process is specifically intended to enable the people to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question. Whenever the affected governmental entity files a declaratory relief action in which it seeks to keep an initiative off the ballot, the action arises out of the proponent's right of petition, in the context of a motion to strike under *Code Civ. Proc., § 425.16*.

*CA(5)*[] **(5)**

**Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Probability of Prevailing—Evidence.**

A SLAPP motion, like a summary judgment motion, pierces the pleadings and requires an evidentiary showing. Although by its terms *Code Civ. Proc., § 425.16, subd. (b)(1)*, calls upon a court to determine whether the plaintiff has established that there is a probability that the plaintiff will prevail on the claim, cases interpreting this provision establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities. The court's responsibility is to accept as true the evidence favorable to the plaintiff. The defendant's evidence is considered with a view toward whether it defeats the plaintiff's showing as a matter of law, such as by establishing a defense or the absence of a necessary element.

*CA(6)*[] **(6)**

**Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Probability of Prevailing—Evidence—Declaratory Action.**

An anti-SLAPP motion may lie against a complaint for declaratory relief. Moreover, the mere existence of a controversy is insufficient **[*895]** to overcome an anti-SLAPP motion against a claim for declaratory relief. To defeat an anti-SLAPP motion, the plaintiff must also make a prima facie evidentiary showing to sustain a judgment in the plaintiff's favor. In other words, for a declaratory relief action to survive an anti-SLAPP motion, the plaintiff must introduce substantial evidence that would support a judgment of relief made in the plaintiff's favor.

*CA(7)*[] **(7)**

**Initiative and Referendum § 11—Local Elections—Initiative—Constitutional Challenges—Declaratory Relief Available.**

*Elec. Code, § 9380*, is not an appropriate vehicle for public entities to challenge the constitutionality of initiatives. An action under *§ 9380* can be brought only by a voter or by the elections official. Moreover, a party asserting such a challenge is not arguing that the ballot material regarding the initiatives is false, misleading, or inconsistent with the Elections Code; it is arguing that the initiatives themselves are unconstitutional and invalid. *Section 9380* and similar provisions are not the sole avenue of relief for a party who seeks to demonstrate that a proposed ballot measure is beyond

the powers of the voters to adopt. Rather, such a question of law may be raised by a nonvoter seeking declaratory relief under *Code Civ. Proc., § 1060*, as to the respective rights and duties of the parties and the construction of a written instrument, where the validity of a ballot measure is concerned.

*CA(8)*[] **(8)**

**Initiative and Referendum § 11—Local Elections—Initiative—Constitutional Authority to Vote on Fees—Water Rates.**

Under Cal. Const., art. XIII C, § 3, local voters by initiative may reduce a public agency's water rate and other delivery charges, but this section does not authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior voter approval. Although this power-sharing arrangement has the potential for conflict, courts must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. It is to be presumed that local voters will give appropriate **[*896]** consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and that the board, whose members are elected, will give appropriate consideration and deference to the voters' expressed wishes for affordable water service.

*CA(9)*[] **(9)**

**Initiative and Referendum § 10—Local Elections—Nature and Scope of Powers—Exclusive Delegation Rule.**

Under the exclusive delegation rule, if the Legislature statutorily delegates the exercise of certain authority exclusively to the governing body of a local governmental entity, that implicitly precludes the exercise of the same authority by initiative. The California Supreme Court has recognized certain guidelines for determining whether the exclusive delegation rule applies. The paramount factors are: (1) statutory language, with reference to “legislative body” or “governing body” deserving of a weak inference that the Legislature intended to restrict the initiative and referendum power, and reference to “city council” and/or “board of supervisors” deserving of a stronger one; and (2) the question whether the subject at issue was a matter of statewide concern or a municipal affair, with the former indicating a greater probability of intent to bar initiative and referendum.

*CA(10)*[] **(10)**

**Initiative and Referendum § 10—Local Elections—Nature and Scope of Powers—Effect of State Statutory Scheme.**

A state statutory scheme does not restrict or preempt the power of an initiative simply because the initiative includes some elements of statewide concern. Rather, there must be a clear showing of the Legislature's intent to exclude the operation of the initiative power.

*CA(11)*[] **(11)**

**Constitutional Law § 113—Substantive Due Process—Statutory Vagueness—Construction in Favor of Validity.**

The underlying concern of a vagueness challenge is the core due process requirement of adequate notice. Statutes or ordinances that are not clear as to the regulated conduct are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers; and (3) to avoid any chilling effect on the exercise of *First Amendment* (*U.S. Const., 1st Amend.*) freedoms. Where the provisions are not penal and do not restrict speech, vagueness review is at its lowest ebb, assuming it applies at all. When assessing a facial challenge to a statute on vagueness grounds, courts should where possible construe the statute in favor of its validity and give it a reasonable and practical construction in accordance with the probable intent of the Legislature; a statute will not be declared void for vagueness or uncertainty if any reasonable and practical construction can be given its language. A statute not sufficiently clear may be made more precise by judicial construction and application of the statute in conformity with the legislative objective.

*CA(12)*[] **(12)**

**Statutes § 22—Construction—Reasonableness—Avoiding Impractical or Arbitrary Results.**

Where more than one statutory construction is arguably possible, a court favors the construction that leads to the more reasonable result. Thus, the court's task is to select the construction that comports most closely with the drafters' apparent intent, with a view to promoting rather than

defeating the statute's general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.

*CA(13)*[] **(13)**

**Initiative and Referendum § 15—Local Elections—Initiative—Adoption of Ordinances—Stating Policies.**

An initiative must enact a statute; it cannot merely state policies and direct the governmental entity to enact unspecified laws pursuant to those policies.

*CA(14)*[] **(14)**

**Elections § 18—Contests—Grounds—Invalidity of Proposed Initiative—Availability of Preelection Review.**

It is usually more appropriate to review challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity. However, this general rule applies primarily when a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative, and the rule does not preclude preelection review when the challenge is based upon a claim, for example, that the proposed measure may not properly be submitted to the voters because the measure is not legislative in character or because it amounts to a constitutional revision rather than an amendment. Preelection review of an initiative measure may be appropriate when the challenge is not based on a claim that the substantive provisions of the measure are unconstitutional, but rests instead on a contention that the measure is not one that properly may be enacted by initiative. A measure may be kept off the ballot if it represents an effort to exercise a power which the electorate does not possess.

*CA(15)*[] **(15)**

**Elections § 18—Contests—Grounds—Invalidity of Proposed Initiative—Availability of Preelection Review.**

When an initiative is challenged on multiple grounds, some of which may be heard preelection and others which, at least ordinarily, may not, a court may proceed to resolve all the challenges on a preelection basis. There is an analogy to the federal concept of pendent jurisdiction. That is, if a court may conduct a preelection review of a particular measure on the issue of the electorate's power, there is no logical reason why the court should be prohibited from reaching all the challenges raised to the measure. A contrary rule would encourage multiple litigation of the most mischievous sort. Having found no ultra vires impropriety, a court would be compelled to **[*898]** permit a measure to be submitted to the voters without addressing even the most patent issues of substantive invalidity. The voters, having been apparently assured that the measure would be effective if approved, would not unreasonably feel betrayed when the court later entertained a new challenge which proved successful.

*CA(16)*[] **(16)**

**Initiative and Referendum § 11—Local Elections—Initiative—Constitutional Authority to Vote on Fees—Otherwise Valid Use of Initiative Power Required—Consistency with State Law—Water Rates.**

Cal. Const., art. XIII C, § 3, provides that local governmental charges can be reduced or repealed by initiative. This is totally irreconcilable with any statutory rule that a water district cannot set its charges by initiative. However, it is not similarly irreconcilable with a statutory rule that a water district must set its charges high enough to cover its costs. The local electorate's right to initiative is generally co-extensive with the legislative power of the local governing body. There is a constitutionally based presumption that the local electorate can legislate by initiative on any subject on which the local governing body could also legislate. Thus, if the state Legislature has restricted the legislative power of a local governing body, that restriction applies equally to the local electorate's power of initiative. Cal. Const., art. XIII C, § 3, does not alter this traditional limitation on the initiative power. It presupposes an otherwise valid use of the initiative power. The voters of a local water district simply lack the initiative power to exempt themselves from *Wat. Code, § 31007*.

*CA(17)*[] **(17)**

**Pleading § 93—Motions and Objections—Motion to Strike—Anti-SLAPP—Probability of Prevailing—Shown.**

Under *Wat. Code, § 31007*, a water district could not set water rates so low that they would be inadequate to pay the costs listed in that section. The local electorate did not have the power to do so by initiative, and Cal. Const., art. XIII C, § 3, was not intended to give it such power. The district, in responding to the initiative proponents' special motion to strike (*Code Civ. Proc., § 425.16*) the district's declaratory relief action challenging the initiatives, introduced uncontradicted evidence that the initiatives, if enacted, would

set water rates so low that they would be inadequate to pay its costs. Therefore, the district showed the probable validity of its claim that the initiatives were invalid under *§ 31007*.

[*Cal. Forms of Pleading and Practice (2013) ch. 376, Motions to Strike: Anti-SLAPP, § 376.20*; *1 Kiesel et al., Matthew Bender Practice Guide: Cal. Pretrial Civil Procedure (2013) § 13.18*; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 849 et seq., 1029, 1038; 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, §§ 72A, 135; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 132.]

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**Judges:** Opinion by Richli, J., with Ramirez, P. J., and Miller, J., concurring.

**Opinion by:** Richli, J.

## Opinion

**[**528]** **RICHLI, J.**—Mission Springs Water District (the District) increased its water and sewer rates. Initiatives to roll back the increases gathered enough signatures to qualify for the ballot. Rather than hold an election on the initiatives, however, the District filed this action against the proponents of the initiatives[1] (the Proponents) for a declaration that the initiatives are invalid.

The Proponents filed a "SLAPP motion"—i.e., a special motion to strike pursuant to *Code of Civil Procedure section 425.16* (SLAPP Act). For this motion to be granted, the Proponents had to show **[**529]** that the action arose out of activity protected under the constitutional right of petition or free speech, and the District had to fail to show a probability of prevailing on its claims. The trial court denied the motion. It ruled that, under our decision in *City of Riverside v. Stansbury (2007) 155 Cal.App.4th 1582 [66 Cal. Rptr. 3d 862]* (*Stansbury*), a declaratory relief action concerning the validity of an initiative does not arise out of protected activity by the initiative's proponents.

The Proponents ask us to reconsider *Stansbury*, asserting that it was poorly reasoned. We conclude that *Stansbury* was sound when decided; however, in light of the California Supreme Court's subsequent holding in *Perry v. Brown (2011) 52 Cal.4th 1116 [134 Cal. Rptr. 3d 499, 265 P.3d 1002]* (*Perry*) that a preelection challenge to an initiative does implicate the personal constitutional rights of the initiative's proponents, *Stansbury* is no longer good law.
**[*900]**

Nevertheless, we also **[***3]** conclude that the trial court properly denied the SLAPP motion, albeit for the wrong reason. The District showed a probability of prevailing on at least one of its theories—that the initiatives would set the District's rates too low to cover its costs, in violation of *Water Code section 31007* and that the voters of a local district cannot override this statewide requirement. Hence, we will affirm.

I.

FACTUAL BACKGROUND

In 2010, the District adopted water and sewer rate increases effective January 1, 2011. According to the District, the rate increases are necessary if it is to remain solvent and to continue to carry out its vital public functions. According to the Proponents, however, the rate increases are unjustifiably high, due in part to employee salaries, health benefits, and pension benefits that are out of line with those prevailing in the private sector.

The Proponents circulated petitions for two initiatives (one for water rates and one for sewer rates) that would undo the rate increases and restore the preexisting rates. The initiatives also provided that, every fiscal year, "the District may adjust these … rates by the percentage increase, if any, in the Consumer Price **[***4]** Index published by the federal Bureau of Labor Statistics for the region applicable to the … District."

In May 2011, defendant Kari Verjil, the registrar of voters, notified the District that the initiatives had received enough signatures. (See *Elec. Code, §§ 9308, subd. (e), 9309, subd. (f)*.) At that point, the District was statutorily required to order that the initiatives be placed on the ballot at the next general

[1] The proponents of the initiatives, and hence the named real parties **[***2]** in interest, are Tim Radigan Brophy, Douglas Ward Sherman, Mary K. Stephens, and Steve Sobotta.

election. (*Elec. Code, §§ 1405, subd. (b)*, *9310, subd. (a)(2)*.)[2] The District, however, did not do so. Instead, it filed this action for declaratory relief.

II.

PROCEDURAL BACKGROUND

The District alleged that the initiatives were invalid because: **[*901]**

1. While Proposition 218 permits reducing local district rates by initiative, the initiatives went beyond this authorization by also limiting **[***5]** future rate increases.

2. The initiatives were void for vagueness because they did not specify which **[**530]** Consumer Price Index (CPI) was to be used for future rate increases.

3. The initiatives would cause the District to become insolvent.

4. The initiatives, rather than enacting legislation directly, required the District to enact legislation.

5. The initiatives unconstitutionally impaired the obligation of contract.

The Proponents filed a demurrer. In it, they argued that the initiatives were not invalid on any of the five theories that the District was asserting.

Meanwhile, the Proponents also filed a SLAPP motion. They argued that the action arose from the protected activity of exercising their right of petition. They also argued that the District was not likely to prevail on the merits.

The trial court held a combined hearing on both the demurrer and the SLAPP motion. After hearing argument, it denied the SLAPP motion. It reasoned that, under *Stansbury*, the action did not arise out of any protected activity. It therefore did not reach the question of whether the District had shown a probability of prevailing on the merits. (See *Code Civ. Proc., § 425.16, subd. (b)(1)*.)

At the same time, however, **[***6]** it overruled the demurrer. It ruled that at least one of the District's theories—that the initiatives unconstitutionally limited future rate increases—appeared to be meritorious.

III.

THE DISTRICT'S CLAIM DOES ARISE OUT OF PROTECTED ACTIVITY, BUT THE DISTRICT SHOWED A PROBABILITY OF PREVAILING

A. *General SLAPP Act Principles.*

The SLAPP Act states: ***HN1***[] "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in **[*902]** connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Code Civ. Proc., § 425.16, subd. (b)(1)*.)

***HN2***[] ***CA(1)***[] **(1)** "The analysis of [a SLAPP] motion thus involves two steps. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" **[***7]** protected activity. [Citation.] If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.]" (*Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 819–820 [124 Cal. Rptr. 3d 256, 250 P.3d 1115]*.)

***HN3***[] "We review an order granting or denying a motion to strike under *section 425.16* de novo. [Citation.]" (*Oasis West Realty, LLC v. Goldman, supra, 51 Cal.4th at p. 820*.)

B. *The "Arising From" Requirement.*

The Proponents contend that this action does arise out of protected activity. They appear to concede that, under *Stansbury*, it does not, but they urge us either to "revisit" (capitalization omitted) *Stansbury* or to carve out an exception to it.

***HN4***[] ***CA(2)***[] **(2)** "[T]o meet its burden 'the defendant … must present a prima facie showing that the plaintiff's causes of action arise from acts of the defendant taken to further the defendant's rights of free speech or petition in connection with a public issue. [Citation.] …' [Citation.]" (*Flatley v. Mauro (2006) 39 Cal.4th 299, 314 **[**531]** [46 Cal. Rptr. 3d 606, 139 P.3d 2]* [discussing & quoting *Paul for Council v. Hanyecz (2001) 85 Cal.App.4th 1356, 1365 [102 Cal. Rptr. 2d 864]*]; see *Flatley, at pp. 316–318* [approving *Paul for Council*].)

"[T]he mere fact that an action **[***8]** was filed after protected activity took place does not mean the action arose

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[2] The petitions requested that the initiatives be submitted to the voters "at a special election … or the … next regular election … ." This wording was probably insufficient to *require* a special election. (See *Elec. Code, § 9310, subd. (a)*.) According to the Proponents themselves, the initiatives should have gone on the ballot in the next general election, on November 8, 2011.

from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten (2002) 29 Cal.4th 82, 89 [124 Cal. Rptr. 2d 530, 52 P.3d 703]*.) "The anti-SLAPP statute's definitional focus is not [on] the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Id. at p. 92*.)
**[*903]**

To the best of our knowledge, this standard has been applied to actions challenging initiatives only twice.

First, in *City of Santa Monica v. Stewart (2005) 126 Cal.App.4th 43 [24 Cal. Rptr. 3d 72]* (*Stewart*), voters in Pasadena passed an initiative that prohibited city officials from accepting gifts and campaign contributions from recipients of certain public benefits. (*Id. at pp. 50–51, 54*.) The city, however, claimed that the initiative **[***9]** was unconstitutional; it refused to authenticate, certify and file copies of the initiative, which prevented the initiative from going into effect. (*Id. at p. 54*.)

The Foundation for Taxpayer and Consumer Rights (FTCR), which had sponsored the initiative, intervened in an action to compel the city to authenticate, certify, and file copies of the initiative. (*Stewart, supra, 126 Cal.App.4th at p. 54*.) The city responded by cross-complaining against FTCR for declaratory relief, asserting that the initiative was unconstitutional. FTCR then filed a SLAPP motion. (*Id. at p. 55*.) The trial court denied the SLAPP motion because it accepted the city's argument that the "cross-action was not motivated by a desire to punish FTCR or chill the exercise of its *First Amendment* rights. Rather, the goal was only to obtain a judicial determination that the city was not required to perform any of the ministerial duties necessary to certify the election results … because the Initiative was unconstitutional." (*Id. at pp. 71–72*; see *id. at pp. 55–56*.)

The appellate court held that this was error, and the cross-complaint did arise out of protected activity. Preliminarily, it rejected the city's argument **[***10]** that the cross-complaint did not arise out of protected activity because it arose out of the passage of the initiative. (*Stewart, supra, 126 Cal.App.4th at pp. 72–73*.) It explained, "[E]ven *if we agreed* that the act which led to the filing of the cross-complaint against FTCR was the voters' approval of the FTCR-sponsored Initiative, that approval would represent, among other things, a paradigmatic exercise of FTCR's and the voters' engagement in 'conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.' [Citations.] Advocacy for an [i]nitiative and adoption of the measure are, without question, a fundamental exercise of the *First Amendment* **[**532]** right to petition." (*Id. at p. 73*, italics added.)

The court went on to hold, however, that the cross-complaint *actually* arose out of FTCR's acts of intervening in the action and demanding that the city perform its ministerial duties of certifying and filing the initiative. (*Stewart, supra, 126 Cal.App.4th at pp. 73–75*.) The court found that the "gravamen" of the cross-complaint was not the constitutionality of the initiative **[***11]** but rather the dispute over the city's obligation to perform its ministerial duties. (*Id. at p. 74*.)
**[*904]**

The court concluded: "FTCR was sued because it had the temerity to file a complaint-in-intervention to force Pasadena to put the [i]nitiative into effect, *and* because it sponsored the [i]nitiative and supported its constitutionality, *all of which* are clearly protected activities." (*Stewart, supra, 126 Cal.App.4th at p. 75*, italics added.)

Thereafter, in *Stansbury*, the defendants were the proponents of an initiative that would have amended the eminent domain provisions of the Riverside city charter. **[**533]** (*Stansbury, supra, 155 Cal.App.4th at p. 1585*.) The city filed a declaratory relief action against them, seeking a declaration that the proposed initiative was invalid and did not have to be placed on the ballot. (*Id. at p. 1586*.) The proponents filed a SLAPP motion, which the trial court granted. (*Id. at p. 1587*.)

We held that this was error, because the complaint did not arise out of any protected activity. We relied on *City of Cotati v. Cashman (2002) 29 Cal.4th 69 [124 Cal. Rptr. 2d 519, 52 P.3d 695]*, which had held that a city's declaratory relief action regarding the validity of a rent control ordinance did not arise **[***12]** out of protected speech. We concluded that, in the case before us, "[b]y its declaratory relief action, the City was simply asking for guidance as to the constitutionality of the proposed initiative. Indeed, the City did nothing to limit respondents' activities in connection with the initiative, nor did the City, by its action, otherwise impact respondents' *First Amendment* rights. Moreover, it was proper for the City to initiate its declaratory relief action as a means of disputing, in a preelection challenge, the validity of the initiative. [Citations.]" (*Stansbury, supra, 155 Cal.App.4th at pp. 1590–1591*.)

As we noted, "[u]nderlying [the] position [of one of the

proponents] is the faulty premise that his right to petition is not complete and thus cannot be challenged—until after the proposed initiative is placed on the ballot and the electorate determines whether it should pass." (*Stansbury, supra, 155 Cal.App.4th at p. 1591*; see *id. at p. 1592*.) We responded that this "overlooks the fact there is no constitutional right to place an *invalid* initiative on the ballot. [Citation.] Moreover, [it] ignores entirely the body of law which recognizes preelection challenges to initiative **[***13]** measures." (*Id. at p. 1592*.) We concluded that "if the trial court's ruling is allowed to stand, no one could ever challenge an initiative's constitutionality prior to the election, which is contrary to law." (*Id. at p. 1585*.)

We distinguished *Stewart*, stating that "[t]he cross-action [in *Stewart*] involved not the constitutionality of the initiative, as in our case, but rather, the dispute over the city's … duty to perform certain ministerial acts … . [Citation.] Thus, because the cross-action 'arose from' FTCR's protected act of filing litigation, it was properly subject to a motion to strike under section 425.16." (*Stansbury, supra, 155 Cal.App.4th at p. 1593*.)
**[*905]**

The Proponents argue that *Stewart* and *Stansbury* are "irreconcilable" and that *Stansbury* was "wrongly decided … ." The District, on the other hand, argues that *Stansbury* is controlling and that *Stewart* is distinguishable on the grounds we stated in *Stansbury*.

The correctness of *Stansbury* turns on whether a declaratory relief action challenging the validity of an initiative arises out of the proponents' exercise of their right of petition. We indicated that the proponents' exercise of their right to petition was "complete" **[***14]** once they had done everything necessary to qualify the initiative for the ballot; hence, a challenge to actually placing the initiative on the ballot did not implicate the proponents' right of petition. (*Stansbury, supra, 155 Cal.App.4th at p. 1591*.) In 2007, when *Stansbury* was decided, there was little authority on this point. There was *Stewart*, but it was not entirely clear; it could be read broadly, as the Proponents do, or narrowly, as the District does and as we ultimately did in *Stansbury*.

In 2011, however, the California Supreme Court confronted the issue directly in *Perry*. There, the Ninth Circuit had asked our Supreme Court to decide " '[w]hether … the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.' " (*Perry, supra, 52 Cal.4th at p. 1124*.)

The Supreme Court began by observing, "[I]n the past official proponents of initiative **[***15]** measures in California have uniformly been permitted to participate as parties—either as interveners or as real parties in interest—in numerous lawsuits in California courts challenging the validity of the initiative measure the proponents sponsored. … This court, however, has not previously had occasion fully to explain the basis upon which an official initiative proponent's ability to participate as a party in such litigation rests." (*Perry, supra, 52 Cal.4th at p. 1125*.)

CA(3)[↑] **(3)** The court stated: HN5[↑] "In the preelection setting, when a proposed initiative measure has not yet been adopted as state law, the official proponents of an initiative measure who intervene or appear as real parties in interest are properly viewed as asserting their own personal rights and interests—under article II, section 8 of the California Constitution and the California statutes relating to initiative proponents—to propose an initiative measure and have the measure submitted to the voters for approval or rejection. *In preelection cases, the official initiative proponents possess a distinct interest in defending the proposed initiative because they are acting to vindicate their own rights* ***[*906]*** *under the relevant* ***[***16]*** *California constitutional and statutory provisions to have their proposed measure*—a measure they have submitted to the Attorney General, have circulated for signature, and have the exclusive right to submit to the Secretary of State after signatures have been collected—*put to a vote of the people*." (*Perry, supra, 52 Cal.4th at p. 1146*, italics added.)

By contrast, the court noted, in postelection litigation, the existence of a personal interest on the part of the official proponents **[**534]** is "arguably less clear … ." (*Perry, supra, 52 Cal.4th at p. 1147*.) It then held that, "at least in those circumstances in which the government officials who ordinarily defend a challenged statute or constitutional amendment have declined to provide such a defense or to appeal a lower court decision striking down the measure, the authority of the official proponents of the initiative to assert the state's interest in the validity of the initiative is properly understood as arising out of article II, section 8 of the California Constitution and the provisions of the Elections Code relating to the role of initiative proponents." (*Id. at p. 1151*.)

CA(4)[↑] **(4)** When this court decided *Stansbury*, *Perry* had not yet **[***17]** been decided. Indeed, as the Supreme Court itself noted, it had not yet articulated precisely why the proponent of an initiative has standing to defend its validity.

(*Perry, supra, 52 Cal.4th at p. 1125*.) Accordingly, we suggested that a proponent's exercise of the right to petition is "complete" once the proposed initiative has qualified procedurally to be placed on the ballot; we indicated that, in a preelection challenge to the validity of the initiative, this right simply is not involved. (*Stansbury, supra, 155 Cal.App.4th at p. 1591*.) Under *Perry*, however—and in particular under the italicized language quoted above—this view is no longer tenable. Rather, *Perry* now stands for the proposition that, ***HN6***[↑] when the proponent of an initiative is a party to preelection litigation challenging the initiative, the litigation arises out of the proponent's exercise of the constitutional right of petition. This is true even when the plaintiff is a governmental entity requesting guidance regarding the constitutionality of the proposed initiative. In *Stansbury*, we reasoned essentially that a preelection declaratory relief action does not "limit [the proponents'] activities in connection with **[***18]** the initiative, nor … otherwise impact [the proponents'] *First Amendment* rights." (*Stansbury, supra, 155 Cal.App.4th at p. 1591*.) However, we now know from *Perry* that this is incorrect. We also believed that *Cotati* was controlling, even though it dealt with an ordinance rather than an initiative. (*Stansbury, at p. 1591*.) Once again, however, *Perry* teaches us that initiative proponents have a constitutional stake in preelection litigation over their initiative that is distinct from the general public's stake in postenactment litigation over a statute.

Moreover, as the court in *Perry* noted, there is an inherent conflict of interest between the proponent of an initiative and the affected governmental **[*907]** entity. "[T]he initiative process is specifically intended to enable the people … to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question … ." (*Perry, supra, 52 Cal.4th at p. 1125*.) Whenever the affected governmental entity files a declaratory relief action in which it seeks to keep an initiative off the ballot, the action arises out of the proponent's right of petition.[3]

**[**535]** We adhere to the concern that we expressed in *Stansbury* about unduly inhibiting preelection challenges to initiatives. However, our statement that "if the trial court's ruling is allowed to stand, no one could ever challenge an initiative's constitutionality prior to the election …" (*Stansbury, supra, 155 Cal.App.4th at p. 1585*) must be viewed in context. In *Stansbury*, one of the proponents was arguing that the right to petition prohibits *any* preelection challenge to an initiative. (*Id. at p. 1591*.) The trial court had agreed, stating that " 'to have a declaratory relief action before the initiative is ever enacted is not something the Court should consider, because the initiative may not pass.' " (*Id. at p. 1594, fn. 10*.) It was *this* ruling that would have meant that no one could ever bring a preelection challenge.

By contrast, holding that a preelection declaratory relief action regarding the validity of an initiative arises out of the proponent's protected activity does not mean that no one could ever bring a preelection challenge. Such a holding merely addresses the first prong of the analysis of a SLAPP motion. It would still be open to the challenger to **[***21]** show that, under the second prong, it has a probability of prevailing. As we will discuss in more detail in part III.C., *post*, this is not a particularly high hurdle. Thus, such a holding would simply mean that no one could bring a *meritless* preelection challenge.

Indeed, it is difficult to underestimate the likely impact of allowing SLAPP motions in declaratory relief actions challenging the validity of initiatives. Admittedly, a SLAPP motion requires the plaintiff to show that it has a **[*908]** probability of prevailing even before it has obtained any discovery. A preelection challenge to the validity of an initiative, however, is likely to present primarily issues of law. (See *Senate of the State of Cal. v. Jones (1999) 21 Cal.4th 1142, 1153–1154 [90 Cal. Rptr. 2d 810, 988 P.2d 1089]* and cases cited [appropriate preelection claims include claim that initiative is not legislative in character, amounts to a constitutional revision rather than amendment, fails to contain accurate short title, or violates single-subject rule].)

Also, to the extent that the preelection challenge is brought by the affected governmental entity, it is likely that the entity already has much of the relevant factual information. Here,

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[3] One of the Proponents' objections **[***19]** to *Stansbury* is that supposedly it allows a local governmental entity to evade its mandatory duty to place an initiative on the ballot by filing a declaratory relief action instead. They claim that one of the issues in this appeal is whether a local governmental entity has a mandatory duty to place a procedurally qualified initiative on the ballot, even when it claims that the initiative is unconstitutional or invalid.

The filing of this declaratory relief action, however, is not what kept the initiatives off the ballot. The District did not request or obtain any provisional relief from the trial court; it simply decided, on its own, not to order an election. Filing the action does enhance the District's appearance of good faith—it can claim it is merely awaiting guidance from the court. However, the District could have refused to place the initiative on the ballot without filing any action at all.

We are somewhat surprised that the Proponents have not cross-complained for any coercive relief, such as a writ or a preliminary injunction, to compel a prompt election on the initiatives. Absent a request for such relief, however, the issue of the existence or scope of the District's mandatory **[***20]** duty simply is not before us.

for example, the District **[***22]** claims that the initiatives would cause it to become insolvent. The information relevant to this claim, including information about the District's revenues, expenses, and ratesetting practices, is in the District's own hands. It does not need discovery on this issue.

The only other significant effect of allowing SLAPP motions is that, if the motion is granted, the plaintiff will have to pay the defendant's attorney fees. (*Code Civ. Proc., § 425.16, subd. (c)(1)*.) Whenever the plaintiff is the affected governmental entity, these fees must come, directly or indirectly, out of the pocket of the **[**536]** public. Once again, however, for fees to be awarded, the action must be meritless. We would hope that local governmental entities—which have ready access to the advice of counsel—will not bring so many meritless challenges to initiatives as drain the public fisc.

"The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of *First Amendment* rights. [Citation.]" (*Fremont Reorganizing Corp. v. Faigin (2011) 198 Cal.App.4th 1153, 1165 [131 Cal. Rptr. 3d 478]*.) When a governmental entity brings a meritless preelection **[***23]** challenge to the validity of an initiative, these legislative policies apply full force.

Finally, the District argues that the Proponents "effectively ask this Court to dispense with the first prong of the anti-SLAPP analysis in any and all challenges to the constitutionality of proposed initiatives." Not at all. We merely conclude that the first prong is satisfied (at least when a proponent of the initiative is a party).

C. *Probability of Prevailing.*

We therefore turn to the second prong of the analysis—whether the District has demonstrated a probability of prevailing on its claim.
**[*909]**

*HN7*[↑] *CA(5)*[↑] **(5)** "[A] SLAPP motion, like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing." (*Simmons v. Allstate Ins. Co. (2001) 92 Cal.App.4th 1068, 1073 [112 Cal. Rptr. 2d 397]*.) " '[A]lthough by its terms *[Code of Civil Procedure] section 425.16, subdivision (b)(1)* calls upon a court to determine whether "the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim" … , past cases interpreting this provision establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine **[***24]** whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities.' [Citation.] '[T]he court's responsibility is to accept as true the evidence favorable to the plaintiff … .' [Citation.] '[T]he defendant's evidence is considered with a view toward whether it defeats the plaintiff's showing as a matter of law, such as by establishing a defense or the absence of a necessary element.' [Citation.]" (*Daniels v. Robbins (2010) 182 Cal.App.4th 204, 215 [105 Cal. Rptr. 3d 683]*.)

*HN8*[↑] *CA(6)*[↑] **(6)** "[A]n anti-SLAPP motion may lie against a complaint for declaratory relief [citation] … ." (*South Sutter, LLC v. LJ Sutter Partners, L.P. (2011) 193 Cal.App.4th 634, 665–666 [123 Cal. Rptr. 3d 301]*.) Moreover, "the mere existence of a controversy is insufficient to overcome an anti-SLAPP motion against a claim for declaratory relief. [¶] To defeat an anti-SLAPP motion, the plaintiff must also make a prima facie evidentiary showing to sustain a judgment in the plaintiff's favor. [Citation.] In other words, for a declaratory relief action to survive an anti-SLAPP motion, **[***25]** the plaintiff must introduce substantial evidence that would support a judgment of relief made in the plaintiff's favor." (*Id. at p. 670*; see *CKE Restaurants, Inc. v. Moore (2008) 159 Cal.App.4th 262, 272 [70 Cal. Rptr. 3d 921]* [plaintiff's evidence failed to show probability of prevailing on its declaratory relief claim].)

1. *The propriety of a declaratory relief action.*

Preliminarily, the Proponents argue that the District cannot bring a declaratory **[**537]** relief action at all because *Elections Code section 9380* provides the exclusive procedure for challenging the validity of a local district initiative. *HN9*[↑] That section provides that, once the text of a proposed ordinance and the arguments for and against it have been submitted (see *Elec. Code, §§ 9312*, *9315*, *9317*), there is a 10-day window during which "any voter of the jurisdiction in which the election is being held, or the elections official, himself or herself, may seek a writ of mandate or an injunction requiring any material to be amended or deleted." (*Elec. Code, § 9380, subd. (b)(1)*.) "A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with this **[***26]** chapter … ." (*Id., subd. (b)(2)*.)
**[*910]**

*CA(7)*[↑] **(7)** As the District notes, *HN10*[↑] *Elections Code section 9380* is not an appropriate vehicle for its particular challenge. An action under *Elections Code section 9380* can be brought only by a voter or by the elections official; the District is neither. Moreover, the District is not arguing that the ballot material regarding the initiatives is

false, misleading, or inconsistent with the Elections Code; it is arguing that the initiatives themselves are unconstitutional and invalid. It has been held that *Elections Code section 9380* and similar provisions (see *Elec. Code, §§ 9092*, *9190, subd. (b)*, *9295, subd. (b)*, *9509, subd. (b)*, *13282*, *13313*) are "not the sole avenue of relief for a party who seeks to demonstrate that a proposed ballot measure is beyond the powers of the voters to adopt. Rather, such a question of law may be raised by a nonvoter seeking declaratory relief under *[Code of Civil Procedure] section 1060* as to the respective rights and duties of the parties and the construction of a written instrument, where the validity of a ballot measure is concerned. [Citation.]" (*City of San Diego v. Dunkl (2001) 86 Cal.App.4th 384, 398 [103 Cal. Rptr. 2d 269]*.)

2. *Proposition 218* ***[***27]*** *and* Bighorn.

The District contends that the portion of the initiatives allowing future rate increases indexed to the CPI is invalid under Proposition 218, as construed in *Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205 [46 Cal. Rptr. 3d 73, 138 P.3d 220]* (*Bighorn*).

"In 1996, California voters adopted Proposition 218, known as the Right to Vote on Taxes Act, which added articles XIII C and XIII D to the California Constitution. [Citation.]" (*Beutz v. County of Riverside (2010) 184 Cal.App.4th 1516, 1520 [109 Cal. Rptr. 3d 851]* [Fourth Dist., Div. Two].) The principal purpose of Proposition 218 was to close a loophole in Proposition 13, which limited the ability of local governments to impose taxes, by similarly limiting their ability to impose assessments, fees, and charges. (*Beutz, at p. 1520*.)

The particular provision of Proposition 218 that is relevant here is section 3 of article XIII C of the California Constitution (article XIII C), which states: ***HN11***[⬆] "Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative **[***28]** to affect local taxes, assessments, fees and charges shall be applicable to all local governments … ."

The California Supreme Court construed article XIII C, section 3 in *Bighorn*. There, one E.W. Kelley qualified an initiative for the ballot that (1) reduced existing water rates and (2) required the water district to obtain voter **[*911]** approval before increasing water rates or imposing any **[**538]** new water rates. (*Bighorn, supra, 39 Cal.4th at pp. 209–210*.)

The Supreme Court held that, to the extent that the initiative reduced existing water rates, it was "expressly authorize[d]" by article XIII C, section 3. (*Bighorn, supra, 39 Cal.4th at p. 216*.) The water district had challenged the initiative under what the Supreme Court called "the exclusive delegation rule" (*id. at p. 219*); it argued that the Legislature had granted the exclusive authority to set water rates to the water district's board of directors and thus had implicitly precluded the use of the initiative power to set water rates. (*Id. at pp. 217, 219*.) The court held, however, that article XIII C, section 3 prevailed over the exclusive delegation rule: "The Legislature is bound by the state Constitution … , and the evident purpose **[***29]** of article XIII C is to extend the local initiative power to fees and charges imposed by local public agencies. … [T]he Legislature's authority in enacting the statutes under which the Agency operates must in this instance yield to constitutional command." (*Bighorn, at p. 217*.)

However, the Supreme Court also held that to the extent the initiative sought to "impose voter-approval requirements for future increases in fees or charges," it was *not* authorized by article XIII C, section 3. (*Bighorn, supra, 39 Cal.4th at p. 218*.) It added: "*Kelley apparently concedes that in the absence of the authority granted by section 3 of article XIII C, the exclusive delegation rule* [citations] *bars initiative measures that infringe on the power of the Agency's governing board to set its water delivery rate and charges*. Accordingly, … Kelley's initiative is invalid insofar as it seeks to impose a voter-approval requirement on future actions by the [water district]'s board of directors to increase the existing water rate and other charges or to impose new charges." (*Id. at p. 219*, italics added.)

***CA(8)***[⬆] **(8)** Finally, the court summarized its holding as follows: "We have concluded that ***HN12***[⬆] under section 3 of … **[***30]** article XIII C, local voters by initiative may reduce a public agency's water rate and other delivery charges, but also that section 3 of article XIII C does not authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior voter approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. [Citation.] We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure **[*912]** needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected [citation], will give appropriate consideration and

deference to the voters' expressed wishes for affordable water service." (*Bighorn, supra, 39 Cal.4th at p. 220*.)

The **[***31]** District argues that the portion of the initiatives here that allows future rate increases indexed to the CPI is analogous to the portion of the initiative in *Bighorn* that required voter approval for future **[**539]** rate increases. The District concludes that, under *Bighorn*, this portion of the initiatives is unauthorized under Proposition 218 and hence invalid. The trial court agreed (at least in connection with the demurrer; it did not reach this argument in connection with the SLAPP motion).

The problem with this contention is that *Bighorn* held this portion of the initiative to be invalid *only* because there the proponent *conceded* that it violated the "exclusive delegation rule." (*Bighorn, supra, 39 Cal.4th at p. 219*.) Here, the Proponents have made no such concession. Thus, we must determine whether the exclusive delegation rule applies.

*HN13*[↑] *CA(9)*[↑] **(9)** Under the exclusive delegation rule, if the Legislature statutorily delegates the exercise of certain authority exclusively to the governing body of a local governmental entity, that implicitly precludes the exercise of the same authority by initiative. (*DeVita v. County of Napa (1995) 9 Cal.4th 763, 776 [38 Cal. Rptr. 2d 699, 889 P.2d 1019]*; see *Bighorn, supra, 39 Cal.4th at p. 219* [citing **[***32]** *DeVita*].)

The Supreme Court has recognized "certain guidelines" for determining whether the exclusive delegation rule applies. (*DeVita v. County of Napa, supra, 9 Cal.4th at p. 776*.) "The paramount factors … are: (1) statutory language, with reference to 'legislative body' or 'governing body' deserving of a weak inference that the Legislature intended to restrict the initiative and referendum power, and reference to 'city council' and/or 'board of supervisors' deserving of a stronger one [citation]; [and] (2) the question whether the subject at issue was a matter of 'statewide concern' or a 'municipal affair,' with the former indicating a greater probability of intent to bar initiative and referendum [citation]." (*Ibid.*)

For purposes of the exclusive delegation rule, the water district in *Bighorn* was significantly different from the water district here. There, the water district was a special district; it operated under the Bighorn Mountains Water Agency Law, an uncodified act. (*Bighorn, supra, 39 Cal.4th at p. 209*.) The statute that assertedly delegated exclusive authority provided: " 'The *board of directors*, so far as practicable, shall fix such rate or rates for water in the agency **[***33]** … as will result in revenues which will pay the operating expenses **[*913]** of the agency, … provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due.'" (*Id. at p. 210*, italics added, citing Stats. 1969, ch. 1175, § 25, pp. 2285–2286.)

Here, by contrast, the District is a county water district. The only statute the District cites as delegating exclusive authority is *Water Code section 31007*, which provides, as pertinent here:

*HN14*[↑] "The rates and charges to be collected by [a county water] district shall be so fixed as to yield an amount sufficient to do each of the following:

"(a) Pay the operating expenses of the district.

"(b) Provide for repairs and depreciation of works owned or operated by the district.

"(c) Pay the interest on any bonded debt.

"(d) So far as possible, provide a fund for the payment of the principal of the bonded debt as it becomes due." (See *Wat. Code, §§ 30010*, *30013* **[**540]** [defining "district," as used in *Wat. Code, §§ 30000–33901*, as county water district].)

Thus, unlike **[***34]** the statute at issue in *Bighorn*, *Water Code section 31007* does not refer to the governing body of the water district at all. Instead, using the passive voice, it merely directs that rates and charges "shall be … fixed," without specifying how or by whom. Thus, there is no basis for even a "weak inference" (*DeVita v. County of Napa, supra, 9 Cal.4th at p. 776*) that the Legislature intended to preclude the voters from using the initiative power to fix rates and charges.

*CA(10)*[↑] **(10)** The District argues that *Water Code section 31007* relates to "public health and water quality," which are "matters of statewide concern." Actually, it relates more narrowly to a county water district's budgeting practices and ability to repay its bonds; arguably, these are predominantly local concerns. In any event, *HN15*[↑] "[a] state statutory scheme does not restrict or preempt the power of an initiative simply because the initiative includes some elements of statewide concern. [Citation.]" (*Shea Homes Limited Partnership v. County of* ***[*914]*** *Alameda (2003) 110 Cal.App.4th 1246, 1257 [2 Cal. Rptr. 3d 739]*; accord, *DeVita v. County of Napa, supra, 9 Cal.4th at pp. 780–781*.) Rather, there must be " 'a clear showing of the Legislature's intent' " to exclude **[***35]** the operation of the initiative power. (*DeVita, at p. 775*.) There is no such showing in the text of *Water Code section 31007*.

We therefore conclude that the District has failed to show a

probability of prevailing on its claim that the initiatives are invalid under *Bighorn*. We need not decide whether article XIII C, section 3 authorizes the portion of the initiatives that allows future rate increases indexed to the CPI. Even assuming it does not, the general initiative power does;[4] and the Legislature has not manifested any intent, in accordance with the exclusive delegation rule, to withdraw this power.

3. *Vagueness of the CPI indexing provision*.

The District contends that the initiatives are void for vagueness because they do not specify which CPI is to be used as the index for future rate increases.

**[**541]** *HN16*[↑] *CA(11)*[↑] **(11)** "The underlying concern of a vagueness challenge 'is the core due process requirement **[***37]** of adequate *notice*.' [Citation.]" (*Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1180 [78 Cal. Rptr. 3d 572]*.) "Statutes or ordinances that are not clear as to the regulated conduct are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on **[*915]** arbitrary and discriminatory enforcement by government officers; and (3) to avoid any chilling effect on the exercise of *First Amendment* freedoms. [Citation.]" (*Concerned Dog Owners of California v. City of Los Angeles (2011) 194 Cal.App.4th 1219, 1231 [123 Cal. Rptr. 3d 774]*.) Here, because the initiatives are not penal and do not restrict speech, vagueness review is at its lowest ebb, assuming it applies at all. (See *Duffy v. State Bd. of Equalization (1984) 152 Cal.App.3d 1156, 1171–1172 [199 Cal. Rptr. 886]* [questioning whether vagueness review even applies to nonpenal, nonspeech-related statutes].)

"When assessing a facial challenge to a statute on vagueness grounds, courts should where possible construe the statute in favor of its validity and give it a reasonable and practical construction in accordance with the probable intent of the Legislature; a statute will not be declared void **[***38]** for vagueness or uncertainty if any reasonable and practical construction can be given its language. [Citation.] … [A] statute not sufficiently clear may be made more precise by judicial construction and application of the statute in conformity with the legislative objective. [Citation.]" (*Schweitzer v. Westminster Investments, Inc. (2007) 157 Cal.App.4th 1195, 1206 [69 Cal. Rptr. 3d 472]*.)

We note that the California Constitution itself, as well as a host of California statutes, all refer to "the consumer price index" without specifying any particular one. (E.g., *Cal. Const., art. XIII A, § 2, subd. (b)*; see *Code Civ. Proc., § 726, subd. (g)*, *Ed. Code, § 17457.5, subd. (d)*, *Gov. Code, § 66427.5, subd. (f)(2)*, *Health & Saf. Code, § 44060, subd. (c)(3)*.) We would not lightly cast doubt on the validity of all of these statutes.

The initiatives' reference to "the Consumer Price Index" is indeed ambiguous. The CPI is not a single number, but rather "a large family of indexes with thousands of indexes published each month." (<*http://www.bls.gov/opub/focus/volume1_number15/cpi_1_15.htm*> [as of Aug. 7, 2013].)[5]

*HN17*[↑] *CA(12)*[↑] **(12)** "Where more than one statutory construction is arguably possible, our 'policy has long been to favor the construction that leads to the more reasonable result.' [Citation.] … Thus, our task is to select the construction that comports most closely with the [drafters'] apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a **[*916]** construction that would lead to unreasonable, impractical, or arbitrary results. [Citations.]" (*Imperial Merchant Services, Inc. v. Hunt (2009) 47 Cal.4th 381, 388 [97 Cal. Rptr. 3d 464, 212 P.3d 736]*.)

The leading subgroups of the CPI are the CPI-U (for urban

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[4] The Proponents contend that the voters' power to enact a local water district initiative has both constitutional and statutory sources. They cite the *California Constitution, article II, section 8*, *article II, section 11*, and *article IV, section 1*. They also cite *Elections Code section 9300 et seq.* and *Water Code section 30830*.

We do not agree that there is a general state constitutional right (i.e., other than under art. XIII C, § 3) to enact a local district initiative. *Article II, section 8* and *article IV, section 1* concern the power to adopt statewide statutes by initiative. **[***36]** Similarly, *article II, section 11* concerns the power to adopt county and city initiatives. None of these provisions grant the power to enact local district initiatives. (***Board of Education v. Superior Court (1979) 93 Cal.App.3d 578, 583 [155 Cal. Rptr. 839]*** [school district].)

We do agree, however, that the Legislature has *statutorily* granted the power of initiative to the voters of a local water district. *Elections Code section 9300* provides that, subject to exceptions not applicable here, "ordinances may be enacted by any district pursuant to this article … ." *Elections Code sections 9301 to 9323* then go on to prescribe the procedure for adopting a district ordinance by initiative. Moreover, specifically with regard to water districts, *Water Code section 30830* provides that "[o]rdinances may be passed by voters in accordance with Article 1 (commencing with *Section 9100*) of Chapter 2 of Division 9 of the Elections Code."

[5] We take judicial notice of the online materials cited in this section. (See *Evid. Code, §§ 452, subd. (h)*, *459*.) **[***39]** By means of our tentative opinion, we gave the parties notice of our intent to do so. (*Evid. Code, § 455, subd. (a)*.)

consumers), C-CPI-U (chained, for urban consumers), and CPI-W (for urban wage earners and clerical workers). (<www.bls.gov/cpi/cpisuptn.htm> [as of Aug. 7, 2013].)

**[**542]** The CPI-W excludes professional, managerial, and technical workers; the self-employed; short-term workers; the unemployed; and retirees and others not in the labor force. (<http://www.bls.gov/news.release/cpi.nr0.htm> **[***40]** [as of Aug. 7, 2013].) As these individuals make up a significant portion of the population that must pay for water, it would not make sense to use the CPI-W for water rate calculations.

The C-CPI-U, unlike the CPI-U, assumes that, as prices increase, consumers will substitute cheaper goods—for example, "[i]f the price of pork increases while the price of beef does not, consumers might shift away from pork to beef." (<http://www.bls.gov/cpi/cpisupqa.htm> [as of Aug. 7, 2013].) However, the C-CPI-U has not been generally adopted as an indexing mechanism. For example, according to the Bureau of Labor Statistics, "The C-CPI-U to our knowledge currently is not used in any federal legislation as an adjustment mechanism." (*Ibid.*) By this process of elimination, it seems that the drafters of the initiatives must have had in mind the CPI-U.

The only other question is what mix of products the drafters intended the CPI to be based on. There is a CPI for all items. This is also broken down into a CPI for food, for energy, for all items other than food and energy, and for services. Each of these is broken down still further; for example, the food CPI is broken down by food at home and food away **[***41]** from home. (<http://www.bls.gov/news.release/cpi.nr0.htm> [as of Aug. 7, 2013].) The all-items CPI is the one most widely reported. Moreover, from the very fact that the drafters did not specify a product mix, we conclude they had in mind the CPI for all items. We therefore conclude that the initiatives refer to the CPI-U for all items for the Los Angeles-Orange County-Riverside geographical area. (See <http://www.bls.gov/cpi/cpid1303.pdf>, Table 16, p. 53 [as of July 16, 2013].)

We emphasize that we are resolving this issue for purposes of the SLAPP motion, not necessarily for the litigation as a whole. The key point is that, on this record, a court can readily determine which CPI was intended, and **[*917]** therefore the initiatives are not unconstitutionally vague. (See *Table Services, Ltd. v. Hickenlooper (Colo.App. 2011) 257 P.3d 1210, 1215–1217* [constitutional amendment indexing minimum wage to " 'the Consumer Price Index used for Colorado' " **[***42]** was not impermissibly vague].) If the parties have evidence that some other CPI was intended, even though they did not present it in support of or in opposition to the SLAPP motion, we do not mean to preclude them from presenting it in subsequent litigation.

*CA(13)*[↑] **(13)** In a twist on its vagueness argument, the District also argues that the initiatives are invalid because they require it to take future legislative action—i.e., to determine which CPI to use. We recognize that *HN18*[↑] an initiative must enact a statute; it cannot "merely state policies and direct the [governmental entity] to enact unspecified laws pursuant to those policies." (*Widders v. Furchtenicht (2008) 167 Cal.App.4th 769, 785 [84 Cal. Rptr. 3d 428]*.) Here, however, because it is possible to discern which CPI the initiatives were referring to, there is no need for any further action by the District.

4. *The fiscal consequences of the initiatives*.

The District contends that the initiatives are invalid because they would (1) violate *Water Code section 31007*; (2) interfere with the provision of an essential governmental service; and (3) unconstitutionally impair the obligation of contract.

**[**543]** In opposition to the SLAPP motion, the District presented extensive and **[***43]** detailed evidence that its 2011 water and sewer rate increases were absolutely necessary due to revenue declines and cost increases, both of which were beyond its control. "Between 2007 and 2010, [the District] experienced operating losses of $2.9 million to $3.5 million annually." If the initiatives pass and rates are rolled back, the District would be unable to meet its costs, pay its debts, and stay in business; the potential consequences for the local water supply would be disastrous.

The Proponents did not contradict this evidence. In this appeal, they belatedly question some of the District's assumptions about future income and expense trends. There is no *evidence*, however, that those assumptions are incorrect. In any event, as already discussed (see pt. III.B, *ante*), we must accept the District's evidence as true.

i. *Preelection review*.

Preliminarily, the Proponents argue that, because the District's challenges based on this evidence raise factual issues, they are not ripe for preelection review.
**[*918]**

*HN19*[↑] *CA(14)*[↑] **(14)** " '[I]t is usually more appropriate to review … challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing **[***44]** the exercise of the people's franchise, in the absence of some clear showing of invalidity.' … [H]owever, '… "… this general rule applies primarily when a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative, and … the rule does

not preclude preelection review when the challenge is based upon a claim, for example, that the proposed measure may not properly be submitted to the voters because the measure is not legislative in character or because it amounts to a constitutional revision rather than an amendment. [Citations.]" [Citation.]' … [P]reelection review of an initiative measure may be appropriate when the challenge is not based on a claim that the substantive provisions of the measure are unconstitutional, but rests instead on a contention that the measure is not one that properly may be enacted by *initiative*. [Citations.]" (*Independent Energy Producers Assn. v. McPherson (2006) 38 Cal.4th 1020, 1029 [44 Cal. Rptr. 3d 644, 136 P.3d 178]*.)

" 'It is clear that a measure may be kept off the ballot if it represents an effort to exercise a power which the electorate does not possess. [Citations.]' [Citation.]" (*City of San Diego v. Dunkl, supra, 86 Cal.App.4th at p. 400*.) **[***45]** Here, the District claims that the voters lack the power to enact the initiatives because the initiatives would set its water rates below its costs and thus would force it to default on its debts and put it out of business. At least for purposes of the SLAPP motion, this does not present a factual issue, because the Proponents have not presented any contrary evidence. (See *Reycraft v. Lee (2009) 177 Cal.App.4th 1211, 1217 [99 Cal. Rptr. 3d 746]* [Fourth Dist., Div. Two] ["[w]hen the facts are undisputed, the legal significance of those facts is a question of law … ."].)

Even if it did present a factual issue, however, the Proponents cite no authority for the proposition that the mere existence of a factual issue precludes preelection review. To the contrary, the Supreme Court has observed that "an initiative petition's alleged failure to have obtained the requisite number of qualified signatures"—an issue that would appear to be quintessentially factual—can be litigated preelection. (*Costa v. Superior Court (2006) 37 Cal.4th 986, 1006 [39 Cal. Rptr. 3d 470, 128 P.3d 675]*.)

**[**544]** CA(15)[↑] **(15)** Finally, the Proponents do not dispute that at least some of the District's claims are subject to preelection review. For example, they do not argue that we cannot reach the **[***46]** District's claim that the initiatives are invalid under *Bighorn*. (See pt. III.C.2., *ante*.) In *Citizens for Responsible **[*919]** Behavior v. Superior Court (1991) 1 Cal.App.4th 1013 [2 Cal. Rptr. 2d 648]* [Fourth Dist., Div. Two], this court indicated that HN20[↑] when an initiative is challenged on multiple grounds, some of which may be heard preelection and others which, at least ordinarily, may not, a court may proceed to resolve all the challenges on a preelection basis: "[T]here is an analogy to the federal concept of 'pendent jurisdiction.' That is, if we are 'permitted' (as petitioner would have it) to conduct a preelection review of a particular measure on the issue of the electorate's power, there is no logical reason why we should be prohibited from reaching all the challenges raised to the measure. [¶] [A contrary] rule would encourage multiple litigation of the most mischievous sort. Having found no 'ultra vires' impropriety, a court would be compelled to permit a measure to be submitted to the voters without addressing even the most patent issues of substantive invalidity. The voters, having been apparently assured that the measure would be effective if approved, would not unreasonably feel betrayed when the **[***47]** court later entertained a new challenge which proved successful. We reject this position." (*Id. at p. 1024, fn. 5*.)

ii. *Water Code section 31007*.

We turn, then, to whether the initiatives are invalid under *Water Code section 31007*. As already mentioned, *Water Code section 31007* requires that a county water district's rates be fixed high enough to cover certain specified costs.

Also as already mentioned, the water district in *Bighorn* was subject to a similar statute. That statute could have been the basis for two distinct challenges to the proposed initiative: (1) under the exclusive delegation rule, the water district's board of directors had the exclusive power to set its water rates and charges, or (2) the particular water rates and charges set by the initiative were insufficient to cover the water district's costs. (*Bighorn, supra, 39 Cal.4th at p. 210*.)

The water district insisted that it was raising only the first issue. (*Bighorn, supra, 39 Cal.4th at p. 210*.) Thus, with regard to that issue, the Supreme Court held that article XIII C, section 3 trumped the exclusive delegation rule. It explained: "The Legislature is bound by the state Constitution … , and the evident purpose **[***48]** of article XIII C is to extend the local initiative power to fees and charges imposed by local public agencies. … [T]he Legislature's authority in enacting the statutes under which the Agency operates must in this instance yield to constitutional command." (*Bighorn, at p. 217*.)

The Supreme Court declined to decide the second issue. It stated: "[W]e are not holding that the authorized initiative power is free of all limitations. **[*920]** In particular, we are not determining whether the electorate's initiative power is subject to the statutory provision requiring that water service charges be set at a level that 'will pay the operating expenses of the agency, … provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due.' **[**545]**

[Citation.] That issue is not currently before us." (*Bighorn, supra, 39 Cal.4th at p. 221*.)

CA(16)[↑] **(16)** We perceive a significant distinction between the two issues. The controlling constitutional provision is HN21[↑] article XIII C, section 3, which provides that local governmental charges **[***49]** *can* be reduced or repealed by initiative. This is totally irreconcilable with any statutory rule that a water district *cannot* set its charges by initiative. However, it is not similarly irreconcilable with a statutory rule that a water district must set its charges high enough to cover its costs.

"[T]he local electorate's right to initiative … is generally co-extensive with the legislative power of the local governing body. [Citation.]" (*DeVita v. County of Napa, supra, 9 Cal.4th at p. 775*.) There is a "constitutionally based presumption that the local electorate could legislate by initiative on any subject on which the local governing body could also legislate." (*Id. at p. 777*.)

Thus, if the state Legislature has restricted the legislative power of a local governing body, that restriction applies equally to the local electorate's power of initiative. For example, in *deBottari v. City Council (1985) 171 Cal.App.3d 1204 [217 Cal. Rptr. 790]* [Fourth Dist., Div. Two], we noted that *Government Code section 65860* "prohibits enactment of a zoning ordinance that is not consistent with the general plan." (*deBottari, at p. 1210*.) We concluded that a local referendum, which, if passed, would have caused a city's **[***50]** zoning ordinances to be inconsistent with the city's general plan, was invalid. (*Id. at pp. 1210–1212*.) If the rule were otherwise, the voters of a city, county, or special district could essentially exempt themselves from statewide statutes.

Article XIII C, section 3 does not alter this traditional limitation on the initiative power. As already mentioned, it provides that "[n]otwithstanding any other provision of this Constitution, including, but not limited to, *Sections 8* and *9 of Article II*, *the initiative power shall not be prohibited or otherwise limited* in matters of reducing or repealing any local tax, assessment, fee or charge. …" (Italics added.) Thus, it presupposes an otherwise valid use of **[*921]** "the initiative power."[6] The voters of a local water district simply lack the initiative power to exempt themselves from *Water Code section 31007*.

The Proponents may argue that a water district has the ability to pad its own "operating expenses," through inflated salaries, sweetheart pension deals, lavish offices, etc.; the voters should be able to rein in such profligate expenditures by initiative. In this case, however, despite the Proponents' suspicions, there is no *evidence* that the District's budget is padded **[**546]** or abusive. It is arguable that "operating expenses," as used in *Water Code section 31007*, should be construed to mean only expenses that are reasonable and/or in good faith. On this record, however, we need not decide this issue.

Instead, we merely note that Proposition 218 also provides that, **[***52]** before increasing any fee or charge, a local governmental entity must give affected property owners notice and an opportunity to protest. If a majority of them do protest, "the agency shall not impose the fee or charge." (Cal. Const., art. XIII D, § 6, subd. (a)(2).) This gives the voters substantial protection against rate increases that, in their opinion, are due to extravagant costs. In this case, the District followed this procedure scrupulously; however, only about one out of every 500 property owners filed a protest. Finally, the voters always have the remedy of booting the members of the water district board out of office.

CA(17)[↑] **(17)** In sum, then, under *Water Code section 31007*, the District could not set water rates so low that they are inadequate to pay the costs listed in that section. We conclude that the local electorate does not have the power to do so by initiative, and article XIII C, section 3 was not intended to give it such power. The District has introduced uncontradicted evidence that the initiatives, if enacted, would set water rates so low that they would be inadequate to pay its costs. We therefore conclude that the District has shown the probable validity of its claim that **[***53]** the initiatives are invalid under *Water Code section 31007*.

In light of this conclusion, we need not decide whether the initiatives are invalid because they would interfere with the provision of an essential governmental service or because they would unconstitutionally impair the obligation of contract.

**[*922]**

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[6] We are aware of a "Statement of Drafters' Intent" (italics omitted) regarding Proposition 218. (Howard Jarvis Taxpayers Assn., Right to Vote on Taxes Act: Statement of Drafters' Intent (May 2006), available at <*http://www.hjta.org/propositions/proposition-218/text-proposition-218-analysis*> [as of Aug. 7, 2013].) However, because this statement was not included **[***51]** in the ballot pamphlet or otherwise presented directly to the voters, it is irrelevant to the construction of Proposition 218. (***Robert L. v. Superior Court (2003) 30 Cal.4th 894, 904–905 [135 Cal. Rptr. 2d 30, 69 P.3d 951]***.)

In any event, according to the statement of intent, article XIII C, section 3 was "merely" intended to " 'constitutionalize[]' " existing law to the effect that an initiative can be used "to reduce or eliminate government imposed levies … ." This supports our view that article XIII C, section 3 was not intended to expand the initiative power.

IV.

DISPOSITION

The order appealed from is affirmed. In the interest of justice, each side shall bear its own costs.

Ramirez, P. J., and Miller, J., concurred.

A petition for a rehearing was denied September 5, 2013, and the petition of real parties in interest for review by the Supreme Court was denied October 16, 2013, S213322.

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# ATTACHMENT NO. 19

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Los Angeles Regional Quality Control Board
Order No. 01-182
Permit CAS004001
Parts 4C2a., 4C2b, 4E & 4F5c3

Filed September 2, 2003, (03-TC-04)
September 26, 2003 (03-TC-19)
by the County of Los Angeles, Claimant

Filed September 30, 2003 (03-TC-20 & 03-TC-21) by the Cities of Artesia, Beverly Hills, Carson, Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce, Vernon, Bellflower, Covina, Downey, Monterey Park, Signal Hill, Claimants

Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21

*Municipal Stormwater and Urban Runoff Discharges*

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

*(Adopted July 31, 2009*)

# STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Leonard Kaye and Judith Fries appeared on behalf of the County of Los Angeles. Howard Gest appeared on behalf of the cities. Michael Lauffer appeared on behalf of the State Water Resources Control Board and the Regional Water Quality Control Board. Carla Castaneda and Susan Geanacou appeared on behalf of the Department of Finance. Geoffrey Brosseau appeared on behalf of the Bay Area Stormwater Management Agencies Association.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 4-2.

## Summary of Findings

The consolidated test claim, filed by the County of Los Angeles and several cities, allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of various facilities to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board.

The Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate on local agencies subject to the permit that are not subject to a trash total

maximum daily load:[1] "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

## BACKGROUND

The claimants allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board (LA Regional Board), a state agency.

History of the test claims

The test claims were filed in September 2003,[2] by the County of Los Angeles and several cities within it (the permit covers the Los Angeles County Flood Control District and 84 cities in Los Angeles County, all except Long Beach). The Commission originally refused jurisdiction over the permits based on Government Code section 17516's definition of "executive order" that excludes permits issued by the State Water Resources Control Board (State Water Board) or Regional Water Quality Control Boards (regional boards). After litigation, the Second District Court of Appeal held that the exclusion of permits and orders of the State and Regional Water Boards from the definition of "executive order" is unconstitutional. The court issued a writ commanding the Commission to set aside the decision "affirming your Executive Director's rejection of Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21" and to fully consider those claims.[3]

The County of Los Angeles and the cities re-filed their claims in October and November 2007. The claims were consolidated by the Executive Director in December 2008. Thus, the

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[1] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

[2] Originally, test claims 03-TC-04 (*Transit Trash Receptacles*) and 03-TC-19 (*Inspection of Industrial/Commercial Facilities)* were filed by the County of Los Angeles on September 5, 2003. Test claim 03-TC-21 (*Stormwater Pollution Requirements*) was filed by the Cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina on September 30, 2003. Test claim 03-TC-20 (*Waste Discharge Requirements*) was filed by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village on September 30, 2003.

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

reimbursement period is as though the claims were filed in September 2003, i.e., beginning July 1, 2002.[4]

Before discussing the specifics of the permit, an overview of municipal stormwater pollution puts the permit in context.

Municipal stormwater

One of the main objectives of the permit is "to assure that stormwater discharges from the MS4 [Municipal Separate Storm Sewer Systems][5] shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-stormwater to the MS4 has been effectively prohibited." (Permit, p. 13.)

Stormwater runoff flows untreated from urban streets directly into streams, lakes and the ocean. To illustrate the effect of stormwater[6] on water pollution, the Ninth Circuit Court of Appeal has stated the following:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[7]

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[4] Government Code section 17557, subdivision (e).

[5] Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

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

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

Because of the stormwater pollution problems described by the Ninth Circuit above, California and the federal government regulate stormwater runoff as described below.

California law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board).
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[8]

Much of what the regional board does, especially as pertaining to permits like the one in this claim, is based in federal law as described below.

Federal law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[9] from point sources[10] to waters of the United States, since

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

[9] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

[10] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

discharges of pollutants are illegal except under a permit.[11] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[12] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[13]

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California's permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a regional board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not " *less stringent* " than the federal standard ( *id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent*

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[11] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

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

[13] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. Actually, State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

> than required by federal law-from taking into account the economic effects of doing so.[14]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[15]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[16]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[17] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[18]

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application.

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

[15] Best management practices, or BMPs, means "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 CFR § 122.2.)

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

[17] 33 USCA 1342 (p)(2)(C).

[18] 33 USCA 1342 (p)(3)(B).

The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[19]

General state-wide permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[20] as described in the permit as follows:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. … Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations. (Permit, p. 11.)

The State Board has statutory fee authority to conduct inspections to enforce the general state-wide permits.[21] The statewide permits are discussed in further detail in the analysis.

The Los Angeles Regional Board permit (Order No. 01-182, Permit CAS004001)

To obtain the permit, the County of Los Angeles, on behalf of all permittees, submitted on January 31, 2001 a Report of Waste Discharge, which constitutes a permit application, and a Stormwater Quality Management Program, which constituted the permittees' proposal for best management practices that would be required in the permit.[22]

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[19] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[20] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

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

[22] State Water Resources Control Board, comments submitted April 18, 2008, page 8 and attachment 36.

The permit states that its objective is: "to protect the beneficial uses of receiving waters in Los Angeles County."[23] The permit was upheld by the Second District Court of Appeal in 2006, which described it as follows:

> The 72-page permit is divided into 6 parts. There is an overview and findings followed by a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees.[24]

After finding that "the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from "municipal separate storm sewer systems" (storm drain systems)" and that the discharges were the subject of regional board permits in 1990 and 1996, the regional board found that the storm drain systems in the county discharged a host of specified pollutants into local waters. The permit summed up by stating: "Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region."[25]

The permit also specifies prohibited and allowable discharges, receiving water limitations, the implementation of the Storm Water Quality Management Program "requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible."[26] As the court described the permit:

> In the prohibited discharges portion of the permit, the county and the cities were required to "effectively prohibit non-stormwater discharges" into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-stormwater emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the

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[23] Permit page 13. The permit also says: "This permit is intended to develop, achieve, and implement a timely comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the US subject to the Permittees' jurisdiction."

[24] *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 990.

[25] *County of Los Angeles v. California State Water Resources Control Board , supra,*143 Cal.App.4th 985, 990

[26] *County of Los Angeles v. California State Water Resources Control Board,, supra,* 143 Cal.App.4th 985, 994.

regional board; "uncontaminated ground water infiltrations" … and waters from emergency fire-fighting flows.[27]

There is also a list of permissible discharges that are incidental to urban activity, as specified (e.g., landscape irrigation runoff, etc.). In the part on receiving water limitations, the permit prohibits discharges from storm sewer systems that "cause or contribute" to violations of "Water Quality Standards" objectives in receiving waters as specified in state and federal water quality plans. Storm or non-stormwater discharges from storm sewer systems which constitute a nuisance are also prohibited.[28]

To comply with the receiving water limitations, the permittees must implement control measures in accordance with the permit.[29]

The permittees are also to implement the Storm Water Quality Management Program (SQMP) that meets the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduces the pollutants in stormwaters to the maximum extent possible with the use of best management practices. And the permittees must revise the SQMP to comply with specified total maximum daily load (TMDL) allocations.[30] If a permittee modified the countywide SQMP, it must implement a local management program. Each permittee is required by November 1, 2002, to adopt a stormwater and urban runoff ordinance. By December 2, 2002, each permittee must certify that it had the legal authority to comply with the permit through adoption of ordinances or municipal code modifications.[31]

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[27] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985, 991-992.

[28] "'Nuisance' means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes." *Id.* at 992.

[29] If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee must immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that describes the best management practices currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes these changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board. *Id.* at 993.

[30] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

[31] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

The permit gives the County of Los Angeles additional responsibilities as principal permittee, such as coordination of the SQMP and convening watershed management committees. In addition, the permit contains a development construction program under which permittees are to implement programs to control runoff from construction sites, with additional requirements imposed on sites one acre or larger, and more on those five acres or larger. Permittees are to eliminate all illicit connections and discharges to the storm drain system, and must document, track and report all cases.

In this claim, however, claimants only allege activities in parts 4C2a, 4C2b, 4E and 4F5c3 of the permit. These parts concern placement and maintenance of trash receptacles at transit stops, and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites, as quoted below.

**Co-Claimants' Position**

Co-claimants assert that parts 4C2a, 4C2b, 4E and 4F5c3 of the LA Regional Board's permit constitute a reimbursable state-mandate within the meaning of article XIII B, section 6, and Government Code section 17514.

*Transit Trash Receptacles*: Los Angeles County ("County") filed test claims 03-TC-04 and 03-TC-19. In 03-TC-04, *Transit Trash Receptacles*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, the claimants allege the following activities as stated in the permit part 4F5c3 (Part 4, Special Provisions, F. Public Agency Activities Program, 5. Storm Drain Operation and Management):

> c. Permittees not subject to a trash TMDL[32] shall: [¶]…[¶]
>
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Claimant County asserts that this permit condition requires the following:

1. Identifying all transit stops within its jurisdiction except for the Los Angeles River and Ballona Creek Watershed Management areas.
2. Selecting proper trash receptacle design and evaluating proper placement of trash receptacles.
3. Designing receptacle pad improvement, if needed.
4. Constructing and installing trash receptacle units.
5. Collecting trash and maintaining receptacles.

*Inspection of Industrial and Commercial Facilities:* In claim 03-TC-19, *Inspection of Industrial/ Commercial Facilities*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, claimants allege the following activities as stated in the permit parts 4C2a and 4C2b (Part 4, Special Provisions, C. Industrial/Commercial Facilities Control Program):

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[32] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:

a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections-: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with State law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP [Storm Water Quality Management Program]. At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on stormwater pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;
- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;

- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO [Retail Gasoline Outlet] and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;
- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices.

b) Phase I Facilities[33]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

**Facilities in Tier 1 Categories**:[34] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

**Facilities in Tier 2 Categories**:[35] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[36] to stormwater. For those facilities that do

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[33] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[34] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills …; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III …;* Restaurants; *Wholesale trade (scrap, auto dismantling)…;* Automotive service facilities; *Fabricated metal products …; Motor freight …; Chemical/allied products …;* Automotive Dealers/Gas Stations …; *Primary Metals.*"

[35] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary…; Air Transportation …; Rubbers/Miscellaneous Plastics …; Local/Suburban Transit …; Railroad Transportation …; Oil & Gas Extraction …; Lumber/Wood Products…; Machinery Manufacturing …; Transportation Equipment …; Stone, Clay, Glass, Concrete …; Leather/Leather Products…; Miscellaneous Manufacturing …; Food and kindred Products…; Mining of Nonmetallic Minerals …; Printing and Publishing …; Electric/Electronics …; Paper and Allied Products …; Furniture and Fixtures …;* Laundries …; *Instruments…; Textile Mills Products …; Apparel …*"

[36] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. … <u>The following categories of facilities are considered to be engaging in "industrial activity"</u> for purposes of paragraph (b)(14): [¶]…[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

*Inspection of Construction Sites:* In claims 03-TC-20 and 03-TC-21, *Waste Discharge Requirements*, the cities allege the activities in permit parts 4C2a, 4C2b, and 4F5c3, as listed in the test claims cited above, in addition to the following activities as stated in part 4E of the permit (Part 4, Special Provisions, E. Development Construction Program):

- For construction sites one acre or greater, each Permittee shall comply with all conditions in section E1 above and shall: …

  (b) Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. The Local SWPPP [Storm Water Pollution Prevention Plan] shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

  Part 4E3 of the Order provides, in relevant part, as follows:

  3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E1 and E2 and shall:

  a) require, prior to issuing a grading permit for all projects requiring coverage under the state general permit,[37] proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;" [40 CFR §122.26 (b)(14), Emphasis added.]

[37] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA [Clean Water Act] within a geographical area." (40 CFR § 122.2.) California has issued one general permit for construction activity and one for industrial activity.

Activity Storm Water Permit][38] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.

b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

Both county and city claimants allege more than $1000 in costs in each test claim to comply with the permit activities.

In comments submitted June 4, 2009 on the draft staff analysis, the County of Los Angeles asserts that local agencies do not have fee authority to collect trash from trash receptacles that must be placed at transit stops, and that voter approval under Proposition 218 would be required to do so. The County also argues that voter approval under Proposition 218 would be required for stormwater inspection costs, and cites as evidence the City of Santa Clarita's stormwater pollution prevention fee, as well as legislative proposals now in the legislature that would, if enacted, provide fee authority.

In comments submitted June 8, 2009 on the draft staff analysis, the cities disagree with the conclusion that they have fee authority to recoup the costs of the transit-stop trash receptacles, and disagree that they have fee authority to inspect facilities covered by the state-issued general stormwater permits, as discussed in more detail below.

**State Agency Positions**

Department of Finance: Finance, in comments filed March 27, 2008 on all four test claims, alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because "The permit conditions imposed on the local agencies are required by federal laws" so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that "requirements of the permit are federally required to comply with the NPDES [National Pollutant Discharge Elimination System] program … [and] is enforceable under the federal CWA [Clean Water Act]."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The permittees submitted a Storm Water Quality Management Program prevention report with their applications, in which they had the option to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies prescribed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[39] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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[38] See page 11, paragraph 22 of the permit for a description of the statewide permits.

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

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance submitted comments on the draft staff analysis on June 19, 2009, agreeing that the local agencies have fee authority sufficient to pay for the mandated activities. Finance disagrees, however, with the portion of the analysis that finds that the activities are not federal mandates.

State Water Resources Control Board: The State Board filed comments on the four test claims on April 18, 2008, noting that the federal CWA mandates that municipalities apply for and receive permits regulating discharges of pollutants from their municipal separate storm sewer system (MS4) to waters of the United States. "Pursuant to federal regulations, the Permit contains numerous requirements for the cities and County to take actions to reduce the flow of pollutants into the rivers and the Bay, known as Best Management practices (BMPs)."

The State Board asserts that the permit is mandated on the local governments by federal law, and applies to many dischargers of stormwater, both public and private, so it is not unique to local governments. The federal mandate requires that the permit be issued to the local governments, and the specific requirements challenged are consistent with the minimum requirements of federal law. According to the State Board, even if the permit were interpreted as going beyond federal law, any additional state requirements are de minimis. And the costs are not subject to reimbursement because the programs were proposed by the cities and County themselves, and because they have the ability to fund these requirements through charges and fees and are not required to raise taxes.

In comments filed with the State Board on April 10, 2008 (attached to the State Board comments on the test claim), the United States Environmental Protection Agency (U.S. EPA) asserts that the permit conditions reduce pollutants to the "maximum extent practicable." The transit trash receptacle and inspection programs, according to U.S. EPA, are founded in section 402 (p) of the Clean Water Act, and are well within the scope of the federal regulations (40 CFR § 122.26 (d)(2)(iv)(A)(3)).

In its comments on the draft staff analysis submitted June 5, 2009, the State Board agrees with the conclusion and staff recommendation to deny the test claim, but disagrees with parts of the analysis. The State Board asserts that federal law: (1) requires local agencies to obtain NPDES permits from California Water Boards, and (2) mandates the permit, which is less stringent than permits for private industry. The State Board also states that the permit does not exceed the minimum federal mandate, as found by a court of appeal. Finally, the State Board argues that the federal stormwater law is one of general application, and therefore does not impose a state mandate.

**Interested Party Positions**

Bay Area Stormwater Management Agencies Association: In comments on the draft staff analysis received June 3, 2009 (although the letter is dated April 29, 2009) the Bay Area Stormwater Management Agencies Association (BASMAA) states that this matter is of statewide importance with broad implications, and fundamentally a matter of public finance. BASMAA also urges keeping the voters' objectives paramount. BASMAA agrees that the permit requirements are a new program or higher level of service and that the requirements go beyond the federal Clean Water Act's mandates. As for the portion of the draft staff analysis that

discusses local agency fee authority, BASMAA calls it "myopic" saying it "falls short in its consideration of all potentially relevant issues and appellate court precedents that need to be presented to the Commission to serve the interest of the public." (Comments p. 3.) BASMAA contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the Proposition 218 voting requirement or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

League of California Cities and California State Association of Counties (CSAC): In joint comments on the draft staff analysis received June 4, 2009, the League of Cities and CSAC agree with the draft staff analysis that the permit is a mandate, but question whether the *Connell* and *County of Fresno* decisions are still valid as applied to Government Code section 17556, subdivision (d), which prohibit the Commission from finding costs mandated by the state if the local agency has fee authority. This is because of the voters' approval of Proposition 218 in 1996. The League and CSAC urge the Commission not to find that fee authority exists for local agencies (1) to the extent there may be doubt about whether a local agency has it, and (2) to the extent that there is no person upon which the local agency can impose the fee.

## COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[40] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[41] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[42] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

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[40] Article XIII B, section 6, subdivision (a), provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

task.[43] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[44]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[45] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[46] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[47]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[48]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[49] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[50]

The permit provisions in the consolidated test claim are discussed separately to determine whether they are reimbursable state-mandates.

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

[44] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[45] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

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

[48] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

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

[50] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

**Issue 1: Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) subject to article XIII B, section 6, of the California Constitution?**

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, and whether they constitute a federal mandate.

**A. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) an executive order within the meaning of Government Code section 17516?**

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which defines an "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following:

(a) The Governor.
(b) Any officer or official serving at the pleasure of the Governor.
(c) Any agency, department, board, or commission of state government."[51]

The LA Regional Water Board is a state agency.[52] The permit it issued is both a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

**B. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) the result of claimants' discretion?**

The permit provisions require placing and maintaining trash receptacles at transit stops and inspecting specified facilities and construction sites.

The Department of Finance, in comments submitted March 27, 2008, asserts that the claimants had discretion over what activities and conditions to include in the permit application, so that any resulting costs are downstream of the claimant's decision to include those provisions in the permit. Thus, Finance argues that the costs are not mandated by the state.

Similarly, the State Board, in its April 18, 2008 comments, cites the Stormwater Quality Management Program (SQMP) submitted by the county that constituted the claimants' proposal for the BMPs required under the permit. The State Water Board refers to (on p. 28 of the SQMP) the county's proposal to "collect trash along open channels and encourage voluntary trash collection in natural stream channels." The State Water Board further states that the SQMP (pp. 22-23) contains the municipalities' proposal for (1) site visits to industrial and commercial facilities, including automotive service businesses and restaurants to verify evidence of BMP

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[51] Section 17516 also states: ""Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 904.

[52] Water Code section 13200 et seq.

implementation, and (2) maintaining a database of automotive and food service facilities including whether they have NPDES stormwater permit coverage.

Claimant County of Los Angeles, in its June 23, 2008 rebuttal comments (pp.3-4), stated whether or not most jurisdictions place transit receptacles at transit stops is not relevant to the existence of a state mandate because Government Code section 17565 provides that if a local agency has been incurring costs for activities that are subsequently mandated by the state, the activities are still subject to reimbursement. The County also states that the permit application only proposed an industrial/commercial *educational* site visit program, not an inspection program. The claimants allege that the inspection program was previously the state's duty, but that the permit shifted it to the local agencies.

Claimant cities in their June 28, 2008 comments also construe the SQMP proposal as involving only educational site visits, which they characterize as very different from compliance inspections. And cities assert that "nowhere in the Report of Waste Discharge do the applicants propose compliance inspections of facilities that hold general industrial and general construction stormwater permits for compliance with those permits." According to the cities, the city and county objected orally and in writing to the inspection permit provision.

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[53]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants were required by state and federal law to submit the NPDES permit application in the form of a Report of Waste Discharge and SQMP. Submitting them was not discretionary. According to the record,[54] the county on behalf of all claimants, submitted on January 31, 2001 a Report of Waste Discharge (ROWD), which constitutes a permit application, and a SQMP, which constitutes the claimants' proposal for best management practices that would be required in the permit.

The duty to apply for an NPDES permit is not within the claimants' discretion. According to the federal regulation:

> a) *Duty to apply.* (1) Any person[55] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a

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

[54] State Water Resources Control Board, comments submitted April 18, 2008, page 8 & attachment 36.

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

> complete application to the Director in accordance with this section and part 124 of this chapter.[56]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …"[57] Thus, submitting the ROWD is not discretionary.

Federal regulations also anticipate the filing of an application for a stormwater permit, which contains the information in the SQMP. The regulation states in part:

> (d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application.[58]

According to the permit, section 122.26, subdivision (d), of the federal regulations contains the essential components of the SQMP (p. 32), which is an enforceable element of the permit (p. 45). Section 122.26, subdivision (d)(2)(iv)(C), in the federal regulations is interpreted in the permit to "require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4." (p. 35.) In short, the claimants were required by law to submit the ROWD and SQMP, with specified contents.

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which were not the result of the claimants' discretion.

**C. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b)?**

The next issue is whether the parts of the permit at issue are federally mandated, as asserted by the State Board and the Department of Finance (whose comments are detailed below). If so, the parts of the permit would not constitute a state mandate.

In *County of Los Angeles v. Commission on State Mandates,* the court stated as follows regarding this permit: "We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."[59] But after

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[56] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[57] Water Code section 13376.

[58] 40 Code of Federal Regulations, section 122.26 (d).

[59] *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 914.

summarizing the arguments on both sides, the court declined to decide the issue, stating: "Resolution of the federal or state nature of these [permit] obligations therefore is premature and, thus, not properly before this court."[60] The court agreed with the Commission (calling it an "inescapable conclusion") that the federal versus state issues in the test claims must be addressed in the first instance by the Commission.[61]

The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state*- mandated costs, not *federally* mandated costs."[62]

When analyzing federal law in the context of a test claim under article XII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[63] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[64]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."

In *Long Beach Unified School Dist. v. State of California*,[65] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[66] The *Long Beach* court stated that unlike the federal law at issue, "the executive

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[60] *Id.* at page 918.

[61] *Id.* at page 917. The court cited *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830, 837, in support.

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

[63] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

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

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

[66] *Id.* at page 173.

Order and guidelines require specific actions … [that were] required acts. These requirements constitute a higher level of service."[67]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[68] Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[69] The federal Clean Water Act also allows for more stringent measures, as follows:[70]

> Permits for discharges from municipal storm sewers [¶]…[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the … State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

As discussed further below, the Commission finds that the permit activities are not federally mandated because federal law does not require the permittees to install and maintain trash receptacles at transit stops, or require inspections of restaurants, automotive service facilities, retail gasoline outlets or automotive dealerships. As to inspecting phase I facilities or construction sites, the federal regulatory scheme authorizes states to perform the inspections under a general statewide permit, making it possible to avoid imposing a mandate on the local agencies to do so.

In its June 2009 comments on the draft staff analysis, the State Board disagrees that specific mandates in the permit exceed the federal requirements, the State Board argues:

> This approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not convert the federal mandate into a state mandate.[71]

The Commission disagrees. Based on the *Long Beach Unified School Dist.* case discussed above and applied in the analysis below, the specific requirements in the permit may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act.

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

[68] 33 U.S.C. § 1370.

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

[70] 33 USCA section 1370.

[71] State Board comments submitted June 2009, page 6.

Finance, in its June 2009 comments on the draft staff analysis, distinguishes this permit from the issue in the *Long Beach Unified School Dist.* case. According to Finance, in *Long Beach,* the courts had suggested certain steps and approaches that might help alleviate racial discrimination, although the state's executive order and guidelines required specific actions. But in this claim, federal law requires NPDES permits to include specific requirements.

The Commission agrees that NPDES permits are required to include specific measures. But as discussed in more detail below, those measures are not the same as the specific requirements at issue in this permit (in Parts 4C2a, 4C2b, 4E, and 4F5c3).

The State Board's June 2009 comments also discuss *County of Los Angeles v. State Water Resources Control Board,*[72] which involved the same permit as in this test claim. The State Board asserts that this case holds, in an unpublished part, that "the permit did not exceed the federal minimum requirements for the MS4 program."[73] (Comments, p. 5.) The State Board asserts that the Commission is bound by this decision.

The Commission reads the *County of Los Angeles* case differently than the State Board. The plaintiffs (permittees and others) in that case challenged the permit on a variety of issues, including that the regional board did not have jurisdiction to issue it, and that it violated the California Environmental Quality Act. The court did not, however, discuss the permit conditions at issue in this test claim. In the portion cited by the State Board, the court was addressing the consideration of the permit's economic effects. One of the plaintiffs' challenges to the permit was that the regional board was required to consider the economic effects in issuing the permit. By alleging the regional board had not done so, the plaintiffs argued that the permit imposed conditions more stringent than required by the federal Clean Water Act. The court held that the plaintiff's contentions were waived for failure to set forth all the documents received by the regional board, and that the regional board had considered the costs and benefits of implementation of the permit. In other parts of the opinion, however, the court acknowledged the regional board's authority to impose permit restrictions beyond the "maximum extent feasible"[74]

The *County of Los Angeles* case is silent on the permit provisions at issue in this claim[75] (Parts 4C2a, 4C2b, 4E, and 4F5c3) except when it said: "we need no [sic] address the parties'

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[72] *County of Los Angeles v. State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

[73] The court's opinion, including the unpublished parts, are in attachment 26 of the State Board's comments submitted April 18, 2008.

[74] See page 18 of attachment 26 of the State Board's comments submitted April 18, 2008.

[75] In *County of Los Angeles,* the plaintiffs also challenged the following parts of the permit: (1) part 2.1 that deals with receiving water restrictions and that prohibits all water discharges that violate water quality standards or objectives regardless of whether the best management practices are reasonable; (2) part 3.C, which requires the permittees to revise their storm water quality management programs in order to implement the total maximum daily loads for impaired water bodies, and (3) parts 3.G and 4., which authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. The court held that these contentions were waived for failure to set forth all the

remaining contentions concerning trash receptacles."[76] The court also said inspections under the permit were not unlawful. Nonetheless, the case is not binding on the Commission in deciding the issues in this claim.

**California in the NPDES program:** By way of background, under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, the section that describes the NPDES program (and which, in subdivision (p), describes the requirements for the municipal stormwater system permits) states in part:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is neither required to have an NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[77] to comply with the Federal Water Pollution Control Act of 1972 stated the following findings and declaration in Water Code section 13370:

(a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants … to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the

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applicable evidence, and that the regional board has authority to impose restrictions beyond the maximum extent feasible.

[76] See page 22, attachment 26 of the State Board's comments submitted April 18, 2008.

[77] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

> provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this Water Code section 13370, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[78] to effect the stormwater permit program.

Any further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

In its June 2009 comments on the draft staff analysis, the State Board argues as follows:

> [T]he … analysis treats the state's decision to *administer* the NPDES permit program in 1972 as the 'choice' referred to in *Hayes.* …The state's 'choice' to administer the program in lieu of the federal government does not alter the federal requirement on municipalities to reduce pollutants in these discharges to the maximum extent practicable.[79]

Finance, in its June 2009 comments, also disagrees with this part of the draft staff analysis, asserting that the duty to apply for a NPDES permit is required by federal law on public and private dischargers, which in this case are local agencies.

Even though California opted into the NPDES program, further analysis is needed to determine whether the federal regulations impose a mandate on the local agencies. To the extent that state requirements go beyond the federal requirements, there would be a state mandate.[80] Thus, the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402(p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26.

**Placing and maintaining trash receptacles at transit stops (part 4F5c3):** This part of the permit states:

> c. Permittees not subject to a trash TMDL[81] shall: [¶]…[¶]
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

The comments of the State Water Board and U.S. EPA assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations. The U.S.

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

[79] State Board comments submitted June 2009, page 4.

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

[81] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

EPA submitted a letter to the State Water Board regarding the permit conditions in April 2008, which the State Water Board attached to its comments. Regarding the trash receptacles, the letter states:

> [M]aintaining trash receptacles at all public transit stops is well within the scope of these [Federal] regulations. Among the minimum controls required to reduce pollutants from runoff from commercial and residential areas are practices for "operating and maintaining public streets, roads, and highways … [40 CFR] § 122.26(d)(2)(iv)(A)(3).[82]

U.S. EPA also cites EPA's national menu of BMPs for stormwater management programs, "which recommends a number of BMPs to reduce trash discharges." Among the recommendations is 'improved infrastructure' for trash management when necessary, which includes the placement of trash receptacles at appropriate locations based on expected need."[83]

The State Water Board, in comments filed April 18, 2008, states that part 4F of the permit (regarding trash receptacles) concerns "the municipalities' own activities, as opposed to its regulation of discharges into its system by others." The State Water Board cites the same section 122.26 regulation as U.S. EPA, and states that the requirements "reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable. It is federal law that animates the requirement and federal law that mandates specificity in describing the BMPs." The State Water Board alleges that two appellate courts[84] have determined that the permit provisions constitute the "maximum extent practicable" standard, which is the minimum requirement under federal law.

The Department of Finance also asserts that the permit requirements are a federal mandate.

The County of Los Angeles, in comments filed June 23, 2008, states that "Nothing in the federal Clean Water Act requires the County to install trash receptacles at transit stops. Nothing in the federal regulations or the Clean Water Act itself imposes this obligation." The county states that the U.S.EPA's citation to BMPs for stormwater management programs "may be permitted under federal law … and even encouraged as 'reasonable expectations.' But such requirements are not mandated on the County by federal law." The County admits the existence of "an abundance of federal guidance and encouragement to have the County install and maintain trash receptacles at all public transit stops. But these are merely federal suggestions, not mandates."

The city claimants, in comments filed June 25, 2008, also argue that the requirement for transit trash receptacles is not a federal mandate, stating that nothing in the Clean Water Act or the federal regulations requires cities to install trash receptacles at transit stops. City claimants also submit a survey of other municipal stormwater permits, finding that none of those issued by U.S. EPA required installation of trash receptacles at transit stops.

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[82] Letter from Alexis Strauss, Director, Water Division, U.S. EPA, to Tam M. Doduc, Chair, and Dorothy Rice, Executive Director, State Water Resources Control Board, April 10, 2008, page 3.

[83] *Id.* at page 3.

[84] The State Water Board cites: *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region* (2006) 135 Cal.App.4th 1377; *County of Los Angeles v. California State Water Resources Control Board* (2006) 148 Cal.App.4th 985.

The federal law applicable to this issue is section 402 of the Clean Water Act, which states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[85] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[86] of a discharge[87] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. … Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]
>
> (2) Part 2 of the application shall consist of: [¶]…[¶]
>
> (iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design

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

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

[87] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures[88] to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]…[¶]

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities. (40 CFR § 122.26(d)(2)(iv)(A)(3).) [Emphasis added.]

The Commission finds that the plain language of the federal statute (33 USCA § 1342 (p)(3)(B)) and regulation (40 CFR § 122.26 (d)(2)(iv)(A)(3)) does not require the permitees to install and maintain trash receptacles at transit stops.

Specifically, the state freely chose[89] to impose the transit trash receptacle requirement on the permittees because neither the federal statute nor the regulations require it. Nor do they require the permittees to implement "practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems"[90] although the regulation requires a description of practices for doing so. Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that "mandate costs that exceed the mandate in the federal law or regulation."[91]

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[88] Minimum control measures are defined in 40 CFR § 122.34 to include: 1) Public education and outreach on storm water impacts; (2) Public involvement/participation; (3) Illicit discharge detection and elimination. (4) Construction site storm water runoff control; (5) Post-construction storm water management in new development and redevelopment.; (6) Pollution prevention/good housekeeping for municipal operations.

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

[90] 40 CFR § 122.26(d)(2)(iv)(A)(3).

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

In *Long Beach Unified School Dist. v. State of California*,[92] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[93] The *Long Beach Unified School District* court stated:

> Where courts have suggested that certain steps and approaches may be helpful [in meeting constitutional and case law requirements] the executive Order and guidelines require *specific actions.* …[T]he point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.[94] [Emphasis added.]

The reasoning of *Long Beach Unified School Dist.* is applicable to this claim. Although "operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[95] is a federal requirement on municipalities, the permit requirement to place trash receptacles at all transit stops and maintain them is an activity, like in *Long Beach Unified School Dist.,* that is a *specified action* going beyond federal law.[96]

Neither of the cases cited by the State Water Board demonstrate that placing trash receptacles at transit stops is required by federal law. In *City of Rancho Cucamonga v. Regional Water Quality Control Board –Santa Ana Region*[97] the court upheld a stormwater permit similar to the one at issue in this claim. The City of Rancho Cucamonga challenged the permit on a variety of grounds, including that it exceeded the federal requirements for stormwater dischargers to "reduce the discharge of pollutants to the maximum extent practicable"[98] and that it was overly prescriptive. The court concluded that the permit did not exceed the maximum extent practicable standard and upheld the permit in all respects. There is no indication in that case, however, that the permit at issue required trash receptacles at transit stops. Similarly, in a suit regarding the same permit at issue in this case, the *Los Angeles County*[99] court dismissed various challenges to the permit, but made no mention of the permit's transit trash receptacle provision.

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

[93] *Id.* at page 173.

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

[95] 40 Code of Federal Regulations, section 122.26 (d)(2)(iv)(A)(3).

[96] *Ibid*.

[97] *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region, supra,* 135 Cal.App.4th 1377.

[98] 33 USCA section 1342 (p)(3(B)(iii).

[99] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

Therefore, the Commission finds that placing and maintaining trash receptacles at all transit stops within the jurisdiction of each permittee, as specified, is not a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b).

Part 4F5c3 of the permit states as follows:

> c. Permittees not subject to a trash TMDL shall: (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Based on the mandatory language (i.e., "shall") in part 4F5c3 of the permit, the Commission finds it is a state mandate for the claimants that are not subject to a trash TMDL to place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003, and to maintain all trash receptacles as necessary.

**Inspecting commercial facilities (part 4C2a):** Section 4C2a of the permit requires inspections of restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships as follows:

> 2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:
>
> (a) Commercial Facilities
>
> (1) Restaurants
>
> Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.
>
> Level of Inspections: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with Statw law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each restaurant, inspectors shall verify that the restaurant operator:
>
> - has received educational materials on stormwater pollution prevention practices;
> - does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
> - keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
> - does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;

- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;
- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;

- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices. [¶]…[¶]

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The state asserts that these inspection requirements in permit part 4C2a are a federal mandate.

In comments filed April 18, 2008, the State Water Board quotes from the MS4 Program Evaluation Guide issued by U.S. EPA, asserting that it requires inspections of businesses. The State Water Board also states:

> The federal regulations also specifically require local stormwater agencies, as part of their responsibilities under NPDES permits, to conduct inspections. [citing 40 CFR § 122.26(d)(2)(iv)(C).] Throughout the federal law, there are numerous requirements for entities that discharge pollutants to waters of the United States to monitor and inspect their facilities and their effluent. [citing Clean Water Act §402(b)(2)(B); 40 CFR § 122.44(i)).] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers they must conduct inspections.

Similarly, the April 10, 2008 letter from U.S. EPA to the State Water Board and attached to the Board's comments submitted April 18, 2008, states:

> A program for commercial and industrial facility inspection and enforcement that includes restaurants and automobile facilities, would appear to be both practicable and effective. Such an inspection program ensures that stormwater discharges from such facilities are reducing their contribution of pollutants and that there are no non-stormwater discharges or illicit connections. Thus these programs are founded in both 402 (p)(3)(B)(ii) and (iii) and are well within the scope of 40 CFR § 122.26(d)(2)(iv)(A) and (B).

The County of Los Angeles, in its June 23, 2008 rebuttal comments, asserts that federal law requires prohibiting non-stormwater discharges into the storm sewers, and reducing the discharge of pollutants in stormwater to the maximum extent practicable (33 USC 1342(p)) but not inspecting restaurants, automotive service facilities, retail gas outlets, or automotive dealerships.

Only municipal landfills, hazardous waste treatment, disposal and recovery facilities and related facilities are required to be inspected (40 CFR § 122.26(d)(2)(iv)(C)).

In comments received June 25, 2008, the city claimants argue that the LA Regional Board freely chose to impose the permit requirements on the permittees, and make the following arguments: (1) The inspection obligations were not contained in two prior permits issued to the cities and the County—thus, the requirements are not federal mandates; (2) No federal statute or regulation requires the cities or the County to inspect restaurants, automotive service facilities, retail gas outlets, automotive dealerships or facilities that hold general industrial permits; (3) Stormwater NPDES permits issued by the U.S. EPA do not contain the requirement to inspect restaurants, auto service facilities, retail gas outlets and automotive dealerships, or require the extensive inspection of facilities that hold general industrial stormwater permits as contained in the Order [i.e. permit]; (4) The Administrator of U.S. EPA, as well as the head of the water division for U.S. EPA Region IX, have specifically stated that a municipality has an obligation under a stormwater permit only to assure compliance with local ordinances; the state retains responsibility to inspect for compliance with state law, including state-issued permits.

The city claimants dispute the State Board's contention that the court in *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377 held that federal law required inspections like those at issue in the permit. The cities quote part of the *City of Rancho Cucamonga* case with the following emphasis:

> Rancho Cucamonga and the other permittees are responsible for inspecting construction and industrial sites and commercial facilities within their jurisdiction for compliance with and enforcement of local municipal ordinances and permits. *But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.* The Regional Board may conduct its own inspections but permittees must still enforce their own laws at these sites. (40 C.F.R. § 122.26, subd. (d)(2) (2005).)

In discussing the federal mandate issue, the applicable federal law is section 402 of the Clean Water Act, which states that municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations (40 CFR § 122.26 (d)(2)(iv)(B)&(C)) state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such

operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]

(2) Part 2 of the application shall consist of: [¶]…[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]…[¶]

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-stormwater discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States [¶]…[¶]

(C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges. (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

There is a requirement in subdivision (d)(2)(iv)(B)(1) for implementing and enforcing "an ordinance, orders, or similar means to prevent illicit discharges to the municipal separate storm system." There is no express requirement in federal law, however, to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Nor does the

portion of the MS4 Program Evaluation Guide quoted by the State Water Board contain mandatory language to conduct inspections for these facilities.

In its April 2008 comments, the State Water Board argues that this reading of the regulations is not reasonable, and that U.S. EPA acknowledged that the initial selection by MS4s was only a starting point. In its comments (p.15), the State Water Board also states:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. … Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.

The State Water Board would have the Commission read requirements into the federal law that are not there. The Commission, however, cannot read a requirement into a statute or regulation that is not on its face or its legislative history.[100]

Based on the plain language of the federal regulations that are silent on the types of facilities at issue in the permit, the Commission finds that performing inspections at restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships, as specified in the permit, is not a federal mandate.

Moreover, the requirement to inspect the facilities listed in the permit is an activity, as in the *Long Beach Unified School Dist.* case discussed above, [101] that is a specified action going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, the inspections are not federally mandated.

The permit states in part: "Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified …" Based on the mandatory language in part 4C2a of the permit, the Commission finds that this part is a state mandate on the claimants to perform the inspections at restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships at the frequency and levels specified in the permit.

**Inspecting phase I industrial facilities (part 4C2b):** Part 4C2b of the permit regarding phase I industrial facilities requires the following:

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[100] *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 219-220. "Rules governing the interpretation of statutes also apply to interpretation of regulations." *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

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

b) Phase I Facilities[102]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

**Facilities in Tier 1 Categories**:[103] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

**Facilities in Tier 2 Categories**:[104] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to stormwater. For those facilities that do have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

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[102] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[103] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills …; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III …;* Restaurants; *Wholesale trade (scrap, auto dismantling)…;* Automotive service facilities; *Fabricated metal products …; Motor freight …; Chemical/allied products …;* Automotive Dealers/Gas Stations …; *Primary Metals.*"

[104] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary…; Air Transportation …; Rubbers/Miscellaneous Plastics …; Local/Suburban Transit …; Railroad Transportation …; Oil & Gas Extraction …; Lumber/Wood Products…; Machinery Manufacturing …; Transportation Equipment …; Stone, Clay, Glass, Concrete …; Leather/Leather Products…; Miscellaneous Manufacturing …; Food and kindred Products…; Mining of Nonmetallic Minerals …; Printing and Publishing …; Electric/Electronics …; Paper and Allied Products …; Furniture and Fixtures …;* Laundries …; *Instruments…; Textile Mills Products …; Apparel …*"

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The issue is whether these inspection requirements for phase I industrial facilities is a federal mandate. The governing federal regulation is 40 CFR section 122.26 (d)(2)(iv)(B)&(C), which is cited above. Specifically on point is subpart (C), which states that the proposed management program must include the following:

> (C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:
>
> (1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges; (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

The phase I facilities in the permit are defined to include.

> (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities. (Permit, p. 62)

And the Tier 1 facilities in the permit include municipal landfills, hazardous waste treatment, disposal and recovery facilities and facilities subject to SARA Title III (see permit attachment B, pp. B-1 to B-2). Thus, there is a federal requirement to inspect these phase I and tier 1 facilities in the permit. The issue is whether this requirement constitutes a federal mandate on local agencies. The Commission finds that it does not.

It is the state that mandates the phase I inspection and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[105] This is because the federal regulatory scheme provides an alternative means of regulating and inspecting these industrial facilities under the state-enforced, statewide permit, as follows:

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

(c) Application requirements for stormwater discharges associated with industrial activity[106] and stormwater discharges associated with small construction activity -

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. Facilities that are required to obtain an individual permit, or any discharge of stormwater which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph. [Emphasis added.]

The state has issued a statewide general activity industrial permit (GIASP) that is enforced through the regional boards.[107] This, along with the statewide construction permit, is described in the permit itself:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was reissued on August 19, 1999. The GIASP was reissued on April 17, 1997. Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and

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[106] According to 40 CFR § 122.26, (b)(14): "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. … The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]…[¶](x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more."

[107] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

> non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.[108]

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspections of industrial facilities (specified in part 4C2b of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4C2b of the permit. In fact, the State Board collects fees for the regional boards for performing inspections under the GIASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

In its April 18, 2008 comments, the State Water Board asserts:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. … Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.[109]

The Commission disagrees. Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the "owner or operator of the discharge") the Commission finds that the state has freely chosen[110] to impose these activities on the permittees. Therefore, the Commission finds that there is no federal mandate on the claimants to perform inspections of phase I facilities as specified in part 4C2b of the permit.

As to whether the permit is a state mandate, part 4C2b contains the following mandatory language:

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[108] Permit, page 11, paragraph 22.

[109] State Water Board comments, submitted April 18, 2008, page 15.

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

b) Phase I Facilities[111]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below. [Emphasis added.]

Frequency of Inspection

**Facilities in Tier 1 Categories**:[112] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

**Facilities in Tier 2 Categories**:[113] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[114] to stormwater. For those facilities that do

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[111] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[112] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills …; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III …;* Restaurants; *Wholesale trade (scrap, auto dismantling)…;* Automotive service facilities; *Fabricated metal products …; Motor freight …; Chemical/allied products …;* Automotive Dealers/Gas Stations …; *Primary Metals.*"

[113] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary…; Air Transportation …; Rubbers/Miscellaneous Plastics …; Local/Suburban Transit …; Railroad Transportation …; Oil & Gas Extraction …; Lumber/Wood Products…; Machinery Manufacturing …; Transportation Equipment …; Stone, Clay, Glass, Concrete …; Leather/Leather Products…; Miscellaneous Manufacturing …; Food and kindred Products…; Mining of Nonmetallic Minerals …; Printing and Publishing …; Electric/Electronics …; Paper and Allied Products …; Furniture and Fixtures …;* Laundries …; *Instruments…; Textile Mills Products …; Apparel …*"

[114] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. … The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]…[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Based on this mandatory language to perform the inspections of phase I facilities as specified, the Commission finds that part 4C2b of the permit is a state-mandate.

**Inspecting construction sites (part 4E):** Part 4E of the permit contains the following requirements:

- Implement a program to control runoff from construction activity at all construction sites within each permittees jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater, each permittee shall:

- Require the preparation and submittal of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).
  - If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
  - If non-compliance continues the Regional Board shall be notified for further joint enforcement actions. (Permit, 4E2b.)

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more." [40 CFR §122.26 (b)(14), Emphasis added.]

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP (Permit, 4E2c.)
- For sites five acres and greater:
    - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
    - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
    - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

The applicable federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) on the issue of whether the inspection of construction sites is a federal mandate is as follows:

> (d) Application requirements for large[115] and medium[116] municipal separate storm sewer discharges. The operator[117] of a discharge from a large or medium

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[115] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as

municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. … Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]

(2) Part 2 of the application shall consist of: [¶]…[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]…[¶]

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in stormwater runoff

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determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. …" (40 CFR § 122.26 (b)(4).)

[116] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. …" (40 CFR § 122.26 (b)(7).)

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

> from construction sites to the municipal storm sewer system, which shall include: [¶]…[¶]
>
> (3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and … [Emphasis added.]

The language of the federal regulation indicates a duty to inspect construction sites and enforce control measures as specified in part 4E of the permit. The *Rancho Cucamonga* case cited by the State Board also states that federal law requires NPDES permittees to inspect construction sites.[118]

The issue, however, is whether the federal requirements to inspect construction sites and enforce control measures amounts to a federal mandate on the local agencies. The Commission finds that it does not. First, the federal regulations quoted above do not specify the frequency or other specifics of the inspection program as the permit does. These are activities, as in the *Long Beach Unified School Dist.* case discussed above,[119] that are specified actions going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, it is not a federal mandate for the local agency permittees to inspect construction sites.

Moreover, it is the state that mandates the inspections of construction sites and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[120] The federal regulations do not require: (1) a municipality to have a separate permit for construction activity or enforcement; or (2) that the inspections and related activities in part 4E of the permit be conducted by the owner or operator of the discharge. Rather, these activities may be conducted by the state under a state-wide, state-enforced, general permit, as stated in the federal stormwater regulation (40 CFR § 122.26 (c)), which states in part:

> (c) Application requirements for stormwater discharges associated with industrial activity [includes construction activity of five or more acres] and stormwater discharges associated with small construction activity[121] [construction activity from one to less than five acres]--

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[118] *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region, supra,* 135 Cal.App.4th 1377, 1390.

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

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

[121] According to 40 CFR § 122.26, (b)(15): "Storm water discharge associated with small construction activity means the discharge of storm water from: (i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. [Emphasis added.]

The state has issued a statewide general construction permit, as described on page 11 of the permit as quoted above, which is enforced through the regional boards.[122] In fact, the State Board collects fees for the regional board for performing inspections under the GCASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities (in part 4E of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4E of the permit. Therefore, the Commission finds that the requirement for local-agency permittees to inspect construction sites in section 4E of the permit is not a federal mandate.

The Commission finds that, based on the permit's mandatory language, the following activities in part 4E are state mandates on the permittees within the meaning of article XIII B, section 6:

- Implement a program to control runoff from construction activity at all construction sites within each permittee's jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater:

- Require the preparation of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).

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Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where: …"

[122] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

- If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
- If non-compliance continues, notify the Regional Board for further joint enforcement actions. (Permit, 4E2b.)

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP. (Permit, 4E2c.)
- For sites five acres and greater:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
  - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

One of the requirements in part 4E3c of the permit is to: "Use an effective system to track grading permits issued by each permittee. To satisfy this requirement, the use of a database or

GIS system is encouraged, but not required." The Commission finds that, based on the plain language of this provision, using an effective system to track grading permits is a state mandate, although use of a database or GIS system is not.

Overall, the Commission finds that the permit provisions (parts 4C2a, 4C2b, 4E & 4F5c3) are subject to article XIII B, section 6, of the California Constitution.

**Issue 2: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) impose a new program or higher level of service?**

The next issue is whether the permit provisions at issue, i.e., found above to be state-mandated, are a program, and whether they are a new program or higher level of service.

First, courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[123]

The State Water Board, in its April 2008 comments, argues that the NPDES program is not a program because "the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES stormwater permits."

In comments submitted June 25, 2008, the cities call the State Board's argument inapposite, and cite the *Carmel Valley Fire Protection District* case[124] regarding whether the permit constitutes a "program." According to claimant, "[t]he test is not whether the general program applies to both governmental and non-governmental entities. The test is whether the specific executive orders at issue apply to both government and non-governmental entities."

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. The permit activities are limited to local governmental entities. The permit defines the "permittees" as the County of Los Angeles and 84 incorporated cities within the Los Angeles County Flood Control District (Permit, p. 1 & attachment A). The permit lists no private entities as "permittees." Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County. (Or as stated on page 13 of the permit: "The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County.") Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

In its comments on the draft staff analysis submitted June 5, 2009, the State Board disagrees with this conclusion because NPDES permits may also apply to private entities.

The State Board made this same argument in *County of Los Angeles v. Commission on State Mandates*, which the court addressed by stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation

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[123] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[124] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[125]

In other words, the issue is not whether NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities (parts 4C2a, 4C2b, 4E & 4F5c3) in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.

The next step to determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption.[126]

The Commission finds that local agencies were not required by state or federal law to place and maintain trash receptacles at transit stops before the permit was adopted. Whether or not most cities or counties do so, as argued by the State Water Board in its April 2008 comments, is not relevant to finding a state-mandated new program or higher level of service because even if they do, Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate."

Because the transit trash receptacle requirement is newly mandated by the permit, and based on the plain language of part 4F5c3 of the permit, the Commission finds that it is a new program or higher level of service to place trash receptacles at transit stops and maintain them as specified in the permit.

For the same reason, the Commission finds that the inspections and enforcement activities at industrial and commercial facilities, including restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, and phase I facilities (in parts 4C2a & 4C2b of the permit) as well as inspection and enforcement at construction sites (in part 4E of the permit) are a new program or higher level of service. These were not required activities of the permittees prior to the permit's adoption.

In sum, the Commission finds that all the permit provisions at issue in this test claim impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

**Issue 3: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E & 4F5c3) impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?**

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

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

The final issue is whether the permit provisions impose costs mandated by the state,[127] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claims. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement.

In test claims 03-TC-20 and 03-TC-21, the cities' claimant representative declares (p. 24) that the cities will incur costs estimated to exceed $1000 to implement the permit conditions.

In test claim 03-TC-04, the County of Los Angeles states (p. 18) that the costs in providing the services claimed "far exceed the minimum reimbursement amount of $1000 per annum." In the attached declaration for *Transit Trash Receptacles*, the County declares (pp. 22-23) the following itemization of costs from December 13, 2001 to October 31, 2002:

> (1) Identify all transit stops in the jurisdiction: $19,989.17;
>
> (2) Select proper trash receptacle design, evaluate proper placement, specification and drawing preparation: $38,461.87;
>
> (3) Preliminary engineering works (construction contract preparation, specification reviewing process, bid advertising and awarding): $19,662.02;
>
> (4) Construct and install trash receptacle units: $230,755.58, construction management $34,628.31;
>
> (5) Trash collection and receptacle maintenance in FY 2002-03, $3,513.94, maintenance contractor costs for maintaining and collecting trash in FY 2002-03, $93,982.50;
>
> (6) Projected costs for on-going maintenance in FY 2003-04, $375,570.00.

Similarly, attached to claim 03-TC-19 (pp. 20-21) are declarations that itemize the County of Los Angeles' costs for *Inspection of Industrial/Commercial Facilities* program, from December 13, 2001 to September 15, 2003, as follows:

> (1) inspect 1744 restaurants: $234,931.83;
>
> (2) inspect 1110 automotive service facilities: $149,526.36;
>
> (3) inspect 249 retail gasoline outlets and automotive dealerships: $33,542.45;
>
> (4) Identify and inspect all Phase I (387 Tier 1 and 543 Tier 2) facilities within the jurisdiction: $125,155.31;
>
> (5) Total $543,155.95.

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

These declarations illustrate that the costs associated with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

**A. Did the claimants request the activities in the permit within the meaning of Government Code section 17556, subdivision (a)?**

The first issue is whether the claimants requested the activities in the permit. The Department of Finance and the State Water Board both asserted that they did. As discussed above, the claimants were required to submit a Report of Waste Discharge and Stormwater Quality Management Plan before the permit was issued.

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (a) The claim is submitted by a local agency … that requested legislative authority for that local agency … to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency … that requests authorization for that local agency … to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

**B. Do the claimants have fee authority for the permit activities within the meaning of Government Code section 17556, subdivision (d)?**

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency … if, after a hearing, the commission finds any one of the following: [¶]…[¶] (d) The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The constitutionality of Government Code section 17556, subdivision (d), was upheld by the California Supreme Court in *County of Fresno v. State of California*,[128] in which the court held that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes. The court stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to

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

> preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[129]

In *Connell v. Superior Court,*[130] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the Districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section

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[129] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.

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

17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[131]

In its April 18, 2008 comments (p. 19), the State Board asserted that the claimants have fee authority to pay for the trash receptacle and inspection programs in the permit. Likewise, the Department of Finance, in its March 2008 comments, states that "some local agencies have set fees to be used toward funding the claimed permit activities" that should be considered offsetting revenues.

Los Angeles County, in its comments submitted in June 2008, states (p. 2) that it is "without sufficient fee authority to recover its costs." The County points out that the state or regional board has fee authority in Water Code section 13260, subdivision (d)(2)(B)(iii) for inspections of industrial and commercial facilities, but those fees are not shared with the County or the cities.[132] The County also states that the inspections are to determine compliance with the general industrial permit that is enforced by the regional boards.[133]

In their comments received June 25, 2008, the city claimants assert that they do not have fee authority. The cities first note that, for facilities that hold state-issued general industrial or general construction stormwater permits, the state already imposes an annual fee and therefore has occupied the field (Wat. Code, § 13260, subd. (d)(2)(B)(iii)). The cities also relate the difficulty of imposing a fee for inspecting restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships because, although the cities could enact a general businesses license on all businesses, "the cities could not charge other businesses for the cost of inspecting this subgroup without again running the risk of charging fees on the other businesses for services not related to regulation of them." The cities also dispute the State Water Board's assertion that transit users could be charged a fee for the transit trash receptacles because the County and cities do not operate the transit system.

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

[132] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii) states:

> (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund. (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

[133] Page 3 of the General Industrial Permit states in part: "Following adoption of this General Permit, the Regional Water Boards shall enforce its provisions."

In comments on the draft staff analysis submitted in June 2009, the League of California Cities and California State Association of Counties (CSAC) question whether the decisions in *Connell* (1997), and *County of Fresno* (1991), can any longer be cited as good authority for the constitutionality of Government Code section 17556, subdivision (d), given the voter-approval requirement of Proposition 218 (discussed below) added to the state Constitution in 1996. Proposition 218 requires, among other things, that new or increased property-related fees be approved by a majority of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners, except for property-related fees for sewer, water, or refuse collection services (Cal. Const., art. XIII D, § 6, subd. (c)).

The League and CSAC also urge the Commission, to the extent there may be legal doubt whether a local agency has the authority to impose a fee, to not find that the fee authority exception to reimbursement in Government Code section 17556, subdivision (d), applies.

The Commission disagrees with the League and CSAC. The Commission cannot ignore the precedents of *Connell* or *County of Fresno*, or find that they conflict with article XIII D of the California Constitution (Proposition 218), until the issue is decided by a court of law. With regards to Government Code section 17556, subdivision (d), article III, section 3.5 of the California Constitution forbids the Commission or any state agency from declaring a statute unenforceable or refusing to enforce it on the basis of its unconstitutionality unless an appellate court declares that it is unconstitutional. Since no appellate court has so declared, the Commission is bound to uphold and analyze the application of Government Code section 17556, subdivision (d), to this test claim.

The issue of local fee authority for the municipal stormwater permit activities, however, is one of first impression for the Commission. Although there are no authorities directly on point, some legal principles emerge that guide the analysis, as discussed below.

**1. Local fee authority to inspect commercial and industrial and construction sites (parts 4C2a, 4C2b & 4E)**

**Fee authority to inspect under the police power:** The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

The Third District Court of Appeal has stated that article XI, section 7, includes the authority to impose fees. In *Mills v. Trinity County*,[134] a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without the two-thirds affirmative vote of the county electors. In upholding the fees, the court stated:

> [S]o long as the local enactments are not in conflict with general laws, the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution.[135]

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[134] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656.

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

In addition to the *Mills* case, courts have held that water pollution prevention is a valid exercise of government police power.[136] And municipal inspections in furtherance of sanitary regulations have been upheld as "an exercise of that branch of the police power which pertains to the public health."[137]

In *Sinclair Paint v. State Board of Equalization*, [138] the California Supreme Court upheld a fee imposed on manufacturers of paint that funded a child lead-poisoning program, ruling it was a regulatory fee and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution (Proposition 13). The court recognized that determining under Proposition 13 whether impositions were fees or taxes is a question of law. In holding that the fee on paint manufacturers was "regulatory" and not a special tax, the court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[139] [Emphasis added.]

The *Sinclair Paint* court also recognized that regulatory fees help to prevent pollution when it stated: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[140]

Although the court's holding in *Sinclair Paint* applied to a state-wide fee, the language it used (putting "ordinances" in the same category as "statutes") recognizes that local agencies also have the police power to impose regulatory fees. Moreover, the court relied on local government police power cases in its analysis.[141]

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

[137] *Sullivan v. City of Los Angeles Dept. of Bldg. & Safety* (1953) 116 Cal.App.2d 807, 811.

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

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

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

[141] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

A regulatory fee is an imposition that funds a regulatory program[142] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. …the regulatory program is for the protection of the health and safety of the public."[143] Courts will uphold regulatory fees if they comply with the following principles:

> Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A section 4 analysis if the "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." [Citations omitted] "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." [Citations omitted] "Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement." [Citations omitted] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee."[144] [Emphasis added.]

Local fees for inspections of commercial and industrial facilities, and construction sites, would be preventative and could be imposed to comply with the criteria the courts have used to uphold regulatory fees, articulated above. And the regulatory fees fall within the local police power to prevent, clean up, or mitigate pollution.

Therefore, pursuant to article XI, section 7, the Commission finds that the claimants have fee authority within the meaning of Government Code section 17556, subdivision (d), sufficient to carry out the mandated activities in parts 4C2a, 4C2b and 4E of the permit. Therefore, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code section 17514 and 17556 to perform the activities in those parts of the permit (commercial, phase I, and construction site inspections and related activities).

In fact, in June 2005, claimant Covina adopted stormwater inspection fees on restaurants, retail gasoline outlets, automotive service facilities, etc., as part of its business license fee, expressly for the purpose of complying with the permit at issue in this test claim.[145]

**Statutory fee authority to operate and maintain storm drains:** Health and Safety Code section 5471 expressly authorizes cities and counties to charge fees for storm drainage maintenance and operation services:

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

[143] *Ibid.*

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

[145] City of Covina, Resolution No. 05-6455.

> [A]any entity[146] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. … Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities ….

The statute makes no mention of "inspecting" commercial or industrial facilities or construction sites. Rather, the fee revenues are used for "maintenance and operation" of storm drainage facilities. Thus, for the types of businesses regulated by the permit (restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites) the Commission cannot find that pursuant to Health and Safety Code section 5471, the claimants have fee authority "sufficient" to pay for the mandated inspection program within the meaning of Government Code section 17556. The statute's "operation and maintenance" of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

**2. Local fee authority under the police power and the Public Resources Code to place and maintain trash receptacles at transit stops (Permit, 4F5c3)**

As discussed above, part 4F5c3 of the permit requires the County and cities to place and maintain trash receptacles at transit stops in their jurisdictions. Public Resources Code section 40059, subdivision (a), suggests that the County and cities have fee authority to perform this activity as follows:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

The statute gives local governments the authority over the "nature, location and extent of providing solid waste handling services" and is broad enough to encompass "placing and maintaining" receptacles at transit stops. The statute also provides local governments with broad authority over the "level of services, charges and fees."

The draft staff analysis determined that the claimants had fee authority under Public Resources Code section 40059 and the police power (Cal. Const. art. XI, § 7) to install and maintain trash receptacles at transit stops and recommended that the Commission deny the test claim with respect to part 4F5c3 of the permit.

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[146] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

The city claimants, in June 2009 comments on the draft staff analysis, argue that section 40059, subdivision (a), does not apply here because it was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board (IWMB) in order to ensure that local trash collection agreements would not be affected by the IWMB legislation. The cities also cite *Waste Resources Technologies v. Department of Public Health* (1994) 23 Cal.app.4th 299, which held that the statute reflected the Legislature's intent to allow for local regulation of waste collection. According to the cities, the statute "was not intended as an *imprimatur* for local agencies to assess fees on their residents or on businesses to pay for the costs of trash generated by transit users when that requirement was established not as a matter of local choice but rather state mandate." (Comments, p. 7.)

The cities also argue that a valid fee must have a causal connection or nexus between the person or entity paying the fee, and the benefit or burden being addressed. Claimants assert that there is no group on which the claimants can assess a fee that has a relationship with the trash receptacles because the burden is created by the transit riders but benefits the public at large. City claimants also argue that they cannot assess fees on transit agencies or increase transit fares to recoup the cost of installing and maintaining trash receptacles because they have no authority to do so. As an example, the claimants cite the Metropolitan Transit Authority's (the largest public transit operator in Los Angeles County) authority to set fares (Pub. Util. Code, § 30638) that rests exclusively with the MTA's board.

As to the police power, City claimants argue that they cannot use it to assess fees on property owners or businesses for the cost of transit trash receptacles because doing so would collect more than the actual cost of the collection and thereby create a special tax that would require a two-thirds vote (Cal. Const. art. XIII A, § 4). And according to the claimants, they do not have statutory fee authority to assess property owners for the cost of installing and maintaining trash receptacles. Finally, claimants assert that a fee on property owners for transit stop trash receptacles, even if it were not a special tax, would require a vote under Proposition 218 (Cal. Const., art. XIII D).

The County of Los Angeles, in its June 2009 comments on the draft staff analysis, argues that local agencies do not have fee authority over bus operators, and for support cites *Biber Electric Co. v. City of San Carlos* (1960) 181 Cal.App.2d 342, which held that a local fee would conflict with a general state Vehicle Code provision. The County also asserts that no fee could be imposed on bus riders because the pollution prevention would benefit all county residents, not only those riding buses, and that such a fee would require a vote under Proposition 218 because the fee's purpose would be excluding trash from storm drains rather than routine collection.

The League of California Cities and CSAC, in their June 2009 comments on the draft staff analysis, criticize the conclusion that fee authority exists for transit trash receptacles because the analysis does not discuss upon whom the fee would be imposed. They also dispute the application of the *Connell* case because the issue is not whether the fee is economically feasible, but whether it is legally feasible. The League and CSAC point out that local agencies have no authority to impose the fee on transit agencies or their ridership, and that Proposition 218 imposes procedural and substantive requirements on adjacent business owners and residences, so that the local agency could not impose the fee or assessment on them without their consent. Thus, the League and CSAC argue that the local agencies do not have fee authority pursuant to

Government Code section 17556, subdivision (d): "sufficient to pay for the mandated program or increased level of service."

After considering these arguments, the Commission agrees that Government Code section 17556, subdivision (d), does not apply to the placement and maintenance of transit trash receptacles as specified in the permit because the claimants do not have the authority to impose fees.

Michael Lauffer was asked at the Commission hearing on July 31, 2009, why the transit trash requirement in the permit was not imposed on transit agencies. Mr. Lauffer testified that transit agencies were not named historically on the permits, and that the Board, at the time it established the requirements, thought it was appropriate to place them on municipalities. He also testified that nothing would prevent the municipalities under the permit from working with Metropolitan Transit Authority (MTA) to cooperatively implement the transit trash requirement, or to have the MTA carry out the primary obligation for meeting it. He added that the transit stops were public facilities, the language used in the federal regulations, which is why the permit included the requirement to place the trash receptacles there.[147]

Because the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks)[148] or transit district property (for bus or metro or subway stations), there are no entities on which the claimants would have authority to impose the fees. The plain language of Public Resources Code section 40059 provides no fee authority over transit districts or transit riders, and the Metropolitan Transit Authority's fee statutes grant fee authority exclusively to its board (Pub. Util. Code, §§ 30638 & 130051.12).

Additionally, the claimants do not have fee authority under the police power because they do not provide the "services necessary to the activity for which the fee is charged."[149]

Thus, the Commission finds that part 4F5c3 of the permit imposes costs mandated by the state within the meaning of Government Code section 17514 and 17556.

The remainder of this analysis addresses the arguments raised by the claimants that their local fee authority for inspections would be preempted by a statute granting the state fee authority, and that a local fee would be a special tax. The application of Proposition 218 on the fee authority for inspection is also discussed.

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[147] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, pages 52-53.

[148] "The general rule views the sidewalk as part of the street; it … holds the city liable for pedestrian injuries caused by the dangerous condition of the sidewalk." *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 832.

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

### 3. Local fee authority to inspect industrial or construction sites (parts 4C2a, 4C2b & 4E) performed under the statewide general permits would not be preempted by state fee authority in Water Code section 13260, subdivision (b)(2)(B)

In their comments submitted in June 2008 (p. 14), the city claimants argue that the permittees cannot impose fees for inspections of industrial or commercial or construction sites as follows:

> [W]ith respect to facilities that hold state-issued general industrial or general construction stormwater permits, the state had occupied the field. …[T]he state already imposes an annual fee on general industrial and general construction stormwater permittees. That fee is explicitly designated, in part, to cover inspections of these facilities and regulatory compliance. Water Code § 13260(d)(2)(B).
>
> This state fee thus preempts any fee that the Cities or County could charge for inspection of these facilities.

The cities also assert that in 2001, the regional board initiated negotiation of a contract with the County whereby the regional board would pay the County to perform inspections of facilities that held general industrial stormwater permits (the 'Phase I facilities') on the regional board's behalf. Immediately after the permit was issued, the regional board terminated those negotiations.

In comments submitted in June 2009 on the draft staff analysis, city claimants clarify that their comments "are not directed towards the claimants' ability to assess fees for inspections of the other commercial establishments, i.e., restaurants and automotive service facilities, retail gasoline outlets and automobile dealerships, or Phase I facilities or construction sites that are not required to hold a state-issued general industrial or general construction stormwater permit."

According to the city claimants, fees for inspecting the phase I industrial facilities and construction sites under the statewide permits (the GIASP and GCASP) would be preempted by state fee authority in Water Code section 13260, under which the State Board collects fees for inspecting those sites. The city claimants state the fact that the specific destination of the funds from the fees in Water Code section 13260, subdivision (d)(2)(iii) is spelled out is evidence of intent that the Legislature fully occupied the field for inspections of GIASP and GCASP permit holders.

Because the fee authority to inspect commercial facilities (identified in the permit as restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships) is not contested by the city claimants, the discussion below is limited to industrial and construction site inspections performed under the statewide permits concurrently with the permit at issue in this claim.

The California Supreme Court has outlined the following rules as to when a statute preempts a local ordinance by fully occupying the field:

> A local ordinance *enters a field fully occupied* by state law in either of two situations-when the Legislature "expressly manifest[s]" its intent to occupy the legal area or when the Legislature "impliedly" occupies the field. ( *Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p.

551["[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost."].)

When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)[150]

The state statute at issue, the stormwater fee statute, in subdivision (d) of section 13260 of the Water Code, reads in pertinent part:

(d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]…[¶]

(2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.

(B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a <u>general industrial or construction stormwater permit</u> under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

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[150] *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068. Emphasis in original.

> (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in that region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. (Wat. Code, § 13260, subds. (d)(1) & (d)(2).) [Emphasis added.]

The State Water Board has adopted regulations to implement the stormwater fee that include fee schedules based on the threat to water quality and a complexity rating.[151] At the hearing on July 31, 2009, Michael Lauffer of the State Water Board testified that the fee is established annually by the State Board, based on the legislative appropriation for the boards to carry out their responsibilities. Mr. Lauffer testified that the annual fee for industrial facilities under this Water Code statute is $833, and the fee for construction facilities is variable, starting at $238, plus $24 per acre, with a cap of $2,600. [152]

The issue is whether Water Code section 13260, subdivision (d)(1) and (d)(2), preempts local fee authority. In resolving this, we look for express or implied preemption or intent to occupy the field.[153]

First, there is no express intent on the face of the Water Code statute to preempt any local fee ordinance because the statute is silent on local fees. As to implied intent to occupy the field of law, the Supreme Court has stated that it may be found if:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.[154]

The city claimants, in their comments on the draft staff analysis submitted in June 2009, argue as follows with regard to Water Code section 13260:

> Here, the Legislature adopted a statute that specifically established a mechanism for fees to be assessed on GIASP and GCASP holders, for those funds to be

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[151] Fees for NPDES permits for municipal separate stormwater sewer systems are in subdivision (b) of section 2200 of title 23 of the California Code of Regulations.

[152] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, page 111.

[153] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[154] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

> segregated and sent to the regional boards, and for a specified amount of those funds ("not less than 50 percent of the money") to be used by the regional boards "solely" on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. Water Code section 13260(d)(2)(iii). Such a specific determination as to the destination of the funds for the purposes of inspection and compliance evidences the intent of the Legislature that the issue of funding for GIASP and GCASP inspections be "fully occupied."

The Commission disagrees. Specific determination of funds is not a factor the courts use to determine whether a state statute fully occupies the field. Applying the Supreme Court's factors from the *O'Connell v. City of Stockton* case, the subject matter of stormwater fees has not been "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern."[155] The Water Code's single fee statute for state permit holders does not rise to that level. Second, the Commission cannot find that "the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action."[156] No clear indication of a paramount state concern can be found on the face of the Water Code fee statute. And the third instance does not apply because the subject is not "of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality."

The legislative history of the Water Code provision does not indicate any intent to occupy the field. The legislative history of the amendment to require 50 percent of the fees to be used for stormwater inspection and regulatory compliance issues indicated as follows:

> …California's 1994 Water Quality Inventory Report states that storm waters and urban run-off are the leading sources of pollution in California estuaries and ocean waters. Proponents argue that non-compliance is rampant, with approximately 10,000 industries in the Los Angeles area alone who are required but have failed to obtain storm water permits. Further, proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site and question whether adequate revenues are returned to the regional boards for this program.[157]

The Legislature acknowledged that the state inspections at the time the statute was enacted were inadequate to prevent the pollution that the statewide permits were intended to prevent.

And the regional board, via the permit, acknowledges the role of both local regulation and state regulation under the general permits. Page 11 of the permit states:

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[155] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[156] *Ibid.*

[157] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assem. Bill No. 1186 (1997-1998 Reg. Sess.) as amended August 6, 1997.

> The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.

As to inspection of construction sites, section 4E of the permit states:

> If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Moreover, the Water Code statute provides broader fee authority than a local inspection fee. The statute requires the regional board to "spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs." (Wat. Code, § 13260, subd. (d)(2)(iii). Emphasis added.) Because the fees for GIASP and GCASP permit holders may also be spent on "regulatory compliance issues" in addition to the inspections, the Commission cannot find that a local fee ordinance would duplicate or be "coextensive" with state fee authority, and therefore cannot find that the state fee statute occupies the field. A local fee would merely partially overlap with the state fee.

As for the phase I facilities[158] subject to inspection, the inspections do not occupy the field because the permit specifies that these need not be inspected if the regional board has inspected them within the past 24 months.

According to the State Board's April 2008 comments, the overlapping fees were envisioned by U.S./EPA.

> In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge stormwater "associated with industrial activity." (fn. CWA § 402(p)(2)(B)). As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits. (fn. CWA § 402(p).) The State Water Board has issued

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[158] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

> permits for industrial and construction discharges of stormwater, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review stormwater practices, was specifically envisioned and required by U.S. EPA in adopting its stormwater regulations.

U.S./EPA, in its "MS4 Program Evaluation Guidance" document, acknowledged regulation at both the local and state levels as follows:[159]

> In addition to regulation of construction site stormwater at the local level, EPA regulations also require construction sites disturbing greater than one acre to obtain an NPDES permit. This permit can be issued by the state permitting authority or EPA, depending on whether the state has been delegated the NPDES authority. This dual regulation of construction sites at both the local and state or federal level can be confusing to permittees and construction operators.[160]

In fact, as to inspection duties and costs under two permit systems, one court has stated regarding a permit similar to the one in this claim:

> Rancho Cucamonga and the other permittees are responsible for inspection construction and industrial sites and commercial facilities within their jurisdiction for compliance with the enforcement of local municipal ordinance and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.[161]

The reasoning of the *City of Rancho Cucamonga* case is instructive because a local regulatory fee could be used for local-government inspections, and the state fee is for state or regional inspections under the general statewide permits.

The state permit program and local inspection program under the regional board's permit can be viewed as two programs with similar, overlapping goals. Viewed in this way, the fees for two sets of inspections for construction sites (or for phase I facilities not inspected by the regional board within the past two years) would not necessarily exceed the costs of both sets of inspections.

In short, a local regulatory fee ordinance that provided for inspections of the industrial facilities and construction sites specified in the permit (parts 4C2a, 4C2b & 4E) would not be preempted

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[159] State Water Resources Control Board, comments submitted April 18, 2008, attachment 33.

[160] *Ibid.*

[161] *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra,* 135 Cal.App.4th 1377. The test claim record is silent as to the number of facilities within the permit area that are subject to the General Industrial Activity Storm Water Permit, or how many construction sites within the permit area are subject to the General Construction Activity Storm Water Permit.

by the state fee authority in Water Code section 13260 or in title 23 of the California Code of Regulations.

**4. Local fee authority to inspect industrial or construction sites covered under the state permits would not be a "special tax" under article XIII A, section 4, of the California Constitution**

In their June 2008 rebuttal comments, the city claimants assert that they do not have sufficient fee authority under Government Code section 17556, subdivision (d). They focus on facilities that hold state-issued general industrial or construction stormwater permits and pay the state-imposed fees pursuant to Water Code section 13260, arguing that an additional local fee for inspecting these facilities would be considered a special tax. According to the city claimants:

> In order for a fee to be considered a "fee" as opposed to a "special tax," the fee cannot exceed the reasonable cost of providing the services necessary for which the fee is charged. See *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660. Any fee assessed by the Cities or the County for inspection of these facilities would be a double assessment, and thus run afoul of this rule.

The city claimants, in their June 2009 comments on the draft staff analysis, again assert that forcing claimants to recover their costs for inspecting the state-permitted GIASP and GCASP facilities and sites, the regional board is creating a special tax on holders of those state permits.

Special taxes are governed by article XIII A, section 4, of the California Constitution:

> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Government Code section 50076 states that a fee is not a special tax under article XIII A, section 4, if the fees are: (1) "charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged," and (2) "are not levied for unrelated revenue purposes." The California Supreme Court has reaffirmed this rule.[162]

The Commission finds that a local regulatory stormwater fee, if appropriately calculated and charged, would not be a special tax within the meaning of article XIII A, section 4. There is no evidence in the record that a local regulatory fee charged for the stormwater inspections would exceed the reasonable cost of providing the inspections and related services or would otherwise violate the criteria in section 50076.

As the court stated in the *Connell v. Superior Court* case discussed above:

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[162] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th at p. 876: "[T]he term "special taxes" in article XIII A, section 4, does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes."

> The [Water] Districts argue any fees levied by the districts "cannot exceed the cost to the local agency to provide such service," because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.[163]

Similarly, in this claim no one is suggesting that the local agencies levy regulatory fees that exceed their costs. Therefore, the Commission finds that a local regulatory fee for stormwater would not be a "special tax" under article XIII A, section 4, of the California Constitution for the activities at issue in the permit.

**5. The local fee to inspect industrial and construction sites would not be subject to voter approval under article XIII D (Proposition 218) of the California Constitution**

Some local government fees are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 (1996). Article XIII D defines a property-related fee or charge as any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service. Among other things, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (article XIII D, § 6, subd. (c)). Exempt from voter approval, however, are property-related fees for sewer, water, or refuse collection services (*Ibid*).

In 2002, an appellate court decision in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to impose storm water fees if they are imposed "as an incident of property ownership."

The Commission finds that local fees for inspections of phase I facilities, restaurants, retail gasoline outlets, automotive dealerships, etc., would not be subject to the vote requirement of Proposition 218. In a case involving inspections of apartments in the City of Los Angeles in which a fee was charged to landlords, the California Supreme Court ruled that the regulatory fee for inspecting apartments was not a "levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service" [164] within the meaning of Proposition 218. The court interpreted the phrase "incident of property ownership" as follows:

> The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge

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

[164] That is the definition of "fee" or "charge" in article XIII D, section 2, subdivision (e).

> against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.[165]
>
> [¶]…[¶] In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners.* The [City of Los Angeles'] ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords.[166]

Following the reasoning of the *Apartment Assoc.* case, the inspection fees on restaurants, retail gasoline outlets, automotive dealerships, phase I facilities, etc., like the fee in *Apartment Assoc.*, would not be imposed on landowners as landowners, nor as an incident of property ownership, but by virtue of business ownership. Thus, the inspection fee would fall outside the voter requirement of Proposition 218.

As to the fees for inspecting construction sites, the Commission finds that they too would not be subject to Proposition 218's voter requirement. Article XIII D of the California Constitution states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[167]

Moreover, the California Supreme Court, in determining whether water connection fees are within the purview of Proposition 218, reasoned that "water service" fees were within the meaning of "property-related services" but "water connection" fees were not.

> Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.[168]

The Supreme Court's reasoning applies to local stormwater fees for inspecting construction sites. That is, the fee would not be an incident of property ownership because it results from the owner's voluntary decision to build on or develop the property. Therefore, the Commission finds that local inspection fees for stormwater compliance at construction sites would not be within the purview of the election requirement of Proposition 218. A recent report by the Office of the Legislative Analyst concurs with this conclusion.[169]

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[165] *Apartment Assoc. of Los Angeles County v.City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[166] *Id.* at 842 [Emphasis in original.]

[167] Article XIII D, section 1, subdivision (b).

[168] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427.

[169] "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners.

In its June 2009 comments, the County disagrees that stormwater pollution fees would not be subject to the voter requirement in Proposition 218, or that fee authority exists. In support, the County points to unadopted legislation pending in the current or in past legislative sessions that would provide fee authority or expressly exempt stormwater fees from the Proposition 218 voting requirement. For example SCA 18 (2009) would add "stormwater and urban runoff management" fees to those expressly exempted from the vote requirement in article XIII D, putting them in the same category as trash and sewer fees. SB 2058 (2002) would have required the regional water boards to share their fees with counties and cities. And SB 210 (2009) would provide cities and counties with stormwater regulatory or user-based fee authority.

The Commission finds that the unadopted legislative proposals cited by the County are unconvincing to show a lack of regulatory fee authority for business inspections as discussed above. First, courts have said that "As evidence of legislative intent, unadopted proposals have been held to have little value."[170] Second, if they were enacted, the legislative proposals would grant broader fee authority than is found in this analysis. For example, SCA 18, by adding a stormwater exception from the vote requirement in Proposition 218, would authorize *user* fees on residential property for stormwater and urban runoff programs, whereas this analysis addresses the much narrower issue of *regulatory* fees on businesses for inspections. Likewise, SB 2058 would have required the State Board's permit fees to be shared with "counties and cities" for the broad purpose of carrying out stormwater programs rather than for the narrower purpose of inspecting businesses. And SB 210 would likewise provide fee authority that is broader than regulatory fees; as the May 28, 2009 version expressly states in proposed section 16103, subdivision (c), of the Water Code: "The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter." In short, the legislative proposals cited by the County do not indicate that fee authority does not exist. Rather, the proposals would, if enacted, provide broader fee authority than now exists.

In comments received June 3, 2009, the Bay Area Stormwater Management Agencies Association (BASMAA) contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the voting requirements of Proposition 218 or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

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Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56.

[170] *County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1590.

The Commission disagrees. BASMAA raises issues that are outside the scope of the portions of the Los Angeles stormwater permit (parts 4C2a, 4C2b, 4E & 4Fc3) that were pled by the test claimants. Because the Commission's jurisdiction is limited by those parts of the permit pled in the test claim, it cannot opine on other issues outside the pleadings, even if it would raise issues closely related to other NPDES permits (or even other parts of this NPDES permit).

In sum, the Commission finds that the inspections and related activities at issue in the Los Angeles stormwater permit are not subject to voter approval in article XIII D of the California Constitution (Proposition 218), so a regulatory fee ordinance for stormwater inspections would not be subject to voter approval.

Given the existence of local regulatory fee authority under the police power (Cal. Const, art. XI, § 7), and lacking any evidence or information to the contrary, the Commission finds that the claimants' authority to adopt a regulatory fee is sufficient (pursuant to Gov. Code, § 17556, subd. (d)) to pay for the inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites, and related activities specified in the permit. Therefore, for the inspections and related activities at issue, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

## CONCLUSION

For the reasons discussed above, the Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate within the meaning of Government Code sections 17514 and 17556: For local agencies subject to the permit that are not subject to a trash TMDL[171] to: "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

[171] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

Abbreviations

BMP - Best management practice

CWA – Clean Water Act

GCASP - General Construction Activity Storm Water Permit

GIASP - General Industrial Activity Storm Water Permit

MS4 - Municipal Separate Storm Sewer Systems

NOI - Notice of Intent for coverage under the GCASP

NPDES - national pollutant discharge elimination system

RGO - Retail Gasoline Outlet

ROWD – Report of Waste Discharge

SQMP - Storm Water Quality Management Program

SWPPP - Storm Water Pollution Prevention Plan

TMDL - Total Maximum Daily Load

U.S. EPA – United States Environmental Protection Agency

WDID - Waste Discharger Identification

# ATTACHMENT NO. 20

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

| | |
|---|---|
| IN RE TEST CLAIM ON:<br><br>San Diego Regional Water Quality Control Board Order No. R9-2007-0001<br>Permit CAS0108758<br>Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L.<br><br>Filed June 20, 2008, by the County of San Diego, Cites of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, San Diego, and Vista, Claimants. | Case No.: 07-TC-09<br><br>*Discharge of Stormwater Runoff - Order No. R9-2007-0001*<br><br>STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.<br><br>*(Adopted on March 26, 2010*) |

# STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on March 26, 2010. Tim Barry, John VanRhyn, Helen Peak, Shawn Hagerty and James Lough appeared on behalf of the claimants. Elizabeth Jennings appeared on behalf of the State Water Resources Control Board. Carla Shelton and Susan Geanacou appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 6-1.

## Summary of Findings

The test claim, filed by the County of San Diego and several cities, alleges various activities related to reducing stormwater pollution in compliance with a permit issued by the San Diego Regional Water Quality Control Board, a state agency.

The Commission finds that the following activities in the permit (as further specified on pp. 122-132 below) are a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

- street sweeping (permit part D.3.a(5));
- street sweeping reporting (part J.3.a.(3)(c) x-xv);
- conveyance system cleaning (part D.3.a.(3));
- conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii));
- educational component (part D.5.a.(1)-(2) & D.5.b.(1)(c)-(d) & D.5.(b)(3));
- watershed activities and collaboration in the Watershed Urban Runoff Management Program (part E.2.f & E.2.g);
- Regional Urban Runoff Management Program (parts F.1., F.2. & F.3);
- program effectiveness assessment (parts I.1 & I.2);
- long-term effectiveness assessment (part I.5) and
- all permittee collaboration (part L.1.a.(3)-(6)).

The Commission also finds that the following test claim activities are not reimbursable because the claimants[1] have fee authority sufficient (within the meaning of Gov. Code § 17556, subd. (d)) to pay for them: hydromodification management plan (part D.1.g) and low-impact development (parts D.1.d.(7) & D.1.d.(8)), as specified below.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

## BACKGROUND

The claimants allege various activities for reducing stormwater pollution in compliance with a permit issued by the California Regional Water Quality Control Board, San Diego Region, (Regional Board), a state agency. Before discussing the specifics of the permit, an overview of the permit's purpose, and municipal stormwater pollution in general, puts the permit in context.

[1] In this analysis, claimants and the permit term "copermittees" are used interchangeably, even though two of the copermittees (the San Diego Unified Port District and San Diego County Regional Airport Authority) are not claimants. The following are the claimants and copermittees that are subject to the permit requirements: Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, Vista, County of San Diego.

Municipal Stormwater

The purpose of the permit is to specify "requirements necessary for the copermittees[2] to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP)." Each of the copermittees or dischargers "owns or operates a municipal separate storm sewer system (MS4),[3] through which it discharges urban runoff into waters of the United States within the San Diego region."

Stormwater[4] runoff flowing untreated from urban streets directly into creeks, streams, rivers, lakes and the ocean, creates pollution, as the Ninth Circuit Court of Appeal has stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[5]

Because of these stormwater pollution problems described by the Ninth Circuit, both California and the federal government regulate stormwater runoff.

California Law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

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[2] "Copermittees" are entities responsible for National Pollutant Discharge Elimination System (NPDES) permit conditions pertaining to their own discharges. (40 C.F.R. § 122.26 (b)(1).)

[3] Municipal separate storm sewer system means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

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

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

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.)
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[6]
>
> In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits [national pollutant discharge elimination system] required by federal law. (§ 13374.)[7]

As to waste discharge requirements, section 13377 of the California Water Code states:

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

Much of what the Regional Board does, especially that pertains to permits like the one in this claim, is based in the federal Clean Water Act.

Federal Law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[8] from point sources[9] to waters of the United States, since

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

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

[8] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other

discharges of pollutants are illegal except under a permit.[10] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[11] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[12]

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California's permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a Regional Board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority

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conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

[9] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[10] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

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

[12] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

> to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard ( *id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent* than required by federal law-from taking into account the economic effects of doing so.[13]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[14]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[15]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[16] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[17]

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

[14] Best management practices are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 CFR § 122.2.)

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

[16] 33 USCA section 1342 (p)(2)(C).

[17] 33 USCA section 1342 (p)(3)(B).

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application. The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[18]

General State-Wide Permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[19] as described in the permit as follows:

> In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the Regional Board is responsible for enforcing the General Construction Activities Storm Water Permit, SWRCB Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, SWRCB Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit), and each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.

The State and Regional Boards have statutory fee authority to conduct inspections to enforce the general statewide permits.[20]

The Regional Board Permit (Order No. R9-2007-001, Permit CAS0108758)

Under Part A, "Basis for the Order," the permit states:

> This Order Renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108758, which was first issued on July 16, 1990 (Order No. 90-42), and then renewed on February 21, 2001 (Order No. 2001-01). On August 25, 2005, in accordance with Order NO. 2001-01, the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit.

Attachment B of the permit (part 7(q)) states that "This Order expires five years after adoption." Attachment B also says (part 7 (r)) that the terms and conditions of the permit "are automatically

[18] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[19] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

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

continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of the expired permits (40 CFR 122.6) are complied with."[21]

Part J.2.d. of the permit requires the Principal Permittee (County of San Diego) to "submit to the Regional Board, no later than 210 days in advance of the expiration of this order, a report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements." The permit specifies the contents of the ROWD.

The permit is divided into 16 sections. It prohibits discharges from MS4s that contain pollutants that "have not been reduced to the maximum extent practicable" as well as discharges "that cause or contribute to the violation of water quality standards." The permit also prohibits non-storm water discharges unless they are authorized by a separate NPDES permit, or fall within specified exemptions. The copermittees are required to "establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means." The copermittees are also required to develop and implement an updated Jurisdictional Urban Runoff Management Program (JURMP) for their jurisdictions that meets the requirements specified in the permit as well as a Watershed Urban Runoff Management Program (watersheds are defined in the permit) and a Regional Urban Runoff Management Program, each of which are to be assessed annually and reported on. Annual fiscal analyses are also required of the copermittees. The principal permittee has additional responsibilities, as specified.

The Regional Board prepared a 115-page Fact Sheet/Technical Report for this permit in which are listed, among other things, Regional Board findings, the federal law, and the reasons for the various permit requirements.

The 2001 version of the Regional Board's permit (treated as prior law in this analysis) was challenged by the Building Industry Association of San Diego County, among others. They alleged that the permit provisions violate federal law because they prohibit the municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.[22] The court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[23]

Attached to the claimants' February 2009 comments is a document entitled "Comparison Between the Requirement of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Stormwater Permit" that compares the 2001 permit with the 1990 and earlier permits. One of the document's conclusions regarding the 2001 permit is: "40% of the requirements in Tentative Order 2001-01 which 'exceed the federal regulations' are based

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

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

[23] *Id.* at page 870.

almost exclusively on (1) guidance documents developed by USEPA and (2) SWRCB's [State Board's] orders describing statewide precedent setting decision on MS4 permits."

**Claimants' Position**

Claimants assert that various parts of the Regional Board's 2007 permit constitute a reimbursable state mandate within the meaning of article XIII B, section 6, and Government Code section 17514. The parts of the permit pled by claimants are quoted below:

**I. Regional Requirements for Urban Runoff Management Programs**

**A. Copermittee collaboration**

Parts F.2. and F.3. (F. Regional Urban Runoff Management Program) of the permit provide:

> Each Copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program. The Regional Urban Runoff Management Program shall meet the requirements of section F of this Order, reduce the discharge of pollutants[24] from the MS4 to the MEP, and prevent urban runoff[25] discharges from the MS4 from causing or contributing to a violation of water quality standards.[26] The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> 2. Develop the standardized fiscal analysis method required in section G of this Order.[27]
>
> 3. Facilitate the assessment of the effectiveness of jurisdictional, watershed,[28] and regional programs.

[24] Pollutant is defined in Attachment C of the permit as "Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated."

[25] Urban Runoff is defined in Attachment C of the permit as "All flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows).

[26] Water Quality Standards is defined in Attachment C of the permit as "The beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of water and the water quality objectives necessary to protect those uses.

[27] Section G requires the permittees to "collectively develop a standardized method and format for annually conducting and reporting fiscal analyses of their urban runoff management programs in their entirety (including jurisdictional, watershed, and regional activities)." Specific components of the method and time tables are specified in the permit (Permit parts G.2 & G.3).

[28] Watershed is defined in Attachment C of the permit as "That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as a drainage area, catchment, or river basin)."

Part L (All Copermittee Collaboration) of the Permit states:

> 1. Each Copermittee collaborate [sic] with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.
>
> a. Management structure – All Copermittees shall jointly execute and submit to the Regional Board no later than 180 days after adoption of this Order, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum:
>
> (1) Identifies and defines the responsibilities of the Principal Permittee[29] and Lead Watershed Permittees;[30]
> (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
> (3) Establishes a management structure to promote consistency and develop and implement regional activities;
> (4) Establishes standards for conducting meetings, decision-making, and cost-sharing.
> (5) Provides guidelines for committee and workgroup structure and responsibilities;
> (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
> (7) Includes any and all other collaborative arrangements for compliance with this order.

Claimants stated that the Copermittees' costs to comply with this activity for fiscal year 2007-2008 was $260,031.29.

**B. Copermittee collaboration – Regional Residential Education Program Development and Implementation**

Part F.1 of the Permit provides:

> The Regional Urban Runoff Management Program shall, at a minimum:
>
> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
>
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

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

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

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

**C. Hydromodification**[31]

Part D.1.g. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, g. Hydromodification – Limits on Increases of Runoff Discharge Rates and Durations) states:

> g. HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS
>
> Each Copermittee shall collaborate with the other Copermittees to develop and implement a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects,[32]

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[31] Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."

Hydromodification is also defined as changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." *Draft Hydromodification Management Plan for San Diego County*, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009 .

[32] According to the permit, "Priority Development Projects" are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

[¶]…[¶] [Part D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This

where such increased rates and durations are likely to cause increased erosion[33] of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses[34] and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan][35] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for

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category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[33] Erosion is defined in Attachment C of the permit as "When land is diminished or worn away due to wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building and timber harvesting."

[34] Beneficial Uses is defined in Attachment C of the permit as "the uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. … "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

[35] The Standard Urban Storm Water Mitigation Plan is defined in Attachment C of the permit as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations[36] shall not exceed pre-project runoff flow rates and durations,[37] where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow[38] that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

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[36] Flow duration is defined in Attachment C of the permit as "The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). … Flow duration within the range of geomorphologically significant flows is important for managing erosion.

[37] Attachment C of the permit defines "Pre-project or pre-development runoff conditions (discharge rates, durations, etc.) as "Runoff conditions that exist onsite immediately before the planned development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development."

[38] Critical channel flow, according to Attachment C of the permit, is "the channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc [critical channel flow], it should be based on the weakest boundary material – either bed or bank."

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) The HMP may include implementation of planning measures (e.g., buffers and restoration activities, including revegetation, use of less-impacting facilities at the point(s) of discharge, etc.) to allow expected changes in stream channel cross sections, vegetation, and discharge rates, velocities, and/or durations without adverse impacts to channel beneficial uses. Such measures shall not include utilization of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc.

(3) Section D.1.g.(1)(c) does not apply to Development Projects[39] where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g.,

[39] Development projects, according to Attachment C of the permit, are "New development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision."

with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[40]

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) the project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

[40] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(b) the project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) the project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

Claimants stated that the total cost of this activity is $1.05 million, of which $630,000 was spent in fiscal year 2007-2008, and the remaining $420,000 will be spent in fiscal year 2008-2009.

**D. Low-Impact Development[41] ("LID") and Standard Urban Storm Water Mitigation Plan ("SMUSP")**

Part D.1.d. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, d. Standard Urban Storm Water Mitigation Plans – Approval Process Criteria and Requirements for Priority Development Projects), paragraphs (7) and (8) state as follows:

(7) Update of SUSMP BMP Requirements

The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP[42] requirements that meet or exceed the requirements of sections D.1.d.(4)[43] and D.1.d.(5),[44] and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs.[45] In addition, the update shall

[41] Low Impact Development (LID) is defined in Attachment C of the permit as "A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions."

[42] Source Control BMPs are defined in Attachment C of the permit as "Land use or site planning practices, or structural or nonstructural measures that aim to prevent urban runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and urban runoff."

[43] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[44] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

[45] A treatment control BMP, according to Attachment C of the permit, is "Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants,

include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.
ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.
iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.
iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.
v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.
vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.
vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either

(1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

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

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

Claimants stated that the total cost of this activity is $52,200 to be spent in fiscal year 2007-2008.

**E. Long Term Effectiveness Assessment**

Part I.5 (I. Program Effectiveness Assessment) of the permit states:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6) of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).[46]

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The claimants state that this activity is budgeted to cost $210,000.

[46] See footnote 50, page 21.

## II. Jurisdictional Urban Runoff Management Program

### A. Street Sweeping

Part D.3.a.(5) of the Permit (D.3 Existing Development Component, a. Municipal) provides:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Part J.3.a.(3)(c)x-xv (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xiii. Identification of the total distance of curb-miles swept.
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
> xv. Amount of material (tons) collected from street and parking lot sweeping.

Claimants state the following costs for this activity: in fiscal year 2007-2008: Equipment: $2,080,245, Staffing: $1,014,321, Contract costs: $382,624; for 2008-2009: Equipment: $3,566,139 (for 2008-2012), Staffing $1,054,893 (4% increase), Contract costs: $382,624.

**B. Conveyance System Cleaning**

Part D.3.a.(3) of the Permit (D.3. Existing Development Component, a. Municipal) provides:

> (3) Operation and Maintenance of Municipal Separate Storm Sewer System and Structural Controls
>
> (a) Each Copermittee shall implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Each Copermittee shall implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year[47] for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter[48] in a timely manner.
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
> v. Proper disposal of waste removed pursuant to applicable laws.
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

Part J.3.a.(3)(c) iv-viii (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

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

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

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

The claimants state that this activity costs $3,456,087 in fiscal year 2007-2008, and increases 4% in subsequent years.

**C. Program Effectiveness Assessment**

Part I.1 and I.2 of the permit states:

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[49] Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[50] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

[49] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[50] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[51] Water Quality Assessment,[52] and Integrated Assessment,[53] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff

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Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

[51] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[52] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[53] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[54] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as

[54] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists the hydrologic units and major receiving water bodies.

necessary to achieve compliance with section A of this Order.[55] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Claimants state that this activity in I.1. and I.2 costs $392,363 in fiscal year 2007-2008, is expected to increase to $862,293 in fiscal year 2008-2009, and is expected to increase 4% annually thereafter.

**D. Educational Surveys and Tests**

Part D.5 of the permit (under D. Jurisdictional Urban Runoff Management Program) states:

5. Education Component

Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

· Municipal Departments and Personnel
· Construction Site Owners and Developers
· Industrial Owners and Operators
· Commercial Owners and Operators
· Residential Community, General Public, and School Children

a. GENERAL REQUIREMENTS

(1) Each Copermittee shall educate each target community on the following topics where appropriate:

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

Table 3. Education

| **Laws, Regulations, Permits, & Requirements** | **Best Management Practices** |
|---|---|
| • Federal, state, and local water quality laws and regulations<br>• Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction).<br>• Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities<br>• Regional Board's General NPDES Permit for Ground Water Dewatering<br>• Regional Board's 401 Water Quality Certification Program<br>• Statewide General NPDES Utility Vault Permit<br>• Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits) | • Pollution prevention and safe alternatives<br>• Good housekeeping (e.g., sweeping impervious surfaces instead of hosing)<br>• Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste)<br>• Non-storm water disposal alternatives (e.g., all wash waters)<br>• Methods to minimized the impact of land development and construction<br>• Erosion prevention<br>• Methods to reduce the impact of residential and charity car-washing<br>• Preventive Maintenance<br>• Equipment/vehicle maintenance and repair<br>• Spill response, containment, and recovery<br>• Recycling<br>• BMP maintenance |
| **General Urban Runoff Concepts** | **Other Topics** |
| • Impacts of urban runoff on receiving waters<br>• Distinction between MS4s and sanitary sewers<br>• BMP types: facility or activity specific, LID, source control, and treatment control<br>• Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction)<br>• Non-storm water discharge prohibitions<br>• How to conduct a storm water inspections | • Public reporting mechanisms<br>• Water quality awareness for Emergency/ First Responders<br>• Illicit Discharge Detection and Elimination observations and follow-up during daily work activities<br>• Potable water discharges to the MS4<br>• Dechlorination techniques<br>• Hydrostatic testing<br>• Integrated pest management<br>• Benefits of native vegetation<br>• Water conservation<br>•Alternative materials and designs to maintain peak runoff values<br>•Traffic reduction, alternative fuel use |

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[56] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

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

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

Claimants state that this activity in D.5 will cost $62,617 in fiscal year 2007-2008, and is expected to increase to $171,319 in fiscal year 2008-2009, and rise 4% annually thereafter.

**III. Watershed Urban Runoff Management Program**

**A. Copermittee Collaboration**

Parts E.2.f and E.2.g of the permit state:

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 below to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]…[¶]

f. Watershed Activities[57]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source

[57] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

Claimants state that the copermittees' staffing costs for watershed program implementation in fiscal year 2007-2008 is $1,033,219 and is expected to increase to $1,401,765 in fiscal year 2008-2009, and are expected to increase four percent annually. For consultant services, the costs are $599,674 in fiscal year 2007-2008 and are expected to be $657,101 in 2008-2009, and are expected to rise five percent annually. For Watershed Urban Runoff Management Program implementation, claimants allege that the cost in fiscal year 2008-2009 is $1,053,880.

Claimants filed a 60-page rebuttal to Finance's and the State Board's comments on February 9, 2009, which is addressed in the analysis below.

Claimant County of San Diego filed comments on the draft staff analysis in January 2010 that disagrees with the findings regarding fee authority for certain permit activities involving development. These arguments are discussed further below.

**State Agency Positions**

**Department of Finance:** In comments filed November 16, 2008, Finance alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because the permit conditions are required by federal laws so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that the State and Regional Water Boards "act on behalf of the federal government to develop, administer, and enforce the NPDES program in compliance with Section 402 of the CWA." Finance also states that more activities were included in the 2007 permit than the prior permit because "it appears … they were necessary to comply with federal law."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The copermittees elected to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies proposed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[58] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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

As to the claimants' identifying NPDES permits approved by other states to show the permit exceeds federal law, Finance states that this "demonstrates the variation envisioned by the federal authority in granting the administering agencies flexibility to address specific regional needs in the most practical manner."

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance commented on the draft staff analysis in February 2010, echoing the comments of the State Board, which are summarized and addressed below.

**State Water Resources Control Board:** The State Board and Regional Board filed joint comments on the test claim on October 27, 2008, alleging that the permit is mandated on the local agencies by federal law, and that it is not unique to government because NPDES permits apply to private dischargers also. The State Board also states that the requirements are consistent with the minimum requirements of federal law, but even if the permit is interpreted as going beyond federal law, any additional state requirements are de minimis. In addition, the State Board alleges that the costs are not subject to reimbursement because most of the programs were proposed by the cities and County themselves, and because the claimants may comply with the permit requirements by charging fees and are not required to raise taxes.

The State Board further comments that the 2007 permit mirrors or is identical to the requirements in the 2001 permit, only providing more detail to the requirements already in existence and to implement the MEP performance standard. Like earlier permits, the 2007 permit implements the federal standard of reducing pollutants from the MS4 to the MEP (maximum extent practicable), but according to the State Board, "what *has* changed in successive permits is the level of specificity included in the permit to define what constitutes MEP." [Emphasis in original.] The State Board asserts that this level of specificity does not make the permit a state mandate, but that even if it is, the additional requirements are de minimis. The State Board also states that the local agencies have fee authority to pay for the permit requirements.

The State Board also addresses specific allegations in the test claim, as discussed below.

The State Board submitted comments on the draft staff analysis in January 2010, arguing that the test claim should not be reimbursable because (1) federal law requires local agencies to obtain NPDES permits from California Water Boards; (2) federal law mandates the permit that was issued, which is less stringent than permits for private industry; (3) the draft staff analysis incorrectly applies the *Hayes* case because the state did not shift the cost of the federal mandate to the local agencies; rather the federal mandate was imposed directly on local agencies and not on the state; (4) the permit provisions are not in addition to, but are required by federal law; (5) even though municipalities are singled out in the federal storm water law, the law is one of general application; and (6) potential limitations on the exercise of fee authority due to Proposition 218 do not invalidate claimants' fee authority because Government Code section 17556, subdivision (d), does not require unlimited or unilateral fee authority. These arguments are addressed below.

**Interested Party Comments**

**Bay Area Stormwater Management Agencies Association (BASMAA):** In comments submitted February 4, 2009, BASMAA speaks generally about California's municipal stormwater permitting program, stating that "increased requirements entail both new programs and higher levels of service." BASMAA also states:

> [T]he State essentially asserts that the federal minimum for stormwater permitting is anything one of its Water Boards says it is. Likewise, the State's assertion that its 'discretion to exceed MEP [the maximum extent practicable standard] originates in federal law' and 'requires [it], as a matter of law, to include other such permit provisions as it deems appropriate' is nothing more than an oxymoron that begs the question of what the federal Clean Water Act actually mandates rather than allows a delegated state permit writer to require as a matter of discretion. [Emphasis in original.]

BASMAA emphasizes that the water boards have wide discretion in determining the content of a municipal stormwater permit beyond the federal minimum requirements, and says that the boards need to work "proactively and collaboratively" with local governments in "prioritizing and phasing in actions that realistically can be implemented given existing and projected local revenues."

**League of California Cities (League) and California State Association of Counties (CSAC):** The League and CSAC filed joint comments on the draft staff analysis on January 26, 2010, expressing support for it "and its recognition of the constraints placed on cities and counties with respect to adopting new or increased property-related fees."

The League and CSAC disagree, however, with the finding that the hydromodification management plan (HMP, part D.1.g.), the requirement to include low impact development (LID) in the Standard Urban Stormwater Mitigation Plans (SUSMPs) (part D.1.d.(7)-(8)), and parts of the education component (part D.5) are not reimbursable because the claimants have fee authority (under Gov. Code, § 66000 et seq., The Mitigation Fee Act) sufficient to pay for them. The League and CSAC point out examples where a city or county constructs a priority development project for which no third party is available upon whom to assess a fee. They also assert that for these city or county projects, a nexus requirement cannot be demonstrated "because no private development impact have generated the need for the projects."

## COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[59] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[60] "Its

[59] Article XIII B, section 6, subdivision (a), provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[61] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[62]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[63]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[64] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[65] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[66]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[67]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[68] In making its

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crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

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

[63] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[64] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

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

[67] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[69]

The permit provisions in the test claim are discussed separately to determine whether they are reimbursable state-mandates.

**Issue 1: Is the permit subject to article XIII B, section 6, of the California Constitution?**

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, whether they constitute a program, and whether they are a federal mandate or a state-mandated new program or higher level of service.

**A. Is the permit an executive order within the meaning of Government Code section 17516?**

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which describes "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) Any agency, department, board, or commission of state government."[70]

The California Regional Water Board, San Diego Region, is a state agency.[71] The permit it issued is a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

**B. Is the permit the result of claimants' discretion?**

The permit requires claimants to undertake various activities to reduce stormwater pollution in compliance with a permit issued by the Regional Board.

The Department of Finance, in comments submitted November 6, 2008, asserts that the claimants "had the option to use best management practices that would identify alternative practices to reduce pollution in water to the maximum extent practicable" Finance asserts that the claimants proposed permit requirements when they submitted the application for the permit,

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

[69] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[70] Section 17516 also states: ""Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 904.

[71] Water Code section 13200 et seq.

and that increased costs due to downstream activities of an underlying discretionary activity are not reimbursable.

Similarly, the State Board, in its October 27, 2008 comments, states that the copermittees proposed the concepts that were incorporated into and form the basis of the permit provisions for which they now seek reimbursement.

In rebuttal comments submitted February 9, 2009, claimants dispute that the Report of Waste Discharge (ROWD, or permit application) "represents a copermittee proposal for 2007 Permit content or that the adopted 2007 Permit is 'based on the ROWD." According to claimants, the 2007 permit provisions "were not taken directly from, nor are they generally consistent with the intent of, most of the specific ROWD content upon which the state contends they are based."

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[72]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants are required by law to submit the NPDES permit application in the form of a Report of Waste Discharge. [73] Submitting it is not discretionary, as shown in the following federal regulation:

> a) *Duty to apply.* (1) Any person[74] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a complete application to the Director in accordance with this section and part 124 of this chapter.[75]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …"[76] Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

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

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

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

[75] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[76] Water Code section 13376.

In addition to federal and state law, the 2001 permit required submission of the ROWD. The 2007 permit, under Part A "Basis for the Order," states: "On August 25, 2005, in accordance with Order No. 2001-01 [the 2001 Permit], the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit."[77]

And although the ROWD provides a basis for some (but not all) of the 2007 permit provisions at issue in this test claim, there is a substantial difference between what was included in the claimants' ROWD and the specific requirements the Regional Board adopted (e.g., copermittee collaboration, parts F.2., F.3 & L, Regional Residential Education Program Development, part F.1., Low Impact Development, part D.1.d(7)-(8), long-term effectiveness assessment, part I.5, program effectiveness assessment, parts I.1 & I.2, educational surveys and tests, part D.5, and the Watershed Urban Runoff Management Program, parts E.2.f & E.2.g). Other permit activities were not proposed in the ROWD (e.g., hydromodification, part D.1.g., street sweeping, parts D.2.a(5) & J.3.a(3)(c)x-xv, conveyance system cleaning, part D.3.a(3) & J.3.a(3)(c)iv-viii).

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which are not the result of the claimants' discretion.

**C. Does the permit constitute a program within the meaning of article XIII B, section 6 of the California Constitution?**

As to whether the permit provisions in the test claim constitute a "program," courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[78]

The State Board, in its October 2008 comments, argues that the NPDES program is not a program because the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government in that industrial and construction facilities must also obtain NPDES stormwater permits.

The State Board reiterates this argument in its January 2010 comments, asserting that the draft analysis "fails to consider that private entities, as well as certain state … and … federal agencies also receive NPDES permits for storm water discharges." The State Board and Finance also cite *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, for the proposition that "where municipalities have separate but not more stringent requirements than private entities, there is no program subject to reimbursement." Finance, in its February 2010 comments, asserts that "the requirements within the test claim permit apply generally to state and private dischargers."

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

[78] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

Claimants, in their February 2009 rebuttal comments, disagree with the State Board and assert that an MS4 permit is unique to government and subject to unique regulations. Claimants cite the definition of an MS4 in 40 C.F.R. § 122.26(b)(8) as "a conveyance or system of conveyances … owned or operated by a State, city, town, borough, county, parish, district, association, or other public body …." Claimants argue that prohibiting "non-stormwater discharges into the storm sewers"[79] is a uniquely government function that provides for the health, safety, and welfare of the citizens in a community. Claimants also point out that the federal regulations for MS4 permits are in 40 C.F.R. §122.26(d), while the regulations pertaining to private industrial dischargers are in 40 C.F.R. § 122.26(c), different regulations that apply the Best Available Technology standard rather than the Maximum Extent Practicable standard imposed on MS4s.

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. In *County of Los Angeles v. Commission on State Mandates*, the State Board argued that an NPDES permit[80] issued by the Los Angeles Regional Water Quality Control Board does not constitute a "program." The court dismissed this argument, stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[81] In other words, whether the law regarding NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6 is not relevant. The only issue before the Commission is whether the permit in this test claim constitutes a program.

The permit activities in this claim (order no. R9-2007-001, NPDES no. CAS0108758) are limited to the local governmental entities specified in the permit. The permit defines the "permittees" as the County of San Diego and 18 incorporated cities, along with the San Diego Unified Port District and San Diego County Regional Airport Authority. [82] No private entities are regulated under this permit, so it is not a law (or executive order) of general application. That fact distinguishes this claim from the *City of Richmond* case cited by Finance and the State Board, in which the workers' compensation law was found to be one of general application. The same cannot be said of the permit in this claim (order no. R9-2007-001, NPDES no. CAS0108758) because no private entities are regulated by it.

Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in San Diego County. As stated in the permit: "This order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable."

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[79] 33 U.S.C. § 1342(p)(3).

[80] Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001. The Commission issued a decision on parts 4C2a, 4C2b, 4E and 4Fc3 of this permit (test claims 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21) at its July 31, 2009 hearing.

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

[82] The cities are Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

Thus, the permit carries out the governmental function of providing public services, and also imposes unique requirements on local agencies in San Diego County to implement a state policy that does not apply generally to all residents and entities in the state. Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

**D. Are the permit provisions in the test claim a federal mandate or a state-mandated new program or higher level of service?**

The next issue is whether the parts of the permit alleged in the test claim are a state mandate, or federally mandated, as asserted by the State Board and the Department of Finance. If so, the permit would not constitute a state mandate. The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs."[83]

Also discussed is whether the permit is a new program or higher level of service. To determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption, in this case, the 2001 permit.[84]

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[85] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[86]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."

In *Long Beach Unified School Dist. v. State of California*,[87] the court considered whether a state executive order involving school desegregation constituted a state mandate. The regulations required, for example, conducting mandatory biennial racial and ethnic surveys, developing a reasonably feasible plan every four years to alleviate and prevent segregation to include specifics

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

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

[85] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

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

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

elements, and taking mandatory steps to involve the community including public hearings. The state argued that its Executive Order did not mandate a new program because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. The court held that the executive order did require school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements imposed on school districts.[88] The court stated:

> A review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. …[T]he executive Order and guidelines require specific actions … [that were] required acts. These requirements constitute a higher level of service."[89]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[90] The federal Clean Water Act allows for more stringent state-imposed measures, as follows:

> Permits for discharges from municipal storm sewers [¶]…[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the … State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[91]

**California in the NPDES program:** Under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, which describes the NPDES program (and subdivision (p), which describes the requirements for the municipal stormwater system permits) states in part:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and

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[88] *Id.* at 173.

[89] *Ibid.*

[90] 33 U.S.C. section 1370.

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

> system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is not required to have its own NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[92] to comply with the Federal Water Pollution Control Act of 1972, stated the following findings and declaration in Water Code section 13370:

(a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants … to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this statute, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[93] to effect the stormwater permit program. Further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

Finance, in its February 2010 comments on the draft staff analysis, states:

> The state's role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. …[N]o state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.

Similarly, the State Board's January 2010 comments argue that the *Hayes* case is distinguishable from this test claim because NPDES permits do not impose a federal mandate on the state. Rather, federal law requires municipalities to comply with the permit. The State Board also states:

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[92] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

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

> This [draft staff analysis'] approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not indicate that requirements extend beyond federal law, as in *Long Beach,* or convert the federal mandate into a state mandate.[94]

The Commission disagrees. As discussed above, the federal Clean Water Act[95] authorizes states to impose more stringent measures than required by federal law. The California Supreme Court has also recognized that permits may include state-imposed, in additional to federally required measures.[96] Those state measures that may constitute a state mandate if they "exceed the mandate in … federal law."[97] Thus, although California opted into the NPDES program, further analysis is needed to determine whether the state requirements exceed the federal requirements imposed on local agencies.

The permit provisions are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402 (p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26. The federal stormwater statute states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
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> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[98] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)).

The issues are whether the parts of the permit in the test claim are federal mandates or state mandates, and whether they are a new program or higher level of service.

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[94] State Board comments submitted January 2010.

[95] 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

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

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

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

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

Part D of the permit describes the Jurisdictional Urban Runoff Management Program (JURMP) of which each copermittee "shall develop and implement" an updated version (p.15). Part J of the permit ("Reporting") requires the JURMP to be updated and revised to include specified information. The test claim includes parts D.1.g (hydromodification management plan), D.1.d.(7)-(8) (low-impact development or LID), D3a(5) (street sweeping) and J.3.a(3)x-xv (reporting on street sweeping), D.3.a.(3) (conveyance system cleaning ) and J.3.a.(3)(c)(iv)-(viii) (reporting on conveyance system cleaning), and D.5 (educational surveys and tests).

**Hydromodification (part D.1.g.):** Part D.1 of the permit is entitled "Development Planning." Part D.1.g. requires developing and implementing, in collaboration with other copermittees, a hydromodification management plan (HMP) "to manage increases in runoff discharge rates and durations from all Priority Development Projects."[99] Priority development projects can include both private projects, and municipal (city or county) projects. The purpose of the HMP is:

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[99] According to the permit, Priority Development Projects are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)..

[¶]…[¶] [Section D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."[100]

As detailed in the permit and on pages 12-17 above, the HMP must have specified content, including "a description of how the copermittees will incorporate the HMP requirements into their local approval processes." Also required is collaborative reporting on the HMP and implementation 180 days after the HMP is approved by the Regional Water Board, with earlier implementation encouraged.

According to the State Board's comments submitted in October 2008 the requirement to develop and implement a HMP is necessary to meet the minimum federal MEP standard. The Board states that "broad federal legal authority is contained in CWA sections 402(p)(3)(B)(ii)-(iii), CWA section 402(a), and in 40 C.F.R. sections 122.26 (d)(2)(i)(B)-(C), (E), and (F), 131.12, and 122.26(d)(2)(iv)(A)(2), which states:

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will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[100] It is also defined as "changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." Draft Hydromodification Management Plan for San Diego County, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009.

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[101] of a discharge[102] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. … Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]

(2) *Part 2.* Part 2 of the application shall consist of: [¶]…[¶]

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]…[¶]

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

[102] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

> (*2*) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. …

The State Board also cited the U.S. Supreme Court decision, *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700, for the state's authority to regulate flow under the federal Clean Water Act in order to protect water quality standards.

In response, the claimants' February 2009 comments state that the permit's Fact Sheet did not cite any federal authorities to justify the HMP portion of the permit, and that none exists. Claimants also assert that no other jurisdiction in the United States that was surveyed for the claim has a permit that requires a HMP. Claimants call the HMP requirement a flood control measure that is not a requirement in any other permit outside of California, and that the HMP exceeds the federal requirements and constitutes a state mandate. Claimants also point to the language in section 122.26(d)(2)(iv)(A)(2) that they say is:

> [A]imed directly at controlling pollutant discharges from an MS4 that originate in areas of new development. [The regulation] does not mention the need to include controls to reduce the *volume* of storm water discharged from these areas. … controls designed only to limit volume are not expressly required.

As to the *P.U.D. No. 1 v. Washington Department of Ecology* decision cited by the State Board, the claimants distinguish it as being decided under section 401 of the Clean Water Act, wherein the permit was issued under section 402. Claimants state that the *P.U.D.* case recognized state authority under the Clean Water Act rather than a federal mandate.

The Commission agrees with claimants about the applicability of the *P.U.D.* case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it. This was not addressed in the *P.U.D.* decision.

Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation."[103] As in *Long Beach Unified School Dist. v. State of California*,[104] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[105] to

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

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

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

impose these requirements. Thus, the Commission finds that part D.1.g. of the permit is not a federal mandate.

All of part D.1.g. of the permit requires the HMP to have specified contents except part D.1.g.(2), which states that the HMP "*may* include implementation of planning measures …" as specified. As the plain language of this part does not require the implementation of planning measures, the Commission finds that part D.1.g.(2) of the permit is not a state mandate.

The Commission also finds that HMP is not a state mandate for municipal (city or county) projects that are priority development projects, such as a hospital, laboratory or other medical facility, recreational facility, airfield, parking lot, street, road, highway, and freeway, a project over an acre, and a project located in an environmentally sensitive area.[106] Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.[107] Thus, municipal projects are built by cities or counties voluntarily, and their decision triggers the requirements to comply with the HMP. In *Kern High School Dist.*,[108] the California Supreme Court decided whether the state must reimburse the costs of school site councils and advisory committees complying with the Brown (Open Meetings) Act for schools who participate in various school-related education programs. The court determined that participation in the underlying school site council program was not legally compelled and so mandate reimbursement was not required for the downstream compliance with the Brown Act. The court said:

> Activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds-even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[109]

As with the voluntary programs in *Kern,* there is no requirement for municipalities to undertake any of the priority development projects described in the permit. Thus, the Commission finds that the costs of complying with the HMP in part D.1.g., is not a state mandate for priority development projects undertaken by a city or county.

Based on the mandatory language of the remainder of part D.1.g. of the permit (except part D.1.g.(2) and except for municipal projects), the Commission finds that it is a state mandate on the claimants to do the following:

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[106] The County of San Diego, in its January 2010 comments on the draft staff analysis, raises the issue of its fee authority for municipal projects. The League of California Cities, in its January 2010 comments on the draft staff analysis, also discusses municipal projects, citing examples "where a city or county constructs a Priority Development Project for which no third party is available to assess a fee against."

[107] California Constitution, article XI, section 7. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

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

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

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

[¶]…[¶]

(3) Section D.1.g.(1)(c) does not apply to Development Projects where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) <u>HMP Reporting</u>

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[110]

[110] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) The project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

(b) The project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) The project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

As to whether part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service, the claimants, in their February 2009 comments, assert that it is.

> The 2001 Permit only included general statements regarding the need to control downstream erosion with post construction BMPs. The 2007 Permit increased these requirements by requiring the copermittees to, among other things, draft and implement interim and long-term hydromodification plans, and impose specific, strict post construction BMPs on new development projects within their jurisdiction.

The State Board, in its October 2008 comments, argues that part D.1 "expands upon and makes more specific the hydromodification requirements in the 2001 Permit."

Finance argues, in its February 2010 comments on the draft staff analysis, that the entire permit is not a new program or higher level of service because additional activities, beyond those

required by the 2001 permit, are necessary for the claimants to continue to comply with the federal Clean Water Act and reduce pollutants to the Maximum Extent Practicable.

The Commission disagrees with Finance. This analysis measures the 2007 permit against the 2001 permit to determine which provisions are a new program or higher level of service. Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly. In *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[111]

The Regional Board prepared a Fact Sheet/Technical Report[112] for the permit that lists the federal authority and reasons the permit provisions were adopted. Regarding part D.1.g. of the permit, the Fact Sheet/Technical Report does not expressly mention the 2001 permit, but states:

> This section of the Order expands the requirements for control of hydromodification caused by changes in runoff resulting from development and urbanization. Expansion of these requirements is needed due to the current lack of a clear standard for controlling hydromodification resulting from modification. While the Model SUSMP[113] [adopted in 2002] developed by the Copermittees requires project proponents to control hydromodification, it provides no standard or performance criteria for how this is to be achieved.

The Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) with respect to private priority development projects is a new program or higher level of service. The Fact Sheet/Technical Report describes the section as an "expansion" of hydromodification control requirements. The 2001 permit (in part F.1.b.(2)(j)) included only the following on hydromodification:

> Downstream Erosion – As part of the model SUSMP [Standard Urban Storm Water Mitigation Plan] and the local SUSMPs, the Copermittees shall develop criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, criteria shall be developed to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Storm water discharge volumes and durations should also be considered.

The requirements in the 2007 permit, however, are much more expansive and detailed, requiring development and implementation of a hydromodification management plan (HMP) to be approved by the Regional Board. And while the 2001 permit contained a broad description of

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

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

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

the criteria required, part D.1.g. of the 2007 permit contains a detailed description of the contents of the HMP, including identifying standards for channel segments, using continuous simulation of the entire rainfall record to identify runoff flows, requiring priority development projects to implement hydrologic control measures, including other performance criteria for priority development projects to prevent urban runoff from the projects, and 9 other components to include in the HMP. Therefore, the Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service over the 2001 permit.

In sum, the Commission finds that part D.1.(g) of the permit (except for D.1.g.(2)) is a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the HMP for municipal priority development projects.

**B. Low Impact Development (LID) and Standard Urban Storm Water Mitigation Plan (part D.1.d.):** Also under part D.1 "Development Planning" is part D.1.d, which requires the copermittees to review and update their SUSMPs (Standard Urban Storm Water Mitigation Plans)[114]and (in paragraphs 7 and 8) add low impact development (LID) and source control BMP requirements for each priority development project, and to implement the updated SUSMP, as specified on pages 17-19 above. The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces (*Id.*)

According to the State Board's comments submitted in October 2008, the requirement in part D.1.d. is necessary to meet the minimum federal MEP standard, and is supported by 40 C.F.R. section 122.26 (d)(2)(iv)(A)-(D), part of which is quoted in the discussion of hydromodification above. Part (d)(2)(iv)(A)(2) of the regulation requires part of the permit application to include:

> (2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

The State Board asserts that these regulations "require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial and municipal land uses or activities." The Board cites a decision of the Washington Pollution Control Hearings Board that found that permit provisions to promote but not require low impact development "failed to satisfy the federal MEP standard and Washington state law because it … did not require LID at the parcel and subdivision level."

In their February 2009 rebuttal comments, the claimants assert: "while federal regulations require the large MS4 permits to include programs to reduce the discharge of pollutants from the

[114] The Permit defines the Standard Urban Storm Water Mitigation Plan as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

MS4 that originate in areas of new development, federal regulations do not require or even mention LID or LID principles." And "while requiring post-construction controls that limit pollutant discharges originating in areas of new development is clearly within the requirements of Section 122.26(d)(2)(iv)(A), the 2007 Permit's specific LID requirements are not." Claimants also address the Washington State Pollution Control Board decision by noting that the Board's decision "explicitly recognized that LID requirements are not federally mandated." The claimants also point out EPA-issued NPDES permits in Washington, D.C. and Albuquerque, New Mexico that make no reference to LID.

The Commission finds nothing in the federal regulation (40 C.F.R. § 122.26) that requires local agencies to collectively review and update the BMP requirements listed in their SUSMPs, or to develop, submit and implement "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the SUSMPs. Thus, the LID requirements in the permit "exceed the mandate in that federal law or regulation."[115] As in *Long Beach Unified School Dist. v. State of California*,[116] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[117] to impose these requirements. Thus, the Commission finds that part D.1.d. of the permit is not a federal mandate.

The Commission further finds that the LID requirements are not a state-mandated program for municipal projects for the same reason as discussed in the HMP discussion above: there is no requirement for cities or counties to build priority development projects, which would trigger the downstream requirement to comply with parts D.1.d.(7) and D.1.d.(8) of the permit, the LID portions of the permit.

As to non-municipal projects, however, because of the mandatory language on the face of the permit, the Commission finds that part D.1.d. of the permit is a state mandate for the claimants to do all of the following:

> (7) Update of SUSMP BMP Requirements
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> The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP requirements that meet or exceed the requirements of sections D.1.d.(4) and D.1.d.(5), and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update shall include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

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

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

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

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.[118]

ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.[119]

iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.[120]

iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.

v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.

vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.

vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

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[118] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

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

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

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either (1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).

ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

The State Board, in its October 2008 comments on the test claim, argues that the requirements in part D.1.d.(7) of the permit are not a new program or higher level of service because they "merely add definition to the scope of the local SUSMP already required in the 2001 Permit (see Section F.1.b.(2))." As to part D.1.d.(8), the State Board asserts that it:

> [P]rovides a framework for the Copermittees to develop criteria to be used in the application of LID requirements to Priority Development Projects. The Copermittees must develop their LID programs through an update to the Model SUSMP, the document that guides (and guided the 2001 Permit cycle) post-construction BMP implementation at Priority Development Projects.

According to the State Board, these parts of the permit are not a new program or higher level of service because they merely add additional detail in implementing the same minimum federal MEP standard and add specificity to already existing BMPs.

The claimants, in their February 2009 comments, assert that by adding requirements and increasing the specificity of existing requirements, the 2007 LID permit requirements are a new program or higher level of service.

The Commission finds that part D.1.d.(7) is a new program or higher level of service because it calls for a collective review and update of BMP requirements listed in the claimants' SUSMPs (presumably those drafted under the 2001 permit) that was not required under the 2001 permit.

The Commission also finds that part D.1.d.(8) is a new program or higher level of service because it requires developing, submitting, and implementing "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the copermittees SUSMPs. Although the 2001 permit required adopting a Model SUSMP and local SUSMP, it

did not require developing and submitting an updated Model SUSMP with the specified LID BMP requirements.

In sum, the Commission finds that parts D.1.d.(7) and D.1.d.(8) of the 2007 permit constitute a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the LID requirements for municipal priority development projects.

**C. Street sweeping and reporting (parts D.3.a.(5) & J.3.a(3)x-xv):** Part D.3 is entitled "Existing Development." Part D.3.a.(5) requires regular street sweeping based on the amount of trash generated on the road, street, highway, or parking facility. Those identified as generating the highest volumes of trash are to be swept at least two times per month, those generating moderate volumes of trash are to be swept at least monthly, and those generating low volumes of trash are to be swept as necessary, but not less than once per year. The copermittees determine what constitutes high, moderate, and low trash generation.

In addition, section J.3.a.(3)(c) x-xv requires the copermittees, as part of their annual reporting, to identify the total distance of curb-miles of improved roads in each priority category, the total distance of curb-miles swept, the number of municipal parking lots and the number swept, the frequency of sweeping, and the tons of material collected from street and parking lot sweeping.

The State Board, in its comments submitted in October 2008, states that requiring minimum sweeping frequencies for streets determined by the copermittees to have high volumes of trash or debris is necessary to meet the minimum federal MEP standard. The State Board cites C.F.R. section 122.26(d)(2)(i)(B)-(C), (E) and (F) and 40 C.F.R. section 122.26(d)(2)(iv), and more specifically, section 122.26(d)(2)(iv)(A)(1), which states that the proposed management program include "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers." Also, section 122.26(d)(2)(iv)(A)(6) provides that the proposed management program include:

> [a] description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

The State Board also cites section 122.44(d)(1)(i), which states as follows regarding NPDES permits: "limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State Water quality standard, including narrative criteria for water quality." And section 122.26(d)(2)(iv)(A)(3) states that the proposed management program include "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities."

In their February 2009 rebuttal comments, the claimants point out that street sweeping as a BMP to control "floatables" is not required by federal law in that none of the federal regulations

specifically require street sweeping. The claimants quote the following from *Hayes v. Commission on State Mandates*:[121] "if the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate."

The Commission agrees with claimants. The permit requires activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[122] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[123]

Yet the more specific requirements in the permit include variable street sweeping schedules for areas impacted by different amounts of trash. They also require reporting on the amount of trash collected, which is not required by the federal regulations. These activities "exceed the mandate in that federal law or regulation."[124] As in *Long Beach Unified School Dist. v. State of California*,[125] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[126] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(5) and J.3.a.(3)(c)x-xv of the permit are not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission also finds part D.3.a(5) of the permit is a state mandate for the claimants to do all of the following:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

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

[122] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[123] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

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

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

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

And as stated in part J.3.a(3)(c)x-xv (on p. 68) of the permit, the claimants report annually on:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xiii. Identification of the total distance of curb-miles swept.
>
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
>
> xv. Amount of material (tons) collected from street and parking lot sweeping.

The State Board, in its October 2008 comments, argues that requiring minimum street sweeping frequencies does not result in a new program or higher level of service. According to the State Board:

> The 2001 Permit required Copermittees to perform street sweeping, but did not specify minimum frequencies. While the minimum frequencies may exceed some Copermittees' existing programs, the Claimants acknowledge than many Copermittees meet or exceed the mandatory requirements on a voluntary basis. To the extent the frequencies are already being met and the Permit imposes the same MEP standard as its predecessor … the 2007 Permit does not impose a higher level of service.

In their February 2009 rebuttal comments, the claimants cite Government Code section 17565 to argue that whether or not they were sweeping streets at frequencies equal or more than the permit requires is not relevant. Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate." The claimants also state that the 2001 permit did not in fact require street sweeping, "[a]t best it only included general statements regarding the need to control pollutants in streets and other impervious areas and, in any event, minimum frequencies were not required."

The Regional Board's Fact Sheet/Technical Report on part D.3.a.(5) of the 2007 permit states that street sweeping "has been added to ensure that the Copermittees are implementing this effective BMP at all appropriate areas."

The Commission finds that the street sweeping provision (part D.3.a.(5)) in the permit is a new program or higher level of service. The Commission agrees that Government Code section 17565 makes it irrelevant (for purposes of mandate reimbursement) whether or not claimants

were performing the activity prior to the permit, since voluntary activities do not affect reimbursement of an activity that is subsequently mandated by the state.

The 2001 permit, in part F.3.a.(3) and (4) stated:

> (a) To establish priorities for oversight of municipal areas and activities required under this Order, each Copermittee shall prioritize each watershed inventory in F.3.a.2. above by threat to water quality and update annually. Each municipal area and activity shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality, each Copermittee shall consider (1) type of municipal area or activity; (2) materials used (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility or area; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; and (9) any other relevant factors.
>
> (b) At a minimum, the high priority municipal areas and activities shall include the following:
>
> (i) Roads, Streets, Highways, and Parking Facilities. [¶]…[¶]
>
> F.3.a.(4) <u>BMP Implementation (Municipal)</u>
>
> (a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality municipal areas and activities (as determined under section F.3.a.(3)).The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific as appropriate.

Street sweeping is not expressly required in this 2001 permit provision, nor does it specify any frequencies or required reporting. Thus, the Commission finds that part D.3.a.(5) of the 2007 permit that requires street sweeping, as specified, is a new program or higher level of service, as well as part J.3.a(3)x-xv that requires reporting on street-sweeping activities.

**D. Conveyance system cleaning and reporting (parts D.3.a.(3) & J.3.a.(3)(c)(iv)-(viii)):** Also under part D.3 "Existing Development," part D.3.a.(3) requires conveyance system cleaning, including the following:

- Verifying proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from the MS4s and related drainage structures.
- Cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Cleaning open channels of observed anthropogenic litter in a timely manner.

In J.3.a.(3)(c)(iv)-(viii), as part of the annual reporting requirements, copermittees shall provide a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned. In addition, copermittees must report by category tons of waste and litter removed from the facilities.

The State Board, in its comments submitted in October 2008, disagrees that the requirements exceed federal law, saying that "the same broad authorities applicable to the street sweeping requirement also apply to the conveyance system cleaning requirements." According to the State Board, specificity in inspection and cleaning requirements is consistent with and supported by U.S. EPA guidance. Also, to the extent that permit requirements are more specific than the federal regulations, the State Board asserts that the requirements are an appropriate exercise of the San Diego Water Board's discretion to define the MEP standard.

The claimants, in their February 2009 comments, state that "the requirements to inspect and perform maintenance to insure compliance with these standards is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards." Also, claimants note that the content and detail in the reporting is more than required by the 2001 permit. As to the MEP standard required by the federal regulations, claimants assert that the U.S. EPA documents cited by the State Board provide guidance, not mandates, and the permit Fact Sheet does not specifically set forth mandatory annual inspection and maintenance requirements. According to the claimants, the only mandatory requirement is that a maintenance program exist, and that the applicant provide an inspection schedule if maintenance depends on the results of inspections or occurs infrequently. Yet the 2007 permit includes "very specific requirements that go beyond the U.S. EPA guidance and are not included within the federal regulations." Finally, claimants note that the State Board has acknowledged that the 2007 permit requirements are more specific than federal regulations, and cites the *Long Beach Unified School District* case to conclude that the specificity makes the requirements state mandates.

The Commission agrees with claimants. Like street sweeping, the permit requires conveyance system cleaning activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[127] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[128]

Yet the permit requirements are more specific. Part D.3.a.(3) requires verifying proper operation of all municipal structural treatment controls, cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner, cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately, and cleaning open channels of observed anthropogenic litter in a timely manner. In addition, the reporting in part J requires a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned, and reporting by category tons of waste and litter removed from the facilities. These activities, "exceed[s] the mandate in that federal law or regulation."[129] As in *Long Beach*

[127] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[128] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

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

*Unified School Dist. v. State of California*,[130] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[131] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(3) and J.3.a.(3)(c)iv-viii of the permit are not a federal mandate.

Rather, the Commission finds that part D.3.a.(3) of the 2007 permit is a state mandate on the claimants to do the following:

> (a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
>
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
>
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.
>
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
>
> v. Proper disposal of waste removed pursuant to applicable laws.
>
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission also finds that part J.3.a.(3)(c) iv-viii is a state mandate to report the following information in the JURMP annual report:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
>
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

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

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

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

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

As to whether these provisions are a new program or higher level of service, the State Board, in its October 2008 comments, states that the 2001 permit contained "*more* frequent inspection and removal requirements than required in the 2007 Permit. It also contained record keeping requirements to document the facilities cleaned and the quantities of waste removed." [Emphasis in original.]

Claimants, in their February 2009 comments, argue that the 2001 permit, in part F.3.a.(5) required each copermittee to 'implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges. By contrast, the 2007 permit requires each copermittee to 'implement a schedule of **inspection and** maintenance' and to '**verify proper operation of all municipal** structural controls…." [Emphasis in original.] Claimants also point out that the 2007 permit requires copermittees to:

- Clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Clean any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Clean open channels of observed anthropogenic litter in a timely manner.

According to claimants, these requirements were not included in the 2001 permit. Claimants also state that the requirement to inspect and perform maintenance "is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards."

As to reporting, claimants state that the language in part D.3.a.(3)(b)(iv),(v) and (vi) of the 2007 permit and part F.3.a.(5)(c)(iii), (iv) and (v) of the 2001 permit track each other, but part J.3.a.(3)(c) iv through viii detail the information that the reports must now contain that was not in the 2001 permit, such as identifying the number of catch basins and inlets, the number inspected, the number found with accumulated waste exceeding the cleaning criteria, the distance of the MS4 cleaned, and other detail.

In analyzing whether parts D.3.a.(3) and J.3.a.(3)(c)(iv) – (viii) are a new program or higher level of service, we compare those provisions to the prior permit and look at the Regional Board's Fact Sheet/Technical Report, which states why Part D.3.a.(3) was added:

> **Section D.3.a.(3)** … requires the Copermittees to inspect and remove waste from their MS4s prior to the rainy season. Additional wording has been added to clarify the intent of the requirements. The Copermittees will be required to inspect all storm drain inlets and catch basins. This change will assist the Copermittees in determining which basins/inlets need to be cleaned and at what

priority. Removal of trash has been identified by the copermittees as a priority issue in their long-term effectiveness assessment. To address this issue, wording has been added to require the Copermittees, at a minimum, inspect [sic] and remove trash from all their open channels at least once a year.

The 2001 permit contained the following in part F.3.a.(5)(b) and (c):

> (b) Each Copermittee shall implement a schedule of maintenance activities for the municipal separate storm sewer system.
> (c) The maintenance activities must, at a minimum, include:
> i. Inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year;
> ii. Additional cleaning as necessary between October 1 and April 30 of each year;
> iii. Record keeping of cleaning and the overall quantity of waste removed;
> iv. Proper disposal of waste removed pursuant to applicable laws;
> v. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission finds that some provisions in the 2007 permit are the same as in the 2001 permit. Specifically, part D.3.a(3)(a) is not a new program or higher level of service because the 2001 permit also required maintenance and inspection in part F.3.a.(5)(b) and (c). The Commission also finds that part D.3.a.(3)(b)(i),(iv)- (vi) of the 2007 permit is the same as part F.3.a.(5)(c)(i)(iii) - (v) in the 2001 permit, both of which require:

- Annual inspection of MS4 facilities (D.3.a(3)(b)(i));
- Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a(3)(b)(iv));
- Proper disposal of waste removed pursuant to applicable laws (D.3.a(3)(b)(v)); and
- Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a(3)(b)(vi)).

Therefore, the Commission finds that these provisions are not a new program or higher level of service.

The Commission also finds that part D.3.a.(3)(b)(ii) is not a new program or higher level of service. It gives the claimants the flexibility, after two years of inspections, to inspect MS4 facilities that require inspection and cleaning less than annually, but not less than every other year. Part F.3.a.(5)(c)(i) of the 2001 permit stated: "The maintenance activities must, at a minimum, include: i. inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year." Potentially less frequent inspections under the 2007 permit is not a new program or higher level of service.

The Commission finds that part D.3.a.(3)(b)(iii) of the 2007 permit is a new program or higher level of service on claimants to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity…. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely

manner." This part contains specificity, e.g., a standard of accumulation greater than 33% of design capacity, which was not in the 2001 permit.

Further, the Commission finds that the reporting in part J.3.a.(3)(c) (iv) – (viii) is a new program or higher level of service. The 2001 permit did not require this information in the content of the annual reports.

**E. Educational component (part D.5):** Part D.5 requires the copermittees to perform the activities on pages 25-28 above, which can be summarized as:

- Implement an educational program so that copermittees' planning and development review staffs (and planning board/elected officials, if applicable) understand certain laws and regulations related to water quality.
- Implement an educational program that includes annual training before the rainy season so that the copermittees' construction, building, code enforcement, and grading review staffs, inspectors, and others will understand certain specified topics.
- At least annually, train staff responsible for conducting stormwater compliance inspections and enforcement of industrial and commercial facilities on specified topics.
- Implement an education program so that municipal personnel and contractors performing activities that generate pollutants understand the activity specific BMPs for each activity to be performed.
- Implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and others relating to specified topics.

The State Board, in its October 2008 comments on the test claim, states that federal regulations authorize the inclusion of an education component, in that the proposed management program must "include a description of appropriate educational and training measures for construction site operations" (40 C.F.R. § 122.26(d)(2)(iv)(D)(4)) and a "description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors…(40 C.F.R. § 122.26(d)(2)(iv)(A)(6)). The federal regulations also require a "description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers" (40 C.F.R. § 122.26(d)(2)(iv)(B)(5)) and a "description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials." (40 C.F.R. § 122.26(d)(2)(iv)(B)(6)). The State Board also says that according to the U.S. EPA's Phase II stormwater regulations, the MEP standard requires the copermittees to implement public education programs. According to the State Board, the regulations apply to copermittees with less developed storm water programs, and require the programs to include a public education and outreach program (40 C.F.R. § 122.34(b)(1)) and a public involvement/participation program (40 C.F.R. § 122.26(b)(2)). To the extent the permit requirements are more specific than federal law, the State Board calls them an appropriate use of the Regional Board's discretion "to require more specificity in establishing the MEP standard."

Claimants, in their February 2009 comments, characterize the federal regulations as only requiring them "to describe educational, public information, and other appropriate activities associated with their jurisdictional, watershed or stormwater management programs." By contrast, under the permit claimants argue that they are required to "implement specific educational and training programs that achieve measurable increases in specific target community knowledge and to ensure a measurable change in the behavior of such target communities rather than simply report on the … educational programs on an annual basis." Claimants state that they are required to perform testing and surveys and "new program elements to secure the measureable changes in knowledge and behavior."

The Commission agrees with claimants. As quoted in the State Board's comments, the federal regulations require nonspecific descriptions of educational programs, for example, requiring the permit application to "include appropriate educational and training measures for construction site operations" and "controls such as educational activities." The permit, on the other hand, requires implementation of an educational program with target communities and specified topics. These requirements "exceed the mandate in that federal law or regulation."[132] As in *Long Beach Unified School Dist. v. State of California*,[133] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[134] to impose these requirements. Thus, the Commission finds that part D.5 of the permit is not federally mandated.

Based on the mandatory language on the face of the permit, the Commission finds that part D.5 of the permit constitutes a state mandate on the copermittees to do all of the following:

> Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:
>
> · Municipal Departments and Personnel
> · Construction Site Owners and Developers
> · Industrial Owners and Operators
> · Commercial Owners and Operators
> · Residential Community, General Public, and School Children
>
> a. GENERAL REQUIREMENTS
>
> (1) Each Copermittee shall educate each target community on the following topics where appropriate:

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

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

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

Table 3. Education

| **Laws, Regulations, Permits, & Requirements** | **Best Management Practices** |
|---|---|
| • Federal, state, and local water quality laws and regulations<br>• Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction).<br>• Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities<br>• Regional Board's General NPDES Permit for Ground Water Dewatering<br>• Regional Board's 401 Water Quality Certification Program<br>• Statewide General NPDES Utility Vault Permit<br>• Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits) | • Pollution prevention and safe alternatives<br>• Good housekeeping (e.g., sweeping impervious surfaces instead of hosing)<br>• Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste)<br>• Non-storm water disposal alternatives (e.g., all wash waters)<br>• Methods to minimized the impact of land development and construction<br>• Erosion prevention<br>• Methods to reduce the impact of residential and charity car-washing<br>• Preventive Maintenance<br>• Equipment/vehicle maintenance and repair<br>• Spill response, containment, and recovery<br>• Recycling<br>• BMP maintenance |
| **General Urban Runoff Concepts** | **Other Topics** |
| • Impacts of urban runoff on receiving waters<br>• Distinction between MS4s and sanitary sewers<br>• BMP types: facility or activity specific, LID, source control, and treatment control<br>• Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction)<br>• Non-storm water discharge prohibitions<br>• How to conduct a storm water inspections | • Public reporting mechanisms<br>• Water quality awareness for Emergency/ First Responders<br>• Illicit Discharge Detection and Elimination observations and follow-up during daily work activities<br>• Potable water discharges to the MS4<br>• Dechlorination techniques<br>• Hydrostatic testing<br>• Integrated pest management<br>• Benefits of native vegetation<br>• Water conservation<br>•Alternative materials and designs to maintain peak runoff values<br>•Traffic reduction, alternative fuel use |

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[135] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

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

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The State Board, in its October 2008 comments, states that the education requirement in part D.5. does not amount to a new program or higher level of service because the 2007 permit "includes education topics from the 2001 permit with minor wording and formatting changes. Additionally, the requirements were adopted to implement the same federal MEP standard as established in the CWA and in the 2001 Permit."

In their February 2009 comments, the claimants state that the 2001 permit did not require:

- Implementation of an education program so that the copermittee's planning and development review staff (and Planning Boards and Elected Officials, if applicable) understand certain specified laws and regulations related to water quality. (D.5.b.(1)(a).)
- Implementation of an education program that includes annual training prior to the rainy season so that the copermittee's construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of certain specified topics. (D.5.b.(1)(b).)
- Training of staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year relating to certain specified topics (D.5.b.(1)(c).)

- Implementation of an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed. (D.5.b.(1)(d).)
- Implementation of a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties relating to certain specified topics. (D.5.b.(2).)

This analysis of whether the permit is a new program or higher level of service is in the order presented in the permit. The Commission finds that nearly all of the educational topics in part D.5.a. are the same as those in the 2001 permit (part F.4). Both the 2001 and 2007 permits require the claimants to "educate" each specified target community on the following topics (Table 3 in the 2007 permit):

> **Laws, Regulations, Permits, & Requirements:** Federal, state, and local water quality laws and regulations; Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction); Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities; Regional Board's General NPDES Permit for Ground Water Dewatering; Regional Board's 401 Water Quality Certification Program; Statewide General NPDES Utility Vault Permit; Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits).
>
> **Best Management Practices:** Pollution prevention and safe alternatives; Good housekeeping (e.g., sweeping impervious surfaces instead of hosing); Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste); Non-storm water disposal alternatives (e.g., all wash waters); Methods to minimized the impact of land development and construction; Methods to reduce the impact of residential and charity car-washing; Preventive Maintenance; Equipment/vehicle maintenance and repair; Spill response, containment, and recovery; Recycling; BMP maintenance.
>
> **General Urban Runoff Concepts:** Impacts of urban runoff on receiving waters; Distinction between MS4s and sanitary sewers; Short-and long-term water , quality impacts associated with urbanization (e.g., land-use decisions, development, construction); How to conduct a storm water inspection.
>
> **Other Topics:** Public reporting mechanisms; Water quality awareness for Emergency/ First Responders; Illicit Discharge Detection and Elimination observations and follow-up during daily work activities; Potable water discharges to the MS4; Dechlorination techniques; Hydrostatic testing; Integrated pest management; Benefits of native vegetation; Water conservation; Alternative materials and designs to maintain peak runoff values; Traffic reduction, alternative fuel use.

Because the requirement to educate the target communities on these topics was in the 2001 permit, as well as the 2007 permit, the Commission finds that doing so, as required by part D.5.a(1), table 3, is not a new program or higher level of service.

Under the 2007 permit, the copermittees are required to "educate each target community" on the following educational topics that were not in the 2001 permit: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID [low-impact development], source control, and treatment control. Thus, the Commission finds that the part D.5.a.(1) is a new program or higher level of service to educate each target community on only the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control.

Part D.5.a.(2) states: "(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources." This provision was not in the 2001 permit, so the Commission finds that part D.5.a.(2) is a new program or higher level of service.

In part D.5.b.(1)(a) (Municipal Development Planning) the permit requires implementing an education program for "municipal planning and development review staffs (and Planning Board and Elected Officials, if applicable)" on specified topics. The 2001 permit required implementing an educational program for "Municipal Departments and Personnel" that would include planning and development review staffs, but not planning boards and elected officials. So the Commission finds that part D.5.b.(1)(a)(i) and (ii) is a new program or higher level of service for planning boards and elected officials.

Certain topics in part D.5.b.(1)(a) are a new program or higher level of service for both planning and development review staffs as well as planning boards and elected officials. Under both part F.4.a. of the 2001 permit, and D.5.b.(1)(a) of the 2007 permit, the copermittees are required to implement an educational program on the following topics:

> i. Federal, state, and local water quality laws and regulations applicable to Development Projects; [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); [The 2001 permit, in F.4.a (p. 35) calls this "Waters Quality Impacts associated with land development."]

Thus the Commission finds that implementing an educational program on these topics is not a new program or higher level of service for municipal departments, but is for planning boards and elected officials.

The following topics were not listed in the 2001 permit, so the Commission finds that part D.5.b.(1)(a) is a new program or higher level of service to implement these in an educational program for all target communities:

> (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements;
>
> (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and

[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

Part D.5.b.(1)(b) (Municipal Construction Activities) of the permit requires implementing an educational program for municipal "construction, building, code enforcement, and grading review staffs." Again, this is not a new program or higher level of service for those topics in which the 2001 permit also required an education program for "Municipal Departments and Personnel," such as:

> i. Federal, state, and local water quality laws and regulations applicable to construction and grading activities. [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment. [The 2001 permit, in F.4.a (p. 35) calls this "Water Quality Impacts associated with land development."]

The timing of the educational program specified in D.5.b.(1)(b) requires it to be implemented "prior to the rainy season." There is no evidence in the record, however, that this timing requirement is a new program or higher level of service compared with the 2001 permit. Thus the Commission finds that part D.5.b.(1)(b)(i) and (ii) are not a new program or higher level of service.

Municipal construction activity education topics were added to the 2007 permit, however, that were not in the 2001 permit, in paragraphs (iii) to (vi) as follows:

> (b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: [¶]…[¶] iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
> v. Current advancements in BMP technologies.
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

Thus, the Commission finds that part D.5.b.(1)(b)(iii) - (vi) of the 2007 permit is a new program or higher level of service.

Part D.5.b.(1)(c) of the 2007 permit (Municipal Industrial/Commercial Activities) requires the following:

> (c) Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

The 2001 permit included (in F.4.b.) the topic "How to conduct a stormwater inspection" but did not specify that the training was to be annual, and did not require the training to cover inspection and enforcement procedures, BMP Implementation, or reviewing monitoring data. Thus, the Commission finds that part D.5.(b)(1)(c) is a new program or higher level of service.

Part D.5.b.(1)(d) of the 2007 permit requires the following:

> (d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

Regarding part D.5.b.(1)(d), the 2007 Fact Sheet/Technical Report states:

> A new requirement has also been added for education of activity specific BMPs for municipal personnel and contractors performing activities that generate pollutants. Education is required at all levels of municipal staff and contractors. Education is especially important for the staff in the field performing activities which might result in discharges of pollutants if proper BMPs are not used.

Because part D.5.b.(1)(d) was not in the 2001 permit, and because the Regional Board called it a "new requirement" the Commission finds that part D.5.(b)(1)(d) of the 2007 permit is a new program or higher level of service.

Part D.5.(b)(2) of the 2007 permit requires an education program for "project applicants, developers, contractors, property owners, community planning groups, and other responsible parties." Parts F.4.a and F4.b. of the 2001 permit required a similar education program for "construction site owners and developers." The Fact Sheet/Technical Report for the 2007 permit states:

> Different levels of training will be needed for planning groups, owners, developers, contractors, and construction workers, but everyone should get a general education of stormwater requirements. Education of all construction workers can prevent unintentional discharges, such as discharges by workers who are not aware that they are not allowed to wash things down the storm drains. Training for BMP installation workers is imperative because the BMPs will not fail if not properly installed and maintained. Training for field level workers can be formal or informal tail-gate format.

Thus, the Commission finds that part D.5.(b)(2) of the 2007 permit is a new program or higher level of service for project applicants, contractors, or community planning groups who are not developers or construction site owners.

The final part of the education programs in the 2007 permit is D.5.(b)(3) regarding "Residential, General Public, and School Children."

> Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers,

door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The 2001 permit (part F.4.c.) stated the following:

> In addition to the topics listed in F.4.a. above, the Residential, General Public, and School Children communities shall be educated on the following topics where applicable:
>
> - Public reporting information resources
> - Residential and charity car-washing
> - Community activities (e.g., "Adopt a Storm Drain, Watershed, or Highway" Programs, citizen monitoring, creek/beach cleanups, environmental protection organization activities, etc..

The 2001 permit did not require claimants to "collaboratively conduct or participate in development … of a plan to educate residential, general public, and school children target communities." The 2001 permit also did not require the plan to "evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods." Thus, the Commission finds that part D.5.(b)(3) of the 2007 permit is a new program or higher level of service.

In sum, as to part D.5 of the 2007 permit that requires implementing educational programs, the Commission finds that the following subparts are new programs or higher levels of service:

- D.5.a.(1): Each copermittee shall educate each target community, as specified, on the following topics: erosion prevention, nonstorm waters discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control.
- D.5.a.(2): Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.
- D.5.b.(1)(a): Implement an education program so that planning boards and elected officials, if applicable, have an understanding of: (i) Federal, state, and local water quality laws and regulations applicable to Development Projects; (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization).
- D.5.b.(1)(a): Implement an education program so that planning and development review staffs as well as planning boards and elected officials have an understanding of: (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements; (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and [6] Selection of the most effective treatment control BMPs for the pollutants of concern."
- D.5.b.(1)(b)(iii) - (vi): Implement an education program that includes annual training prior to the rainy season for its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an

understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

> iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
>
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
>
> v. Current advancements in BMP technologies.
>
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

- D.5.(b)(1)(c) and (d) as follows:

  > Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

- Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

- D.5.(b)(2), As early in the planning and development process as possible and all through the permitting and construction process, to implement a program to educate project applicants, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) [Municipal Development Planning] and D.5.b.(1)(b) [Municipal construction Activities] above, as appropriate for the audience being educated. The education program shall also educate project applicants, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

- D.5.(b)(3), Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

**II. Watershed Urban Runoff Management Program (Part E)**

Part E of the permit is the Watershed Urban Runoff Management Program (WURMP). The permit (Table 4) divides the copermittees into nine watershed management areas (WMAs) by "major receiving water bodies." The 2001 permit also had a WURMP component (in part J).

**A. Watershed Urban Runoff Management Program copermittee collaboration (parts E.2.f & E.2.g):** These provisions require the copermittees to do the activities on pages 28-29 above, including the following:

- Collaborating with other copermittees within their watershed management areas (WMAs) to develop and implement an updated Watershed Urban Runoff Management Program for each watershed that prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards which at a minimum includes:
    - Identifying and implementing watershed activities that address the high priority water quality problems in the watershed management areas that include both watershed water quality activities[136] and watershed education activities.[137]
    - Creating a watershed activities list that includes certain specified information to be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter.
    - Implementing identified watershed activities within established schedules.
    - Collaborating to develop and implement the Watershed Urban Runoff Management Program, including frequent regularly scheduled meetings.[138]

In its October 2008 comments, the State Board asserts that the Watershed Urban Runoff Management Program activities are necessary to meet the minimum federal MEP standard. The State Board quotes the following federal regulations: "The Director may … issue distinct permits for appropriate categories of discharges … including, but not limited to … all discharges within a system that discharge to the same watershed…" (40 C.F.R. 122.26(a)(3)(ii).) The State Board also quotes more specific federal regulations:

> Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system. (40 C.F.R. § 122.26 (a)(3)(v).)
>
> The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, a

[136] Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of the permit (Part E.2.f).

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

[138] In their February 2009 comments, the claimants also list the following activities: (1) Annual review of WURMPs to identify needed modifications and improvements (part E.2.i); (2) Develop and periodically update watershed maps (part E.2.b); (3) Develop and implement a program for encouraging collaborative watershed-based land-use planning (part E.2.d); (4) Develop and implement a collective watershed strategy (part E.2.e). These parts of the permit, however, were not pled in the test claim so the Commission makes no findings on them.

> jurisdiction-wide basis, watershed basis, or other appropriate basis;" (40 C.F.R. § 122.26 (a)(5).)
>
> Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. (40 C.F.R. § 122.26 (d)(2)(iv).)

The State Board argues that the regional board "determined that the inclusion of the requirement to formalize the Watershed Water Qualities Activities List was appropriate to further the goal of the WURMPS in achieving compliance with federal law." Based on some reports it received, the Regional Board determined that "many of the watershed water quality activities had no clear connection to the high priority water quality problems in the area of implementation." The Board determined it was therefore necessary and appropriate to require development of an implementation strategy to maximize WURMP effectiveness.

Claimants, in their February 2009 comments, point out that while cooperative agreements may be required by 40 C.F.R. § 122.26(d)(2)(i)(D), "each copermittee is only responsible for their own systems." Claimants quote another federal regulation: "Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate." (40 C.F.R. § 122.26(a)(3)(vi).) Claimants argue that the 2007 permit:

> [R]equires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year.

Claimants also state that the permit "mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order." (part E.2.f.(1)(a).) According to what the claimants call these "dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work."

The Commission finds that the permit requirements in sections E.2.f and E.2.g. are not federal mandates. As with the other requirements in the permit, the federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed or other basis. These requirements "exceed the mandate in that federal law or regulation."[139] As in *Long Beach Unified School Dist. v. State of California*,[140] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[141] to impose these requirements.

Based on the mandatory language in the permit, the Commission finds that the following in part E are a state mandate on the copermittees:

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

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

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

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) as in Table 4 [of the permit] to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below:
[¶]…[¶]

f. Watershed Activities[142]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

[142] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

As to the issue of new program or higher level of service, the State Board, in its October 2008 comments, states:

> Although Section E.2.f. requires development and implementation of a list of Watershed Water Qualities Activities for potential implementation that was not specifically required in the 2001 Permit, the Copermittees were previously required to identify priority water quality issues and identify recommended activities to address the priority water quality problems (See 2001 Permit, section J.1 and J.2.d.)

The State Board asserts that Copermittees were already required to collaborate with other Copermittees, and that "Section E.2.g. merely adds effectiveness strategies to the collaboration requirements." … Other requirements challenged by the Claimants exist in the 2001 Permit, but with minor wording changes (e.g., the requirement to update watershed maps, which exists in both permits).

Claimants, in their February 2009 comments, assert that parts E.2.f. and E.2.g do impose a new program or higher level of service. According to the claimants:

> Under the 2001 Permit the watershed requirements were essentially limited to mapping, assessment and identification of short and long term issues. Collaboration included mapping (J.2.a.), assessment of receiving waters (J.2.b); identification and prioritization of water quality problems (J.2.c); implementation of time schedules (J.2.d) and identification of copermittee responsibilities for each recommended activity including a time schedule.
>
> [¶]…[¶]

> The 2007 Permit imposes standards far beyond those listed in … the 2001 Permit …. The 2007 Permit now requires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year. The two-activity watershed requirement is a condition of all copermittees regardless of whether the activity is within their jurisdictional authority or not.
>
> In addition, while the 2007 Permit states that activities can be implemented at a regional, watershed or jurisdictional level, it mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order. By reason of the dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work.

The Commission finds that E.2.f. and E.2.g of the permit are a new program or higher level of service.

As to watershed education in part E.2.f, the 2001 permit (in part J.2.g.) stated that the WURMP shall contain "A watershed based education program." The 2007 permit states that the WURMP shall include "watershed education activities" defined as "outreach and training activities that address high priority water quality problems in the WMA [Watershed Management Area(s)]." Moreover, in part E.f.(4), the 2007 permit states: "A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences." Because of this increased requirement for implementation of watershed education, the Commission finds that watershed education activities, as defined in part E.2.f, is a new program or higher level of service.

Additionally, the Commission finds that the rest of part E.2.f. is a new program or higher level of service because it includes elements not in the 2001 permit, such as:

- A definition of watershed water quality activities (part E.2.f.(1)(a)).
- Submission of a watershed activities list, with specified contents (part E.2.f.(2)).
- A detailed description of each activity on the watershed activities list, with seven specific components (part E.2.f.(3)).
- Implementation of watershed activities pursuant to established schedules, including definitions of when activities are in an active implementation phase (part E.2.f.(4)).

As to part E.2.g., although the 2001 (in parts J.1. & J.2.) and 2007 permits both require copermittee collaboration in developing and implementing the Watershed Urban Runoff Management Plan, copermittee collaboration is a new program or higher level of service because the WURMP is greatly expanded over the 2001 permit in part E.2.f as discussed above. This means that new collaboration is required to develop and implement the watershed activities in part E.2.f.

The 2007 permit (in part E.2.g) also states that "Watershed Copermittee collaboration shall include frequent regularly scheduled meetings." This requirement for meetings was not in the 2001 permit. The Fact Sheet/Technical Report states:

> The requirement for regularly scheduled meetings has been added based on Regional Board findings that watershed groups which hold regularly scheduled meetings (such as for San Diego Bay) typically produced better programs and work products than watershed groups that went for extended periods of time without scheduled meetings.[143]

Therefore, the Commission finds that part E.2.g. of the 2007 permit is a new program or higher level of service.

Regarding watershed water quality activities in part E.2.f, the Fact Sheet/Technical Report the Regional Board stated:

> This requirement developed over time while working with the Copermittees on their WURMP implementation under Order No. 2001-01. In October 2004 letters, the Regional Board recommended the Copermittees develop a list of Watershed Water Quality Activities for potential implementation. Following receipt of the Regional Board letters, the Copermittees created the Watershed Water Quality Activity lists. Although the Copermittees' lists needed improvement, the Regional Board found the lists to be useful planning tools that can be evaluated to identify effective and efficient Watershed Water Quality Activities. Because the lists are useful and have become a part of the WURMP implementation process, a requirement for their development has been written into the Order.

Thus, the Commission finds that part E.2.f. of the permit is a new program or higher level of service, in that it requires the following not required in the 2001 permit:

- Identification and implementation of watershed activities that address the high priority water quality problems in the WMA (Watershed Management Area), as specified (part E.2.f.(1)).
- Submission of a watershed activities list with each updated WURMP and updated annually thereafter, as specified (part E.2.f.(2)-(3)).
- Implementation of watershed activities pursuant to established schedules: no less than two watershed water quality activities and two watershed education activities in active implementation phase, as defined, per permit year (part E.2.f.(4)).

**III. Regional Urban Runoff Management Program (Part F)**

Part F of the permit describes the Regional Urban Runoff Management Program (RURMP). It was included because "some aspects of urban runoff management can be effectively addressed at a regional level. … However, significant flexibility has been provided to the Copermittees for new regional requirements."[144]

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[143] For an inexplicable reason, the Fact Sheet/Technical Report lists this collaboration activity under Section E.2.m of the permit rather than E.2.g.. The permit at issue has no section E.2.m.

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

**A. Copermittee collaboration – Regional Residential Education Program Development and Implementation (part F.1):** Part F.1 requires the copermittees to develop and implement a Regional Residential Education Program, with specified contents (see p. 12 above). In the test claim the claimants discuss hiring a consultant to develop the educational program that "will generally educate residents on: 1) the difference between stormwater conveyance systems and sanitary sewer systems; 2) the connection of storm drains to local waterways; and 3) common residential sources of urban run-off." Claimants allege activities to comply with section F.1 of the permit that include, but are not limited to: "development of materials/branding, a regional website, regional outreach events, regional advertising and mass media, partnership development, and the development of marketing and research tools, including regional surveys to be conducted in FY 2008-09 and again in FY 2011-12."

In comments submitted in October 2008, the State Board asserts that the permit condition in section F.1. is necessary to meet the minimum federal MEP standard and that the requirement is supported by the Clean Water Act statutes and regulations. The State Board cites the following federal regulations:

> (v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.[145] [¶]…[¶]
>
> (5) The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.[146] [¶]…[¶]
>
> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[147]
>
> (iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. …[148]

In response, the claimants' February 2009 comments state that the Regional Residential Education Program is not necessary to meet the minimum federal MEP standard. The regional nature of the education program, according to the claimants, is duplicative because it imposes the

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[145] 40 Code of Federal Regulations section 122.26 (a)(3(v).

[146] 40 Code of Federal Regulations section 122.26 (a)(5).

[147] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[148] 40 Code of Federal Regulations section 122.26 (d)(iv).

education requirements at the regional and jurisdictional levels concurrently, and it exceeds federal law.

The Commission finds that the requirements in part F.1 of the permit do not constitute a federal mandate. There is no federal requirement to provide a regional educational program, so the education program, "exceed[s] the mandate in that federal law or regulation."[149] As in *Long Beach Unified School Dist. v. State of California*, the permit "requires specific actions … [that are] required acts."[150] In adopting part F.1, the state has freely chosen[151] to impose these requirements. Thus, the Commission finds that part F.1. of the permit does not constitute a federal mandate.

Based on the mandatory language on the face of the permit, the Commission finds that the permit constitutes a state mandate on the claimants to do all the following in part F.1 of the permit:

> The Regional Urban Runoff Management Program shall, at a minimum:
>
> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a (p. 50.)

As to whether this is a new program or higher level of service, the State Board, in its October 2008 comments, states that it is not because the claimants were already implementing a residential education program at a regional level before the permit was adopted.

In claimants' February 2009 rebuttal comments, they assert that it is irrelevant whether or not the copermittees voluntarily met or exceeded the now mandatory requirements imposed by the 2007 permit because Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate."

The Commission finds that part F.1 of the permit is a new program or higher level of service. The 2001 permit required an educational component as part of the Jurisdictional Urban Runoff Management Program (part F.4) that contained a residential component, but not a Regional Residential Education Program, so the activities in this program are new. Also, the Commission agrees that whether or not claimants were engaged in an educational program is not relevant due to Government Code section 17565. The Regional Board, in requiring the regional educational program, leaves the local agencies with no choice but to comply.

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

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

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

**B. Copermittee collaboration (parts F.2 & F.3):** Parts F.2 and F.3 (quoted on p. 11 above) require the copermittees to collaborate to develop, implement, and update as necessary a Regional Urban Runoff Management Program, to include developing the standardized fiscal analysis method required in permit part G (part F.2) and facilitating the assessment of the effectiveness of jurisdictional, watershed, and regional programs (part F.3).

In comments submitted in October 2008, the State Board asserts that the permit conditions in sections F.2 and F.3 are necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[152]

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

> (v) Permits for all or a portion of all discharges from large[153] or medium[154] municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different

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

[153] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. …" [40 CFR § 122.26 (b)(4).]

[154] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. …" [40 CFR § 122.26 (b)(7).]

management programs for different drainage areas which contribute storm water to the system.

The State Board also asserts:

> To the extent the Clean Water Act and federal regulations do not identify all of the specificity required in Sections F.2, F.3 …, the San Diego Water Board properly exercised its discretion under federal law to include specificity so that the federal MEP standard can be achieved. The San Diego Water Board exercised this duty under federal law and therefore the provisions of the 2007 Permit were adopted as federal requirements.

In the claimants' rebuttal comments submitted in February 2009, they state that "all of the authorities cited by the State merely acknowledge the State's authority to go beyond the federal regulations."

The Commission finds that the requirements in parts F.2 and F.3. of the permit do not constitute a federal mandate. There is no federal requirement to collaborate on, develop, or implement a Regional Urban Runoff Management Program (RURMP). The Commission finds that these RURMP activities "exceed the mandate in that federal law or regulation."[155] As in *Long Beach Unified School Dist. v. State of California*,[156] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[157] to impose these requirements. Thus, the Commission finds that parts F.2 and F.3 of the permit do not constitute federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts F.2 and F.3 of the permit constitutes a state mandate on the claimants to do all the following:

> Collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> (2) Develop the standardized fiscal analysis method required in section G of the permit, and,
>
> (3) Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

As to whether these activities are a new program or higher level of service, the claimants state in the test claim:

> "[W]hile the 2001 Permit required the copermittees to collaborate to address common issues and promote consistency among JURMPs and WURMPs and to

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

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

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

establish a management structure for this purpose, it lacked the detail, specificity and level of effort now mandated by the 2007 Permit."

In their February 2009 rebuttal comments, claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

The State Board, in its October 2008 comments, states that the 2001 permit required that "the Copermittees enter into a formal agreement to provide, at a minimum, a management structure for designating joint responsibilities, decision making, watershed management, information management of data and reports" and other collaborative arrangements to comply with the permit.

According to the State Board, parts F.2 and F.3 are not a new program or higher level of service because the copermittees "were already conducting multiple efforts on a regional level under the 2001 permit. The inclusion of the RURMP is designed to organize these efforts into one framework to improve Copermittee and Regional Board tracking of regional efforts." The State Board also asserts that the requirements were intended to reduce redundant reporting and improve efficiency and streamline regional program implementation. The State Board describes the 2007 permit as merely elaborating on and refining the 2001 requirements.

The permit itself states: "This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards." [Emphasis added.] The permit also describes the Regional Urban Runoff Management Plan as new.

While the 2001 permit contained requirements for a fiscal analysis (part F.8) and an assessment of effectiveness (part F.7), it did so only as components of a Jurisdictional Urban Runoff Management Program. The Regional Urban Runoff Management Program, required in part F.2 of the 2007 permit, is new. The fiscal analysis in part G is incorporated by reference into part F.2, and the effectiveness assessment is incorporated into part F.3. Thus, the Commission finds that the requirements in parts F.2 and F.3 are a new program or higher level of service.

## IV. Program Effectiveness Assessment (Part I)

Part I of the permit is called "Program Effectiveness Assessment" and includes subparts for Jurisdictional (I.1), Watershed (I.2) and Regional (I.3) assessment, in addition to a Long Term Effectiveness Assessment (I.5). Of these, claimants pled subparts I.1, I.2 and I.5.

**A. Jurisdictional and Watershed Program effectiveness assessment (parts I.1 & I.2):** As more specifically stated on pages 22-24 above, the permit requires the copermittees to do the following:

- Annually assess the effectiveness of the Jurisdictional Urban Runoff Management Program (JURMP) that includes specifically assessing the effectiveness of specified components of the JURMP and the effectiveness of the JURMP as a whole.
- Identify measureable targeted outcomes, assessment measures, and assessment methods for each jurisdictional activity/BMP implemented, each major JURMP component, and the JURMP as a whole.

- Development and implement a plan and schedule to address the identified modifications and improvements.
- Annually report on the effectiveness assessment as implemented under each of the specified requirements.
- As a watershed group of copermittees, annually assess the effectiveness of the Watershed Urban Runoff Management Program (WURMP) implementation, including each water quality activity and watershed education activity, and the program as a whole.
- Determine source load reductions resulting from WURMP implementation and utilize water quality monitoring results and data to determine whether implementation is resulting in changes to water quality.
- As with the JURMP, annually review WURMP jurisdictional activities or BMPs to identify modifications and improvements needed to maximize the program's effectiveness, develop and implement a plan and schedule to address the identified modifications and improvements to the programs, and annually report on the program's effectiveness assessment as implemented under each of the requirements.

Regarding parts I.1.a. and I.2.a. of the permit, the Fact Sheet/Technical Report states: "The section requires both specific activities and broader programs to be assessed since the effectiveness of jurisdictional [or watershed] efforts may be evident only when considered at different scales."[158]

The State Board, in its comments submitted in October 2008, cites section 402(p)(3(B)(ii)-(iii) of the Clean Water Act, as well as 40 C.F.R. sections 122.26(d)(2)(i)(B)-(C), (E) and (F) and subdivision (d)(2)(iv) of the same section to show the "broad federal authorities relied upon by the San Diego Water Board to support Section I … [that] … support inclusion of the JURMP and WURMP effectiveness assessments under federal law." The State Board also quotes section 122.26(d)(2)(v) that the copermittees must include in part 2 of their application for a permit:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

The State Board also says that "under 40 C.F.R. section 122.42(c), applicants must provide annual reports on the progress of their storm water management programs. The federal law behind the JURMP and WURMP effectiveness assessment requirements were discussed at great length in the 2001 Permit Fact Sheet."[159] The State Board quotes a lengthy portion of the 2001

[158] Fact Sheet/Technical Report for Order No. R9-2007-0001, Parts I.1.a. and I.2.a.. Two identical paragraphs describe the JURMP on page 319 and the WURMP on page 320.

[159] 40 C.F.R. section 122.42(c) states:

> *Municipal separate storm sewer systems.* The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must

Fact Sheet, which states that the U.S. EPA requires applicants to submit estimated reductions in pollutant loads expected to result from implemented controls and describe known impacts of storm water controls on groundwater. The 2001 Fact Sheet also includes "Throughout the permit term, the municipality must submit refinements to its assessment or additional direct measurements of program effectiveness in its annual report." It also lists a number of U.S. EPA suggestions, recommendations, and encouraged actions.

The State Board also quotes at length from the 2007 Permit Fact Sheet/Technical Report regarding why the effectiveness assessments are required under the permit, including the need for them and the benefits of including them. According to the State Board, the federal authorities support including the effectiveness assessments, and the Regional Board appropriately exercised discretion under federal law to include them, finding them necessary to implement the MEP standard. Thus, the State Board asserts that sections I.1 and I.2 do not exceed federal law.

The claimants, in their February 2009 comments, state that neither the broad nor the specific legal authority cited in the permit Fact Sheet "contains the above-referenced mandates required under the 2007 Permit." Claimants characterize the federal regulations as only requiring "program descriptions, estimated reductions, known impacts, and an annual report on progress. Federal law does not mandate the specific activities mandated by the 2007 Permit." Claimants also argue that the permit requirements are not necessary to meet the federal MEP standard, and point out that the 2001 Permit Fact Sheet cited by the State Board describes actions recommended or encouraged by the U.S. EPA, but not required. As claimant says: "they simply authorize applicants to go beyond minimum federal requirements." Claimants also quote the State Board's comment on "the need for and benefits of assessment requirements," noting that needs and benefits "constitute an insufficient basis for the imposition of a mandated requirement without subvention."

Although the federal regulations require assessment of controls and annual reports, they do not require the detailed assessment in the 2007 permit. The regulations do not require, for example, assessments of the effectiveness of each significant jurisdictional activity/BMP or watershed

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

quality activity, or of the implementation of each major component of the JURMP or WURMP, or identification of modifications and improvements to maximize the JURMP or WURMP effectiveness. These requirements, "exceed the mandate in that federal law or regulation."[160] As in *Long Beach Unified School Dist. v. State of California*,[161] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[162] to impose these requirements. Thus, the Commission finds that parts I.1 and I.2 of the permit are not federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts I.1 and I.2 of the permit are a state mandate on the copermittees to do all of the following:

> 1. Jurisdictional
>
> a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
>
> (1) Specifically assess the effectiveness of each of the following:
>
> (a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
> (b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[163] Detection and Elimination, and Education); and
> (c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
>
> (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.
>
> (3) Utilize outcome levels 1-6[164] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (5) Utilize Implementation Assessment,[165] Water Quality Assessment,[166] and Integrated Assessment,[167] where applicable and feasible.

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

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

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

[163] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[164] See footnote 50, page 21.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[168] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

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[165] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[166] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[167] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[168] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[169] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

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

The State Board, in its October 2008 comments, states that the program effectiveness assessment is not a new program or higher level of service because the 2001 permit included a JURMP (in part F.7) and WURMP (in part J) effectiveness assessment requirements.

The claimants, in their February 2009 comments, state as follows:

> The 2001 Permit only required the copermittees to develop a long term strategy for assessing the effectiveness of their individual JURMP using specific and indirect measurements to track the long term progress of their individual JURMPs towards achieving water quality. [part F.7.a. of the 2001 permit.] The 2001 Permit also only mandated that the long term strategy developed by the copermittees include an assessment of the effectiveness of their JURMP in an annual report using the direct and indirect assessment measurements and methods developed in the long-term strategy. [part F.7. of the 2001 permit.]

Part F.7 of the 2001 permit required developing the following on the topic of "Assessment of Jurisdictional URMP Effectiveness Component."

> a. As part of its individual Jurisdictional URMP, each Copermittee shall develop a long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that each Copermittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.
>
> b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

The 2007 permit requires more detail in its assessments than the 2001 permit. The 2007 permit requires annual assessments and using outcome levels, among other things, to assess the effectiveness of (a) each significant jurisdictional activity/BMP, (b) implementation of each major component of the JURMP, and (c) implementation of the JURMP as a whole. The 2001 permit did not require assessments at these three levels. And for example, outcome level 4 in the 2007 permit is required for measuring load reductions.[170] This is a higher level of service than "pollutant loading estimations" to be used as an effectiveness strategy in the 2001 permit.[171] Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

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[170] There are six Effectiveness Assessments incorporated into part I.1.a.(3) of the permit and are defined in Attachment C. One of them is "Effectiveness Assessment Level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed."

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

The assessment provisions of the Watershed Urban Runoff Management Program are in part J.2 of the 2001 permit, which requires each copermittee to develop and implement a Watershed URMP that contains, among other things:

> b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual watershed water quality monitoring that satisfies the watershed monitoring requirements of Attachment B.
>
> [¶]…[¶]
>
> i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that will track the long-term progress of the Watershed URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

As with the JURMP, the 2001 permit required a "long-term strategy for assessing the effectiveness of the Watershed URMP" whereas the 2007 permit requires the annual assessment of more specific criteria: (a) each Watershed Water Quality Activity implemented; (b) Each Watershed Education Activity implemented; and (c) Implementation of the Watershed Urban Runoff Management program as a whole. And the 2007 permit requires assessing these activities using the same six effectiveness outcome levels as for the JURMP (defined in Attachment C), that were not in the 2001 permit.[172]

[172] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

Therefore, the Commission finds that section I.2. of the permit (the Watershed URMP effectiveness assessment) is a new program or higher level of service.

**B. Long Term Effectiveness Assessment (part I.5):** As stated on pages 19-20 above, part I.5 requires the copermittees to collaborate to develop a Long Term Effectiveness Assessment (LTEA) that evaluates the copermittee programs on a jurisdictional, watershed, and regional level, and that emphasizes watershed assessment. The LTEA must build on the results of the August 2005 Baseline LTEA, and must be submitted to the Regional Board no later than 210 days before the permit expires. The LTEA must address the Regional objectives listed in part I.3 of the permit, as well as assess the effectiveness of the Receiving Waters Monitoring Program, and address outcome levels 1-6 as specified in attachment C of the permit.

In its October 2008 comments on the test claim, the State Board says that the LTEA requirement was imposed "so that the San Diego Water Board could properly evaluate the Copermittees' storm water program during the reapplication process." The State Board asserts that the LTEA provision is a federal mandate, citing 40 C.F.R. section 122.26, subdivisions (d)(2)(iv) and (v), in which (v) states that a permit application must include:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

According to the State Board, "Even if the requirements to develop an LTEA are not specifically required by the federal regulations, the general discussion of the federal MEP standard is applicable here and supports the San Diego Water Board's determination that the region-wide LTEAs are necessary to meet the federal MEP standard."

In their February 2009 rebuttal comments, the claimants state:

> The program effectiveness component of the 2007 Permit mandates Jurisdictional (I.1), Watershed (I.2), Regional (I.3), Total Maximum Daily Loads ("TMDL") and BMP Implementation (I.4) and Long-term Effectiveness Assessment (I.5) requirements. This Section mandates multiple layers of program assessment, review and reporting. Such duplicative and collaborative efforts were not required under the 2001 Permit and are not required by federal law.

Claimants assert that there is no federal authority that states that the regional, jurisdictional and watershed program effectiveness training requirements are required to meet the minimum federal MEP standards. Claimants also state that permits in other jurisdictions do not have LTEA requirements. According to the claimants, "while portions of the federal regulations cited by the State permit region-wide or watershed-wide cooperation, there is no mandatory requirement for multiple layers of program effectiveness assessment."

Although the federal regulations require assessment of controls, they do not require the detailed assessment in the 2007 permit. They do not require, for example, collaboration with other copermittees, addressing specified objectives or outcome levels, or addressing jurisdictional, watershed, and regional programs. These requirements "exceed the mandate in that federal law

or regulation."[173] As in *Long Beach Unified School Dist. v. State of California*,[174] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[175] to impose these requirements. Thus, the Commission finds that part I.5 of the permit is not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission finds that part I.5 of the permit is a state mandate for the claimants to do all of the following:

> 5. Long-term Effectiveness Assessment
>
> a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.
>
> b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[176] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.
>
> c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).
>
> d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of

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

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

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

[176] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The next issue is whether the LTEA (part I.5) is a new program or higher level of service. The State Board, in its October 2008 comments, state as follows:

> The LTEA does not impose a new program or higher level of service. Rather, it requires the Copermittees to conduct a long term effectiveness assessment prior to submitting an application for reissuance of the Order in the next permit term and is necessary to support proposed changes to the Copermittees' programs."

The claimants, in their February 2009 comments, argue that the LTEA requirement in part I.5 does impose a new program or higher level of service. According to the claimants:

> Section F.7 of the 2001 Permit only required individual copermittees to develop long term effectiveness assessments for their Jurisdictional Urban Runoff Management Plan ("JURMP"). … The 2001 Permit did not require the copermittees to collaborate to develop an overarching LTEA for regional, jurisdictional and watershed programs, and did not require the submission of a LTEA by a date certain in advance of the Permit expiration.

The Commission finds that the LTEA is a new program or higher level of service. The 2001 permit required JURMP assessment (in part F.7) and WURMP (in part J.2) as quoted above in the discussion on parts I.1 and I.2., but not an LTEA. The Fact Sheet/Technical Report for the 2007 permit states:

> Section I.5 (Long-Term Effectiveness Assessment) requires the Copermittees to conduct a Long-Term Effectiveness Assessment prior to their submittal of an application for reissuance of the Order. The Long-Term Effectiveness Assessment is necessary to provide support for the Copermittees' proposed changes to their programs in their ROWD. It can also serve as the basis for changes to the Order's requirements.

The Commission finds that the LTEA (part I.5) is a new program or higher level of service for three reasons. First, the scope of the assessment in the 2001 permit addresses only the JURMP and WURMP rather than "jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment" as in the 2007 permit (see the analysis of I.1 and I.2 above). Second, the 2001 permit did not require collaborating with all other copermittees on assessment. Third, the 2001 permit contains much less detail on what to include in the assessment, such as, for example, the eight regional objectives listed in I.3.a.(6), incorporated by reference in part I.5. Also, the LTEA must assess the "effectiveness of the Receiving Waters Monitoring Program … [and] shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods." These methods were not required under the 2001 permit.

## V. All Copermittee Collaboration (Part L)

Part L, labeled "All Permittee Collaboration," requires the copermittees to collaborate to address common issues and plan and coordinate activities, including developing a Memorandum of

Understanding (MOU), as specified. The Copermittees entered into an MOU effective in January 2008, which is attached to the test claim. The Copermittees allege activities involved with working body support and working body participation.

In comments submitted in October 2008, the State Board asserts that the permit condition in part L is necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[177]

The Commission finds that there is no federal mandate to develop a management structure (memorandum of understanding, or MOU) as required in part L of the 2007 permit. The federal regulation most on point requires an applicant (claimant) to demonstrate adequate legal authority "which authorizes or enables the applicant at a minimum to: [¶]…[¶] (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;"[178] All the federal regulations address is authority to establish an interagency agreement or memorandum of understanding, but do not require it to be implemented or specify its contents beyond "controlling … the contribution of pollutants from one portion of the municipal system to another portion of the municipal system."

By contrast, part L of the permit requires the copermittees to collaborate, promote consistency among JURMP and WURMP and plan and coordinate activities required under the permit. It also requires joint execution and submission to the Regional Board an MOU with a minimum of seven specified requirements.

Thus, this permit activity "exceed[s] the mandate in that federal law or regulation."[179] As in *Long Beach Unified School Dist. v. State of California*,[180] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[181] to impose these requirements. Thus, the Commission finds that part L of the permit does not impose a federal mandate.

Based on the mandatory language in the permit, the Commission finds that part L of the permit is a state mandate on the claimants to do the following:

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[177] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[178] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

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

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

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

1. Collaborate with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

(a) Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum:

(1) Identifies and defines the responsibilities of the Principal Permittee[182] and Lead Watershed Permittees;[183]

(2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decisions-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;

(7) Includes any and all other collaborative arrangements for compliance with this order.

The State Board, in its October 2008 comments, asserts that the management structure framework in part L of the 2007 permit is not a new program or higher level of service because:

> The 2001 permit required significant collaboration to address common issues and promote consistency across management programs [and] development of a management structure through execution of a formal agreement, meeting minimum specifications. It also required standardized reporting, including fiscal analysis.

The State Board also argues there is "minimal substantive difference" between the 2001 and 2007 permits in their requirements to establish "a formal cooperative arrangement and to implement regional urban runoff management activities. The 2007 Permit merely elaborates on and refines the 2001 requirements."

In its February 2009 rebuttal comments, the claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

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

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

Part L.1 of the 2007 permit, the first paragraph in L requiring collaboration, is identical to part N of the 2001 permit. The Commission finds, however, that the collaboration is a new program or higher level of service because it now applies to all the activities that are found to be a new program or higher level of service in the analysis above (i.e, not in the 2001 permit) including the Regional Urban Runoff Management Program.

Part L.1.a, regarding the MOU or formal agreement, is similar but not identical to part N of the 2001 permit. Both permits require adoption of a "Memorandum of Understanding [MOU], Joint Powers Authority, or other instrument of formal agreement." The 2001 permit, in part N.1.a, required the MOU to provide a management structure with the following contents: "designation of joint responsibilities, decision making, watershed activities, information management of data and reports, including the requirements under this Order; and any and all other collaborative arrangements for compliance with this Order."

By contrast, the 2007 permit, requires the MOU to be submitted to the Regional Board within 180 days after adoption of the permit and requires that the MOU, at a minimum:

(1) Identifies and defines the responsibilities of the principal Permittee and Lead Watershed Permittees;

(2) Identifies Copermittees and defines their individual and joint responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decision-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement; and

(7) Includes any and all other collaborative arrangements for compliance with this order.

The contents of the MOU specified in the 2001 permit, although stated with less specificity, are the same as those in the 2007 permit for numbers (1)-(2) and (7) above. Both permits require the MOU to contain "designation of joint responsibilities" and "collaborative arrangements for compliance with this order." Thus, the Commission finds that jointly executing and submitting those parts of the MOU to the Regional Board is not a new program or higher level of service.

The Commission finds that part L.1.a of the permit is a new program or higher level of service for all copermittees to do the following:

- Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum: (3) Establishes a management structure to promote consistency and develop and implement regional activities; (4) Establishes standards for conducting meetings, decision-making, and cost-sharing; (5) Provides guidelines for

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

**Summary of Issue 1:** The Commission finds that the following parts of the 2007 permit are a state-mandated, new program or higher level of service.

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

- Collaborate with other copermittees to develop and implement a hydromodification management plan, as specified (D.1.g.), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Develop and submit an updated Model SUSMP that defines minimum Low-impact Development and other BMPs as specified (D.1.d.(7)-(8)), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Street sweeping (D.3.a.(5)) and reporting on street sweeping (J.3.a(3)x-xv);
- Conveyance system cleaning (D.3.a.(3)(b)(iii)) and reporting on conveyance system cleaning (J.3.a.(3)(c)(iv)-(viii));
- Educational component (D.5).
    - Educate each specified target community on the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control (D.5.a.(1));
    - Educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources (D.5.a.(2));
    - Implement an education program that includes annual training only for planning boards and elected officials, if applicable, to have an understanding of the topics in (i) and (ii) (D.5.b.(1)(a)(i) & (ii));
    - Implement an education program so that its planning and development review staffs (and Planning Boards and Election Officials, if applicable) have an understanding of the topics in (iii) and (iv) as specified (D.5.b.(1)(a)(iii) & (iv));
    - Implement an education program that includes annual training prior to the rainy season so that [the Copermittee's] construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: the topics in (iii) to (vi), as specified (D.5.b.(1)(b)(iii) & (iv));
        - Municipal Industrial/Commercial Activities (D.5.b.(1)(c));
        - Municipal Other Activities (D.5.b.(1)(d));
        - New Development and Construction Education (D.5.(b)(2));
        - Residential, General Public, and School Children Education (D.5.(b)(3)).

II. Watershed Urban Runoff Management Program (Parts E.2.f & E.2.g.)

- Identify and implement the Watershed activities as specified (E.2.f.).
- Collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings. (E.2.g.)

III. Regional Urban Runoff Management Program (Parts F.1, F.2 & F.3)

- Include developing and implementing a Regional Residential Education Program development and implementation in the RURMP, as specified (F.1.).
- Include developing the standardized fiscal analysis method required in permit part G in the RURMP (F.2.).
- Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs in the RURMP (F.3.).

IV. Program Effectiveness Assessment (Parts I.1, I.2 & I.5)

- Annually assess the effectiveness of each copermittee's JURMP, as specified (I.1.).
- Annually assess the effectiveness of each watershed group's WURMP (I.2.).
- Collaborate with the other copermittees to develop a Long-term Effectiveness Assessment, as specified, and submit it to the Regional Board as specified (I.5.).

V. All Permittee Collaboration (Part L)

- Collaborate with all other copermittees to address common issues, promote consistency among the JURMP and WURMP, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement as specified (L.1.a. (3)-(5)).

Any further reference to the test claim activities is limited to these parts of the permit found to be a new program or higher level of service.

**Issue 2: Do the test claim activities impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?**

The final issue is whether the permit provisions impose costs mandated by the state,[184] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

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

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement. In the test claim, the County of San Diego itemized the costs of complying with the permit conditions as follows:

| Activity | Cost FY 2007-08 |
|---|---|
| Regional Urban Runoff Management Program<br>-Copermittee collaboration (F.2, F.3, L) | $260,031.09 |
| Copermittee collaboration, Regional Residential Education, Program Development and Implementation (F.1) | $131,250.00 |
| Jurisdictional Urban Runoff Management Program (JURMP)<br>-hydromodification ( D.1.g) | $630,000.00 |
| JURMP Standard Urban Storm Water Mitigation Plans<br>-low impact development ( D.1.d) | $52,200.00 |
| Long Term Effectiveness Assessment ( I.5) | $210,000.00 |
| Street Sweeping (D.3.a.(5)<br>Equipment, Staffing, Contract | $3,477,190.00 |
| Conveyance System Cleaning ( D.3.a.(3))<br>and Reporting (J.2.a.(3)(c) iv – vii. | $3,456,087.00 |
| Program Effectiveness Assessment (I.1 & I.2) | $392,363.00 |
| Educational Surveys and Tests (D.5) | $62,617.00 |
| Watershed Urban Runoff Management Program<br>-Copermittee collaboration (E.2.f., E.2.g) | $1,632,893.00 |
| Total | $10,304,631.09 |

Claimants submitted documentation in February 2010 that show the 2008-2009 cost for the permit activities is $18,014,213. These figures, along with those in the test-claim narrative and declarations submitted by the San Diego County and 18 cities,[185] illustrate that the costs to comply with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

**A. Claimants did not request the test claim activities within the meaning of Government Code section 17556, subdivision (a).**

The first issue is whether the claimants requested or proposed the activities in the permit. The Department of Finance and the State Board both assert that claimants did so in their Report of

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

Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.[186]

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (a) The claim is submitted by a local agency … that requested legislative authority for that local agency … to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency … that requests authorization for that local agency … to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

**B. Claimants have fee authority under Government Code section 17556, subdivision (d), for the test claim activities that do not require voter approval under Proposition 218**

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency … if, after a hearing, the commission finds any one of the following: [¶]…[¶] (d) The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[187] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly

[186] Water Code section 13376; 40 Code of Federal Regulations, section 122.21 (a). The Federal regulation applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state-program provision) by reference. Also see the 2007 permit, page 2, part A.

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

> declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[188]

In another case about subdivision (d) of section 17556, *Connell v. Superior Court,*[189] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[190]

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

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

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

**1. Claimants' have regulatory fee authority (within the meaning of Gov. Code, § 17556, subd. (d)) under the police power sufficient to pay for the mandated activities that do not require voter approval under Proposition 218: the hydromodification plan and low-impact development.**

In its October 2008 comments, the State Board asserted that the claimants have fee authority to pay for the permit activities. Although the Board recognizes "limitations on assessing fees and surcharges under California law … [concerning] the percentage of voters who must approve the assessment" the Board points to examples of local agencies (Cities of Los Angeles, San Clemente, and Palo Alto) that have successfully adopted an assessment. The State Board also argues that the cities' trash collection responsibilities may also include street sweeping and conveyance system cleaning for which the city could charge fees, and that developer fees could be charged for hydromodification and low impact development.

Claimants, in comments submitted in February 2009, state that they cannot unilaterally impose a fee to recover the cost to comply with the 2007 permit on water or sewer bills sent to residents because of *Howard Jarvis Taxpayer Assoc. v. City of Salinas,*[191] in which the court invalidated a stormwater management utility fee imposed by the city on all owners of developed parcels in the city. The court held that article XIII D (Proposition 218) of the California Constitution "required the city to subject the proposed storm drainage fee to a vote of the property owners or the voting residents of the affected area."[192] As to the argument that claimants can put the fee to a vote in their jurisdictions, claimants state as follows:

> Articles XIII C and XIII D, which were added to the Constitution by Proposition 218, regulate the imposition of general and special taxes as well as the imposition of special assessments and property related fees. In each of these cases the question of whether to impose a tax, special assessment or a property related fee must be submitted to and approved by the voters. And, in the case of a special tax, and in certain instances the imposition of a fee or charge, the tax or fee must be approved by a two-thirds vote of the resident voters. The State fails to cite any authority that requires the copermittees to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. Such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The issue of local fee authority for municipal stormwater permit activities in this permit cannot be answered without discussing regulatory fee authority under the police power and the limitations on that authority via the voter-approval requirement in article XIII D of the California Constitution (Proposition 218).

Case law has recognized three general categories of local agency fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.[193] The regulatory and development fees are discussed below in the context of

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

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

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

XIII D (Proposition 218) that would allow the claimants to impose fees for the activities in the test claim related to development.

Regulatory fee authority under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Article XI, section 7, includes the authority to impose fees, and courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[194]

Water pollution prevention is also a valid exercise of government police power.[195]

In *Sinclair Paint v. State Board of Equalization*,[196] the California Supreme Court upheld a fee on manufacturers of paint that funded a child lead-poisoning program that provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The program was entirely supported by fees assessed on manufacturers or other persons contributing to environmental lead contamination. In upholding the fee, the court ruled that it was a regulatory fee imposed under the police power and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution. The court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[197] [Emphasis added.]

Regulatory fees also help to prevent or mitigate pollution, as the Court said: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[198] The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.[199]

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[194] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662, in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors.

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

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

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

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

[199] *Id.* at page 875.

Although the holding in *Sinclair Paint* applied to a state-wide fee, the court's language (treating "ordinances" the same as "statutes") recognizes that local agencies also have police power to impose regulatory fees, and it relied on local government police power cases in its analysis.[200]

Other cases have defined a regulatory fee as an imposition that funds a regulatory program[201] or that distributes the collective cost of a regulation"[202] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. …the regulatory program is for the protection of the health and safety of the public."[203] Courts will uphold regulatory fees if they do not exceed the reasonable cost of providing services necessary to the activity on which the fee is based and are not levied for an unrelated revenue purpose.

In upholding regulatory fees for environmental review by the California Department of Fish and Game, the court of appeal summarized the following rules on regulatory fees:

> A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. [Citations omitted.] Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement. [Citations omitted.] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted.] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee.[204] [Emphasis added.]

In *Tahoe Keys Property Owner's Assoc. v. State Water Resources Control Board*,[205] the court refused to issue a preliminary injunction against collecting a pollution mitigation fee of $4000 for each lot developed in the Tahoe Keys subdivision of Lake Tahoe. The fees were to be used for mitigation projects designed to achieve a net reduction in nutrients generated by the Tahoe Keys development. The court said: "on the face of the regulation, there appears to be a sufficient

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[200] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

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

[202] *Id.* at 952.

[203] *Ibid.*

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

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

nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme [mitigation of pollution in Lake Tahoe]."[206]

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,[207] art in public places,[208] remedying substandard housing,[209] recycling,[210] administrative hearings under a rent-control ordinance,[211] signage,[212] air pollution mitigation,[213] and replacing converted residential hotel units.[214] Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.[215]

Given the variety of examples where regulatory fees have been upheld, and the broad range of costs to which they may be applied (including those for 'administration'), the claimants have fee authority under the police power to impose fees for the permit activities that are a state-mandated new program or higher level of service. But a determination as to whether the claimants' fee authority is sufficient, within the meaning of Government Code section 17556, subdivision (d), to pay for the mandated activities and deny the test claim, cannot be made without analysis of the limitations on the fee authority imposed by Proposition 218.

Regulatory fee authority is limited by voter approval under Proposition 218: With some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996. Article XIII D defines a fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service." It defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property [and] includes, but is not limited to, "special assessment,' 'benefit assessment,' 'maintenance assessment,' and 'special assessment tax.'"

Among other procedures, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (art. XIII D, § 6, subd. (c)). Assessments must also be approved by owners of the affected parcels (art. XIII D, § 4, subd.(d)). Expressly exempt from voter

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[206] *Id.* at page 1480.

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

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

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

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

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

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

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

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

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

approval, however, are property-related fees for sewer, water, or refuse collection services (art. XIII D, § 6, subd. (c)).

In 2002, an appellate court in *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to charge stormwater fees if they are imposed "as an incident of property ownership."

The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556, subdivision (d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) is one of first impression for the Commission.

The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[216]

In its January 2010 comments on the draft staff analysis, the State Board disagrees that "the requirement to subject new or increased fees to these voting or protest requirements strips the claimants of 'fee authority' within the meaning of Government Code section 17556, subdivision (d)." The State Board cites *Connell v. Superior Court*,[217] in which the water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."[218] The State Board equates the Proposition 218 voting requirement with the economic impracticability faced by the water districts in *Connell*.

The claimants disagree, citing a lack of authority that requires them to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. According

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

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

[218] *Id.* at page 401.

to the claimants, such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The Commission disagrees with the State Board. The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."[219]

In fact, the fee at issue in the *Connell* case (Wat. Code, § 35470) was amended by the Legislature in 2007 to conform to Proposition 218. Specifically, the Water Code statute now requires compliance with "the "notice, protest, and hearing procedures in Section 53753 of the Government Code."[220] This Government Code statute implements Proposition 218.

For these reasons, the Commission finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities that would condition the fee or assessment on voter or property-owner approval under Proposition 218 (article XIII D). The Commission finds that Proposition 218 applies to all the activities in this test claim (except for the hydromodification and LID activities that are related to priority development projects discussed below) so that they impose "costs mandated by the state" (within the meaning of Gov. Code, § 17556, subd. (d)). To the extent that property-owner or voter-approved fees or assessments are imposed to pay for any of the permit activities found above to be a state-mandated new program or higher level of service, the fee or assessment would be identified as offsetting revenue in the parameters and guidelines to offset the claimant's costs in performing those activities.

Fees imposed for two of the test-claim activities, however, i.e., for the hydromodification management plan and low-impact development, would not be subject to voter approval under Proposition 218, as discussed below.

Fees as a condition of property development are not subject to Proposition 218: Proposition 218 does not apply to development fees, including those imposed on activities in part D of the permit. Article XIII D expressly states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[221]

Moreover, the California Supreme Court has ruled that fees imposed "as an incident to property ownership" are subject to Proposition 218, but fees that result from the owner's voluntary

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

[220] Water Code section 35470, as amended by Statutes 2007, chapter 27. Section 53753 of the Government Code requires compliance with "the procedures and approval process set forth in Section 4 of Article XIII D of the California Constitution" for assessments.

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

decision to seek a government benefit are not.[222] Thus, fees imposed as a result of the owner's voluntary decision to undertake a development project are not subject to Proposition 218, because they are not merely incident to property ownership.[223]

The final issue, therefore, is whether claimants may impose fees that are sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the activities in the permit related to development: the hydromodification management plan (part D.1.g), and low-impact development (part D.1.d.(7)&(8)). The Commission finds claimants have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d), and that these activities do not impose costs mandated by the state and are not reimbursable.

Hydromodification management plan: Part D.1 of the permit describes the development planning component of the JURMP. Part D.1.g. requires each copermittee to collaborate with other copermittees to develop and implement and report on developing a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, as specified. As discussed above, the HMP is a state-mandated new program or higher level of service for only private priority development projects. The purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

According to the permit, priority development projects are:

> a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

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[222] In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, the court held that water service fees were subject to Proposition 218, but that water connection fees were not. In *Apartment Assoc. of Los Angeles County v.City of Los Angeles, supra,* 24 Cal.4th 830, 839-840, the court held that apartment inspection fees were not subject to Proposition 218 because they were not imposed on property owners as such, but in their capacity as landlords.

[223] A recent report by the Office of the Legislative Analyst concurs with this conclusion: "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners. Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56. [Emphasis added.] See: <http://www.lao.ca.gov/2008/rsrc/water_primer/ water_primer_102208.pdf> as of October 22, 2008.

The priority development project categories listed in part D.1.d.(2) are:

(a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments.

(b) Commercial developments greater than one acre. [as specified]

(c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.).

(d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except … hydromodification requirement D.1.g.

(f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

(j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

The Commission finds that claimants have authority to impose fees for complying with the HMP activities in permit part D.1.g. for priority development projects, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that the fee would not be subject to Proposition 218 voter approval. These activities involve collaborating with other copermittees to develop and implement a hydromodification management plan, and reporting on it. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on these priority development projects to pay for the costs of HMP, the Commission finds that permit part D.1.g. does not impose costs mandated by the state.

Low impact development: Low impact development is defined in Attachment C of the permit as a "storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions." The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces.

Part D.1.d.(7) requires updating the Standard Urban Storm Water Mitigation Plans (SUSMP) to include low impact development requirements, as specified, including BMP requirements that meet or exceed the requirements of sections D.1.d.(4)[224] and D.1.d.(5).[225] Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

Part D.1.d.(8) requires permittees to develop and submit an updated model SUSMP that defines minimum low impact development and other BMP requirements to incorporate into the permittees local SUSMPs for application to priority development projects.

The Commission finds that claimants have authority to impose fees for complying with the LID activities in parts D.1.d.(7) and D.1.d.(8) of the permit, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that they are not subject to Proposition 218 voter approval. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on the priority development projects to pay for the costs associated with LID, the Commission finds that permit parts D.1.d.(7) and D.1.d.(8) do not impose costs mandated by the state.

[224] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[225] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

**2. Claimants also have fee authority regulated by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d)) to pay for the hydromodification and low-impact development permit activities.**

Development fees are also an exercise of the local police power under article XI, section 7 of the California Constitution.[226] A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development's probable costs to the community and benefits to the developer.[227] Development fees are not restricted by Proposition 218 as discussed above.

Fees on developers as conditions of permit approval are governed by the Mitigation Fee Act (Gov. Code, §§ 66000-66025) which defines a "fee" as:

> [A] monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include ... fees for processing applications for governmental regulatory actions or approvals ...."[228] [Emphasis added.]

Public facilities are defined in the Act as "public improvements, public services, and community amenities."[229]

When a local agency imposes or increases a fee as a condition of development approval, it must do all of the following: (1) Identify the purpose of the fee; (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and, (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project upon which the fee is imposed. (Gov. Code, § 66001, subd. (a),)

The city or county must also determine whether there is a reasonable relationship between the specific amount of the fee and the costs of building, expanding, or upgrading public facilities. These determinations, known as nexus studies, are in writing and must be updated whenever new fees are imposed or existing fees are increased.[230] A fee imposed "as a condition of approval of

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

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

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

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

[230] Government Code section 66001, subdivision (b). The Act also requires cities to segregate fee revenues from other municipal funds and to refund them if they are not spent within five years. Any person may request an audit to determine whether any fee or charge levied by the city or county exceeds the amount reasonably necessary to cover the cost of the service provided (Gov. Code, §66006, subd. (d)). Under Government Code section 66014, fees charged for zoning changes, use permits, building permits, and similar processing fees are subject to the same nexus requirements as development fees. Lastly, under California Government Code

a proposed development or development project" is limited to the estimated reasonable cost of providing the service or facility.[231] This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.[232]

The Mitigation Fee Act defines a "development project" as "any project undertaken for the purpose of development ... includ[ing] a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate." (Gov. Code, § 66000, subd. (a).)

A fee does not become a development fee simply because it is made in connection with a development project. Approval of the development must be conditioned on the payment of the fee. The Mitigation Fee Act is limited to situations where the fee or exaction is imposed as a condition of approval of a development project.[233]

Because local agencies may make development of priority development projects conditional on the payment of a fee, the Commission finds that the claimants have fee authority, governed by the Mitigation Fee Act, that is sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the hydromodification management plan and low-impact development activities. As discussed below, HMP and LID are "public facilities," which the Mitigation Fee Act defines as "public improvements, public services, and community amenities."[234]

The County of San Diego, in its January 2010 comments on the draft staff analysis, disagrees that it can impose a fee for the hydromodification plan (HMP) activities in the permit, stating that development and implementation of the HMP does not constitute a "public facility."

The Commission disagrees. The purpose of the permit is to prevent or abate pollution in waterways and beaches in San Diego County. More specifically, the purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

All these stated purposes of the HMP provide public services or improvements, or community amenities within the meaning of the Act.[235] Moreover, the California Supreme Court stated that the Act "concerns itself with development fees; that is, fees imposed on development projects in

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section 66020, agencies collecting fees must provide project applicants with a statement of the amounts and purposes of all fees at the time of fee imposition or project approval.

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

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

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

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

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

order to finance public improvements or programs that bear a 'reasonable relationship' to the development at issue."[236] The HMP is such a program.

Similarly, the purposes of LID are to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff from priority development projects. These activities are public services or improvements that fall within the Act's definition of public facility.

The County also argues that under the Mitigation Fee Act, the local agency must determine that there is "a reasonable relationship between the fee's use and the type of development project on which the fee is imposed." The County argues that there is no reasonable relationship between the costs incurred by claimants to develop and implement the HMP and a particular development project on which the fee might be imposed.

Again, the Commission disagrees. Every time a developer proposes a project that falls within one of the "priority development project" categories listed above, and the developer has "not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences," the local agency may impose a fee subject to the Mitigation Fee Act. The fee would be for the costs of developing and implementing the HMP to "manage increases in runoff discharge rates and durations from all Priority Development Projects [that] cause … impacts to beneficial uses and stream habitat due to increased erosive force." The local agency may also impose a fee on priority development projects to comply with LID, the purpose of which is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff.

Finally, the County argues that assessing fees on a private developer who submits a project for approval to recover the costs of reviewing and approving a particular project is "specifically excluded from the definition of 'fee' under the Act." The definition of fee in the Act states that it "does not include ... fees for processing applications for governmental regulatory actions or approvals ...." (Gov. Code, § 66000, subd. (b).)

The Commission disagrees that an HMP fee would be for "processing applications for governmental regulatory actions or approvals." Rather, it would be for permit approval of priority development projects, and used to implement the HMP and LID requirements. In *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 698, the California Supreme Court distinguished between regulatory fees that implement state and local building safety standards under the Health and Safety Code and developer fees subject to the Mitigation Fee Act by stating: "These regulatory fees fund a program that supervises how, not whether, a developer may build." Thus, the Commission finds that the developer fees may be imposed for permit approval for priority development projects if the permit is conditional on payment of the fee, and the fee is used for HMP and LID compliance.

In sum, the Commission finds that the claimants have fee authority governed by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d), to pay for the following parts of the permit that are related to development: the hydromodification management plan (part D.1.g) and updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (part D.1.d.(7)&(8)).

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

### 3. Claimants' fee authority under Public Resources Code section 40059, or via benefit assessments, is not sufficient to pay for street sweeping, and Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping.

Street sweeping is one test claim activity that is typically funded by local agency fees or assessments. Fees and assessments are both governed by Proposition 218.

The permit (in part D.3.a.5) requires a program to sweep "improved (possessing a curb and gutter) municipal roads, streets, highways, and paring facilities" at intervals depending on whether they are identified as consistently generating the highest volumes, moderate volumes, or low volumes of trash and/or debris. Reporting on street sweeping, such as curb-miles swept and tons of material collected, is also required (part J.3.a.(3)(c)x-xv).

Some local agencies collect fees for street sweeping for their refuse fund, such as the City of Pasadena.[237] Other local agencies, e.g., the County of Fresno[238] and the City of La Quinta,[239] collect an assessment for street sweeping as a street maintenance activity. Both approaches are discussed below in light of the procedural requirements under Proposition 218.

Fees for street sweeping as refuse collection/solid waste handling: Article XI, section 7 of the California Constitution states: "A county or city may make and enforce within its limits all local, police, sanitary or other ordinances and regulations not in conflict with general laws." Local agency fees for refuse collection are authorized by Public Resources Code section 40059, which states:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:
>
> (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services. [Emphasis added.]

"Solid waste" is defined in Public Resources Code section 40191 as:

> [A]ll putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge

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[237] City of Pasadena, Agenda Report, Resolution Nos. 8942 and 8943, April 27, 2009, "Public Hearing: Amendment to the General Fee Schedule to Increase the Residential Refuse Collection Fees and Solid Waste Franchise Fees." One of the findings in the resolution is: "Whereas, street sweeping is a refuse collection service involving solely the collection, removal and disposal of solid waste from public rights of way, and is, therefore, properly allocated to the Refuse Fund."

[238] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[239] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.[240]

"Solid waste handling" is defined in Public Resources Code section 40195 as "the collection, transportation, storage, transfer, or processing of solid wastes." Given the nature of material swept from city streets, street sweeping falls under the rubric of 'solid waste handling.'

Under Proposition 218, "refuse collection" is expressly exempted from the voter-approval requirement (article XIII D, § 6, subd. (c).). Although "refuse collection" has no definition in article XIII D, the plain meaning of refuse[241] collection is the same as solid waste handling, as the dictionary definition of "refuse" and the statutory definition of "solid waste" both refer to rubbish and trash as synonyms. Refuse is collected via solid waste handling.

To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)). In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property-related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner (article XIII D, § 6, subd. (b)).

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.

Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[242]

Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.

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

[241] "Refuse" is defined as " Items or material discarded or rejected as useless or worthless; trash or rubbish." <http://dictionary.reference.com/browse/refuse> as of November 23, 2009.

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

Any proposed fees that are not blocked by a majority of parcel owners for street sweeping must be identified as offsetting revenue in the parameters and guidelines.

Fees for street sweeping reports: Proposition 218 does not contain an express exemption on voter approval for reporting on street sweeping, only for "refuse collection." Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the street sweeping reports be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping, so that part J.3.a.(3)(c)x-xv of the permit imposes costs mandated by the state and is reimbursable.

Assessments for street operation and maintenance: As mentioned above, some local agencies collect an assessment for street sweeping, e.g., the County of Fresno[243] and the City of La Quinta.[244] Assessments are defined as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.'" (article XIII D, § 2, subd. (b).) The terms "maintenance and operation" of "streets" and "drainage systems," although used in article XIII D, are not defined in it. The plain meaning of maintenance of streets and drainage systems, however, would include street sweeping because "maintenance" means "the work of keeping something in proper condition; upkeep."[245] Clean streets are used not only for transportation, but for conveying storm water to storm drains.

The Supreme Court defined special assessments as follows:

> A special assessment is a "'compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein....' " [Citation.]' [Citation.] In this regard, a special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.] 'The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.[246]

The Supreme Court summarized the constitutional procedures for creating an assessment district.

> Under Proposition 218's procedures, local agencies must give the record owners of all assessed parcels written notice of the proposed assessment, a voting ballot, and a statement disclosing that a majority protest will prevent the assessment's

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[243] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[244] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

[245] <http://dictionary.reference.com/browse/maintenance> as of December 7, 2009.

[246] *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 442.

> passage. (Art. XIII D, § 4, subds. (c), (d).) The proposed assessment must be "supported by a detailed engineer's report." (Art. XIII D, § 4, subd. (b).) At a noticed public hearing, the agencies must consider all protests, and they "shall not impose an assessment if there is a majority protest." (Art. XIII D, § 4, subd. (e).) Voting must be weighted "according to the proportional financial obligation of the affected property." (*Ibid.*)[247]

Proposition 218 dictated that as of July 1, 1997, existing assessments were to comply with its procedural requirements, but an exception was created for "any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control." (art. XIII D, § 5, subd. (a), emphasis added.) This means that the procedural requirements of Proposition 218 apply only to increases in assessments for street sweeping that were imposed after Proposition 218 was enacted.[248]

Absent any evidence in the record that assessments imposed before July 1, 1997 for street sweeping are sufficient to pay for the street sweeping specified in part D.3.a. of the permit, the Commission cannot find that assessments imposed before that date would pay for the costs mandated by the state for street sweeping within the meaning of Government Code section 17556, subdivision (d).

Should a local agency determine that its existing assessments are not sufficient to pay for the mandated street sweeping, it can raise assessments by following the article XIII D (Proposition 218) procedures detailed above. Those procedures, however, include an election and a protest, both of which were found above to extinguish local fee authority sufficient to pay for the mandate and to block the application of Government Code section 17556, subdivision (d).

Thus, to the extent that the claimants impose or increase assessments to pay for the street sweeping, they would be identified as offsetting revenue in the parameters and guidelines.

**4. Claimants' fee or assessment authority under Health and Safety Code section 5471 is not sufficient to pay for conveyance-system cleaning, and Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning**

Conveyance-system cleaning for operation and maintenance of the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.) is required in the permit (part D.3.a.(3)). Specifically, claimants are required to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity…. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner." Claimants are also required to report on the number of catch basins and inlets inspected and cleaned (J.3.a.(3)(c)iv-viii).

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[247] *Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Authority, supra,* 44 Cal.4th 431, 438.

[248] See also *Howard Jarvis Taxpayers Ass'n. v. City of Riverside* (1999) 73 Cal.App.4th, 679, holding that a preexisting streetlighting assessment is 'exempt under Proposition 218.'

Local agencies have fee authority under Health and Safety Code section 5471 to charge fees for storm drainage maintenance and operation as follows:

> [A]ny entity[249] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. … Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities …. [Emphasis added.]

This plain meaning of this statutory fee for storm drain operation and maintenance would include conveyance-system cleaning as required in the permit (part D.3.a.(3)(iii)), which the permit specifies as cleaning "catch basins or storm drain inlets." This cleaning is within the operation and maintenance of the storm drains.

The statutory fee, adopted in 1953, is now subject to the procedural requirements of Proposition 218. As it states in subdivision (d) of Health and Safety Code section 5471:

> If the procedures set forth in this section as it read at the time a standby charge was established were followed, the entity may, by ordinance adopted by a two-thirds vote of the members of the legislative body thereof, continue the charge pursuant to this section in successive years at the same rate. If new, increased, or extended assessments are proposed, the entity shall comply with the notice, protest, and hearing procedures in Section 53753 of the Government Code [the codification of the Proposition 218 procedural requirements].

Proposition 218 does not exempt from voting requirements fees for storm drain maintenance like it does for "water, sewer, and refuse collection" in section 6 (c) of article XIII D. In fact, in *Howard Jarvis Taxpayers Ass'n. v. City of Salinas* (2002) 98 Cal.App.4th 1351, the court invalidated a local storm drain fee and held that the exemption from an election for sewer fees does not include storm drainage fees. As to new or increased assessments imposed for storm drainage operation and maintenance, they would be subject to the same election requirement of Proposition 218 (art. XIII D, § 4, subd. (e)) as for other assessments.

Therefore, the Commission finds that local agencies do not have sufficient authority under section 5471 of the Health and Safety Code to impose fees or assessments (under Gov. Code § 17556, subd. (d)) for conveyance system cleaning as required by part D.3.a.(3)(iii) of the permit or reporting as required by part J.3.a.(3)(c)iv-viii of the permit.

Fees or assessments for conveyance-system reports: The Commission also finds that local agencies do not have fee or assessment authority for reporting on conveyance-system (in part J.3.a.(3)(c)iv-viii) on the number of catch basins and inlets inspected and cleaned. Fees or

[249] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

assessments imposed for this reporting would be subject to a vote of parcel owners. Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the reports on conveyance- system cleaning be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning, and that part J.3.a.(3)(c)iv-viii of the permit imposes costs mandated by the state within the meaning of Government Code section 17556, subdivision (d), and is reimbursable.

Any revenue from existing assessments, or assessments obtained after voter approval, for conveyance system cleaning would be included in the parameters and guidelines as offsets to reimbursement.

**C. Claimants have potential fee authority and offsetting revenue if they comply with the requirements of Senate Bill 310 (Stats. 2009, ch. 577)**

Effective January 2010, Senate Bill 310 (Stats. 2009, ch. 577) was enacted to add Water Code provisions authorizing local agencies to adopt watershed improvement plans.

SB 310 is intended to establish multiple watershed-based pilot programs.[250] The bill creates the California Watershed Improvement Act of 2009 (commencing with Wat. Code, § 16000). Pursuant to Water Code section 16101, each county, city, or special district that is a copermittee under a NPDES permit ***may*** develop either individually or jointly a watershed improvement plan. The process for developing a watershed improvement plan is to be conducted consistent with all applicable open meeting laws. Each county, city, or special district, or combination thereof, is to notify the appropriate Regional Board of its intention to develop a watershed improvement plan.

The watershed improvement plan is voluntary – it is not necessarily the same watershed activities required by the permit in the test claim.

SB 310 includes the following local agency fee authority:

> 16103. (a) In addition to making use of other financing mechanisms that are available to local agencies to fund watershed improvement plans and plan measures and facilities, a county, city, special district, or combination thereof may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:
>
> (1) The Regional Board has approved the watershed improvement plan.
>
> (2) The entity or entities that develop the watershed improvement plan make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the feepayer. "Activities," for the purposes of this paragraph,

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

means the operations and existing structures and improvements subject to regulation under an NPDES permit for municipal separate storm sewer systems.

(3) The fee is not imposed solely as an incident of property ownership.

(b) A county, city, special district, or combination thereof may plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality, including controls and facilities related to the infiltration, retention and reuse, diversion, interception, filtration, or collection of surface runoff, including urban runoff, stormwater, and other forms of runoff, the treatment of pollutants in runoff or other waters subject to water quality regulatory requirements, the return of diverted and treated waters to receiving water bodies, the enhance-ment of beneficial uses of waters of the state, or the beneficial use or reuse of diverted waters.

(c) The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.

However, Water Code section 16102, subdivision (d), states: "A regional board may, if it deems appropriate, utilize provisions of the approved watershed improvement plan (approved under this new act) to promote compliance with one of more of the regional board's regulatory plans or programs." Subdivision (e) states "Unless a regional board incorporates the provisions of the watershed improvement plan into waste discharge requirements issued to a permittee, the implementation of a watershed improvement plan by a permittee shall not be deemed to be in compliance with those waste discharge requirements."

Therefore, the Commission finds that Water Code section 16103 may only provide offsetting revenue for this test claim to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

### D. The holding in *San Diego Unified School Dist. v. Commission on State Mandates* does not apply to the test claim activities.

The State Board's January 2010 comments on the draft staff analysis cite *San Diego Unified v. Commission on States Mandates,*[251] arguing that the permit in this test claim, like the pupil expulsion hearings, are intended to implement a federal law, and has costs that are, in context, de minimis. In *San Diego Unified School District,* the California Supreme Court held costs for hearing procedures and notice are not reimbursable for pupil expulsions that are discretionary under state law. The court found that these hearing procedures are incidental to federal due process requirements and the costs are de minimis, and thus not reimbursable.

The Commission disagrees. The permit in this case does not meet the criteria in the *San Diego Unified School District* case. Unlike the discretionary expulsions in *San Diego Unified School District,* the permit imposes state-mandated activities. And although the permit is intended to implement the federal Clean Water Act, there is no evidence or indication that its costs are de minimis. Claimants submitted declarations of costs totaling over $10 million for fiscal year

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

2007-2008 alone.[252] Claimants further submitted documentation of 2008-2009 costs of over $18 million. The State Board offers no evidence or argument to refute these cost declarations, so the Commission finds that permit activities (except for LID and HMP discussed above) impose costs mandated by the state that are not de minimis.

Summary: To recap fee authority under issue 2, the Commission finds that, due to the fee authority under the police power generally, and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

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

## CONCLUSION

For the reasons discussed above, the Commission finds that parts of 2007 permit issued by the California Regional Quality Control Board, San Diego Region (Order No. R9-2007-001, NPDES No. CAS0108758), are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the claimants to perform the following activities.

The term of the permit is from January 24, 2007 – January 23, 2012.[253] The permit terms and conditions are automatically continued, however, pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits are complied with.[254]

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

**Street sweeping (part D.3.a.(5)):** Sweeping of Municipal Areas

> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

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

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[253] According to attachment B of the permit: "*Effective Date.* This Order shall become effective on the date of its adoption provided the USEPA has no objection…." "(q) *Expiration.* This Order expires five years after adoption."

[254] According to attachment B of the permit: "(r) *Continuation of Expired Order* [23 CCR 2235.4]. After this Order expires, the terms and conditions of this Order are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with."

x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xiii. Identification of the total distance of curb-miles swept.
xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
xv. Amount of material (tons) collected from street and parking lot sweeping.

**Conveyance system cleaning (D.3.a.(3)):**

(a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.

(b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include: [¶]…[¶]

iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.

**Conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii)):** Update and revise the copermittees' JURMPs to contain:

iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

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

**Educational component (part D.5):** To implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

- Municipal Departments and Personnel
- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children

a.(1) Each Copermittee shall educate each target community on the following topics where appropriate: (i) Erosion prevention, (ii) Non storm water discharge prohibitions, and (iii) BMP types: facility or activity specific, LID,-source control, and treatment control.

a.(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its Planning Boards and Elected Officials, if applicable, have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year [except for staff who solely inspect new development]. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

**II. Watershed Urban Runoff Management Program (parts E.2.f & E.2.g.)**

Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 [of the permit] to develop and

implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]…[¶]

[Paragraphs (a) through (e) were not part of the test claim.]

f. Watershed Activities

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;

(b) A time schedule for implementation of the activity, including key milestones;

(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;

(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

(e) A description of how the activity is consistent with the collective watershed strategy;

(f) A description of the expected benefits of implementing the activity; and

(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

**III. Regional Urban Runoff Management Program (parts F.1, F.2 & F.3)**

The Regional Urban Runoff Management Program shall, at a minimum:

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]

1. Develop and implement a Regional Residential Education Program. The program shall include:

a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.

b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

2. Develop the standardized fiscal analysis method required in section G of the permit, and,

3. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

**IV. Program Effectiveness Assessment (parts I.1 & I.2)**

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[255] Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[256] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

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[255] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[256] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[257] Water Quality Assessment,[258] and Integrated Assessment,[259] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[260] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

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[257] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[258] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[259] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[260] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;

(b) Each Watershed Education Activity implemented; and

(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban

Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[261] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

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

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

**Long Term Effectiveness Assessment (I.5):**

a. Collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[262] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

1. Collaborate with all other Copermittees regulated under the permit to address common issues, promote consistency among Jurisdictional Urban Runoff

[262] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

**V. All Copermittee Collaboration (part L)**

(a) Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.

Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum: [¶]…[¶]

3. Establishes a management structure to promote consistency and develop and implement regional activities;
4. Establishes standards for conducting meetings, decisions-making, and cost-sharing.
5. Provides guidelines for committee and workgroup structure and responsibilities;
6. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

The Commission finds that due to the fee authority under the police power (Cal. Const. art. XI, § 7) and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code

section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;

- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

# ATTACHMENT NO. 21

**California Regional Water Quality Control Board**
**San Diego Region**

# Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the County of Riverside, the Incorporated Cities of Riverside County, and the Riverside County Flood Control and Water Conservation District within the San Diego Region

**Order No. R9-2010-0016**
**NPDES No. CAS0108766**

***November 10, 2010***

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
**SAN DIEGO REGION**
9174 Sky Park Court, Suite 100, San Diego, California 92123-4340
Phone • (858) 467-2952 • Fax (858) 571-6972
http://www.waterboards.ca.gov/sandiego

To request copies of the Riverside County Municipal Storm Water Permit, please contact Ben Neill, Water Resources Control Engineer at (858) 467 – 2983, bneill@waterboards.ca.gov

Documents also are available at: http://www.waterboards.ca.gov/sandiego

# Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the County of Riverside, the Incorporated Cities of Riverside County, and the Riverside County Flood Control and Water Conservation District within the San Diego Region

Adopted by the
California Regional Water Quality Control Board
San Diego Region
on
November 10, 2010

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
**SAN DIEGO REGION**
**9174 Sky Park Court, Suite 100**
**San Diego, California 92123-4340**

**Telephone (858) 467-2952**

# STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, Governor
LINDA S. ADAMS, Agency Secretary, California Environmental Protection Agency

**California Regional Water Quality Control Board**
**San Diego Region**

| | |
|---|---|
| Grant Destache, *Vice Chair* | Industrial Water Use |
| Eric Anderson | Irrigated Agriculture |
| Wayne Rayfield | Water Quality |
| George Loveland | Water Supply |
| Marc Luker | Undesignated (Public) |
| Gary Strawn | Recreation / Wildlife |
| Bill Green | Water Quality |

David W. Gibson, *Executive Officer*
James Smith*, Assistant Executive Officer*

**This permit was prepared under the direction of**

David T. Barker, P.E.*, Supervising Water Resource Control Engineer, Surface Water Basins Branch*
Chiara Clemente, *Senior Environmental Scientist, Northern Watershed Unit*

**by**

Benjamin Isaac Neill, *Water Resource Control Engineer*
Chad Lörtscher Loflen, *Environmental Scientist*
Wayne Chiu, P.E., *Water Resource Control Engineer*

# Table of Contents

The California Regional Water Quality Control Board, San Diego Region (hereinafter San Diego Water Board), finds that:

## A. BASIS FOR THE ORDER

**1.** This Order is based on the federal Clean Water Act (CWA), the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, 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 Resources Control Board (State Water Board), the Water Quality Control Plan for the San Diego Basin adopted by the San Diego Water Board (Basin Plan), the California Toxics Rule, and the California Toxics Rule Implementation Plan.

**2.** This Order reissues National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108766, which was first adopted by the San Diego Water Board on July 16, 1990 (Order No. 90-38), and then reissued on May 13, 1998 (Order No. 98-02). On May 26, 1998, the United States Environmental Protection Agency (USEPA), Region IX, objected to Order No. 98-02 due to concerns regarding Receiving Water Limitations (RWL) language. The USEPA concluded that the RWL language in the permit did not comply with the CWA and its implementing regulations. On April 27, 1999, the USEPA reissued the MS4 permit, which the San Diego Water Board adopted as Addendum No. 1 to Order No. 98-02 on November 8, 2000. On July 14, 2004, the San Diego Water Board adopted the third term MS4 permit, Order No. R9-2004-001. On January 15, 2009, the Riverside County Flood Control and Water Conservation District (RCFCD), as the Principal Copermittee, submitted a Report of Waste Discharge (ROWD) for reissuance of the municipal separate storm sewer system (MS4) Permit.

**3.** This Order is consistent with the following precedential Orders adopted by the State Water Board addressing MS4 NPDES Permits: Order 99-05, Order WQ-2000-11, Order WQ 2001-15, and Order WQO 2002-0014.[1]

[1] In July 2010, the court in Los Angeles County v. State Water Resources Control Board remanded the Los Angeles Water Board's MS4 permit underlying Order WQ 2009-0008 for procedural reasons occurring during the permit adoption process. The court did not evaluate or rule upon the substantive findings and reasoning set forth in Order WQ 2009-0008. The State Water Board rescinded and voided Order WQ 2009-0008 to comply with the court's order. While the San Diego Water Board may no longer cite Order WQ 2009-0008, the San Diego Water Board has independently considered whether the requirement to eliminate non-storm water discharges is subject to the MEP standard. The San Diego Water Board concludes that the MEP standard does not apply to non-storm water discharges for the same reasons expressed by the State Water Board.

**4.** The Fact Sheet / Technical Report for the Order No. R9-2010-0016, NPDES No. CAS0108766, Waste Discharge Requirements for Discharges from the MS4s Draining the County of Riverside, the Incorporated Cities of Riverside County, and the Riverside County Flood Control and Water Conservation District within the San Diego Region, includes cited regulatory and legal references and additional explanatory information and data in support of the requirements of this Order. This information, including any supplements thereto, is hereby incorporated by reference into these findings.

## B. REGULATED PARTIES

Each of the persons in Table 1 below, hereinafter called Copermittees or dischargers, owns or operates an MS4, through which it discharges into waters of the United States (U.S.) within the San Diego Region. These MS4s fall into one or more of the following categories: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) a small MS4 that is "interrelated" to a medium or large MS4; or (3) an MS4 that contributes to a violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the U.S.

Table 1. Municipal Copermittees

| | |
|---|---|
| 1. City of Murrieta | 4. County of Riverside |
| 2. City of Temecula | 5. Riverside County Flood Control and Water Conservation District |
| 3. City of Wildomar | |

The Cities of Murrieta, Menifee and Wildomar also discharge into the waters of the U.S. in the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board), so are located partially within both the San Diego and Santa Ana Water Board boundaries. Water Code (WC) section 13228 provides a way to streamline the regulation of entities whose jurisdictions straddle the border of two or more Regions. WC section 13228 is implemented in this Order to ease the regulatory burden on Storm Water Agencies and Municipalities that lie in both the San Diego Water Board and the adjacent Santa Ana Water Board's jurisdiction. As allowed by California Water Code (CWC) §13228, the Cities of Murietta, Menifee, and Wildomar submitted written requests to be regulated for MS4 purposes under a permit adopted by only one Water Board. As authorized by CWC §13228 and pursuant to written agreements dated September 28, 2010 between the San Diego Water Board and the Santa Ana Water Board, the Cities of Murrieta and Wildomar are wholly regulated by the San Diego Water Board under this Order, including those portions of the Cities jurisdiction not within the San Diego Water Board's region. Similarly, the City of Menifee is wholly regulated by the Santa Ana Water Board under Order No. R8-2010-0033, including those portions of the City of Menifee within the San Diego Water Board's region.

## C. DISCHARGE CHARACTERISTICS

**1.** Discharges from the MS4 contain waste, as defined in the CWC, and pollutants that adversely affect the quality of the waters of the State. The discharge from an MS4 is a "discharge of pollutants from a point source" into waters of the U.S. as defined in the CWA.

**2.** MS4 storm water and non-storm water discharges are likely to contain pollutants that cause or threaten to cause a violation of water quality standards, as outlined in the Basin Plan. Storm water and non-storm water discharges from the MS4 are subject to the conditions and requirements established in the Basin Plan for point source discharges.

**3.** The most common categories of pollutants in runoff include total suspended solids, sediment, pathogens (e.g., bacteria, viruses, protozoa), heavy metals (e.g., copper, lead, zinc and cadmium), petroleum products and polynuclear aromatic hydrocarbons, synthetic organics (e.g., pesticides, herbicides, and PCBs), nutrients (e.g., nitrogen and phosphorus fertilizers), oxygen-demanding substances (decaying vegetation, animal waste), detergents, and trash.

**4.** The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and/or impair or threaten to impair designated beneficial uses resulting in a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance.

**5.** Pollutants in runoff can threaten and adversely affect human health. Human illnesses have been clearly linked to recreating near storm drains flowing to receiving waters. Also, runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may be eventually consumed by humans.

**6.** Runoff discharges from MS4s often contain pollutants that cause toxicity to aquatic organisms (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). Toxic pollutants impact the overall quality of aquatic systems and beneficial uses of receiving waters.

**7.** The Copermittees discharge runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within one of the eleven hydrologic units (Santa Margarita Hydrologic Unit) comprising the San Diego Region as shown in Table 2. Some of the receiving water bodies have been designated as impaired by the San Diego Water Board in 2009 pursuant to CWA section 303(d).

Table 2. Common Watersheds and CWA Section 303(d) Impaired Waters in the San Diego Region.

| Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the Santa Margarita Hydrologic Unit | Major Receiving Water Bodies | 303(d) Pollutant(s)/Stressor or Water Quality Effect[2] |
|---|---|---|
| DeLuz Creek HSA (902.21) | De Luz Creek | Iron, Manganese, Nitrogen, Sulfates |
| Murrieta HSA (902.32) | Long Canyon Creek (tributary to Murrieta Creek) | Chlorpyrifos, E. Coli, Fecal Coliform, Iron, Manganese |
| Wolf HSA (902.52) | Murrieta Creek | Chlorpyrifos, Copper, Iron, Manganese, Nitrogen, Toxicity |
| Pauba HSA (902.51) | Redhawk Channel | Chlorpyrifos, Copper, Diazinon, E. Coli, Fecal Coliform, Iron, Manganese, Nitrogen, Phosphorus, Total Dissolved Solids |
| Gavilan HSA (902.22) | Sandia Creek | Iron, Sulfates |
| Gertrudis HSA (902.42) | Santa Gertrudis Creek | Chlorpyrifos, Copper, E. Coli, Fecal Coliform, Iron, Phosphorous |
| Lower Ysidora HSA (902.11) | Santa Margarita Lagoon | Eutrophic |
| Lower Ysidora HSA (902.11) | Santa Margarita River (Lower) | Enterococcus, Fecal Coliform, Phosphorus, Total Nitrogen as N |
| Gavilan HSA (902.22) | Santa Margarita River (Upper) | Toxicity |
| Pauba HSA (902.51) | Temecula Creek | Chlorpyrifos, Copper, Phosphorus, Total Dissolved Solids, Toxicity |
| French HSA (902.33) | Warm Springs Creek (Riverside County) | Chlorpyrifos, E. Coli, Fecal Coliform, Iron, Manganese, Phosphorus, Total Nitrogen as N |

[2] The listed 303(d) pollutant(s) do not necessarily reflect impairment of the entire corresponding WMA or all corresponding major surface water bodies. The specific impaired portions of each WMA are listed in the State Water Resources Control Board's 2008 Section 303(d) List of Water Quality Limited Segments.

**8.** Trash is a persistent pollutant that can enter receiving waters from the MS4, accumulate, and be transported downstream into receiving waters over time. Trash poses a serious threat to the beneficial uses of the receiving waters, including, but not limited to, human health, rare and endangered species, navigation and human recreation.

**9.** The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff-related pollutants (indicator bacteria, dissolved solids, turbidity, metals, pesticides, etc.) at various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicate that the majority of the monitored receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Riverside County.

**10.** When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed area is significantly greater in runoff volume, velocity, and peak flow rate than pre-development runoff from the same area. Runoff durations can also increase as a result of flood control and other efforts to control peak flow rates. Increased volume, velocity, rate, and duration of runoff, and decreased natural clean sediment loads, greatly accelerate the erosion of downstream natural channels. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as a 3-5 percent conversion from natural to impervious surfaces. The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

**11.** Development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4. As a result, the runoff leaving the developed urban area is significantly greater in pollutant load than the pre-development runoff from the same area. These increased pollutant loads must be controlled to protect downstream receiving water quality.

**12.** Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d)-impaired water bodies. Such areas have a much lower capacity to withstand pollutant loads than other, more sensitive areas. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particularly sensitive environment. Therefore, additional controls to reduce storm water pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.

**13.** Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not "inject" runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable steps to prevent the illegal disposal of wastes; (3) protecting footings and foundations; (4) ensuring that each drainage feature is adequately maintained in perpetuity; and (5) pretreatment.

**14.** Non-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard from CWA 402(p)(3)(B)(iii), which is explicitly for "Municipal … *Stormwater Discharges* (emphasis added)" from the MS4. Rather, non-storm water discharges into the storm sewers, per CWA 402(p)(3)(B)(ii), are to be effectively prohibited. Such dry weather non-storm water discharges have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds and are to be effectively prohibited under the CWA.

**15.** Non-storm water discharges to the MS4 granted an influent exception [i.e., which are exempt from the effective prohibition requirement set forth in CWA section 402(p)(3)(B)(ii)] under 40 CFR 122.26 are included within this Order. Any exempted discharges identified by Copermittees as a source of pollutants are subsequently required to be *addressed* (emphasis added) as illicit discharges through prohibition and incorporation into existing IC/ID programs. Furthermore, the USEPA contemplates that permitting agencies such as the San Diego Water Board may also identify exempted discharges as a source of pollutants required to be addressed as illicit discharges (See Vol. 55 Fed. Reg. 48037). The San Diego Water Board and the Copermittees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the U.S.

## D. RUNOFF MANAGEMENT PROGRAMS

### 1. General

a. This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in storm water to the MEP. However, since MEP is a dynamic performance standard, which evolves over time as runoff management knowledge increases, the Copermittees' runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard. Absent evidence to the contrary, this continual assessment, revision, and improvement of runoff management program implementation is expected to ultimately achieve compliance with water quality standards in the Region.

b. The Copermittees have generally been implementing the jurisdictional runoff management programs (JRMPs) required pursuant to Order No. R9-2004-001 since July 14, 2005. Prior to that, the Copermittees were regulated by Order No. 98-02, since May 13, 1998. MS4 discharges, however, continue to cause or contribute to violations of water quality standards as evidenced by the Copermittees' monitoring results.

c. This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards. Some of the new or modified requirements, such as the revised Watershed Water Quality Workplan (Watershed Workplan) section, are designed to specifically address high priority water quality problems. Other requirements, such as for unpaved roads, are a result of San Diego Water Board's identification of water quality problems through investigations and complaints during the previous permit period. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other San Diego Water Board compliance assessment activities. Additional changes in the monitoring program provide consistency with the Code of Federal Regulations, USEPA guidance, State Water Board guidance, and the Southern California Monitoring Coalition recommendations.

d. Updated individual Storm Water Management Plans (Individual SWMP or JRMP), and Watershed Stormwater Management Plans (watershed SWMPs or Watershed Workplans), which, together with references in the DAMP, describe the Copermittees' runoff management programs in their entirety, are needed to guide the Copermittees' runoff management efforts and aid the Copermittees in tracking runoff management program implementation. Hereinafter, the individual SWMP is referred to as the JRMPs and the Watershed SWMP is referred to as the Watershed Workplan. It is practicable for the Copermittees to update the

JRMPs and Watershed Workplans within the timeframe specified in this Order, since significant efforts to develop these programs have already occurred.

e. Pollutants can be effectively reduced in storm water runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best "first line of defense." Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting run-on around pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control BMPs remove pollutants that have been mobilized by wet-weather or dry-weather flows.

f. Runoff needs to be addressed during the three major phases of urban development (planning, construction, and use) in order to reduce the discharge of pollutants from storm water to the MEP, effectively prohibit non-storm water discharges and protect receiving waters. Development which is not guided by water quality planning policies and principles can unnecessarily result in increased pollutant load discharges, flow rates, and flow durations which can negatively impact receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development generates substantial pollutant loads which are discharged in runoff to receiving waters.

g. Annual reporting requirements included in this Order are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs.

h. This Order establishes Storm Water Action Levels (SALs) for selected pollutants based on USEPA Rain Zone 6 (arid southwest) Phase I MS4 monitoring data for pollutants in storm water. The SALs were computed as the 90$^{th}$ percentile of the data set, utilizing the statistical based population approach, one of three approaches recommended by the State Water Board's Storm Water Panel in its report, 'The Feasibility of Numerical Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 2006). SALs are identified in Section D of this Order. Copermittees must implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water from the permitted areas so as not to exceed the SALs. Exceedance of SALs may indicate inadequacy of programmatic measures and BMPs required in this Order.

**2. Development Planning**

a. The Standard Storm Water Mitigation Plan (SSMP) requirements contained in this Order are consistent with Order WQ-2000-11 adopted by the State Water Board on October 5, 2000. In the precedential order, the State Water Board

found that the design standards, which essentially require that runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. The order also found that the SSMP requirements are appropriately applied to the majority of the Priority Development Project categories that are also contained in Section F.1 of this Order. The State Water Board also gave California Regional Water Quality Control Boards (Regional Water Boards) the needed discretion to include additional categories and locations, such as retail gasoline outlets (RGOs), in SSMPs.

b. Controlling runoff pollution by using a combination of onsite source control and site design BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important for the following reasons: (1) Many end-of-pipe BMPs (such as diversion to the sanitary sewer) are typically ineffective during significant storm events. (2) Whereas, onsite source control BMPs can be applied during all runoff conditions end-of-pipe BMPs are often incapable of capturing and treating the wide range of pollutants which can be generated on a sub-watershed scale; (3) End-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented; (4) End-of-pipe BMPs do not protect the quality or beneficial uses of receiving waters between the pollutant source and the BMP; and (5) Offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding sources of pollution and their prevention.

c. Use of Low-Impact Development (LID) site design BMPs at new development, redevelopment and retrofit projects can be an effective means for minimizing the impact of storm water runoff discharges from the development projects on receiving waters. LID is a site design strategy with a goal of maintaining or replicating the pre-development hydrologic regime through the use of design techniques. LID site design BMPs help preserve and restore the natural hydrologic cycle of the site, allowing for filtration and infiltration which can greatly reduce the volume, peak flow rate, velocity, and pollutant loads of storm water runoff. Current runoff management, knowledge, practices and technology have resulted in the use of LID BMPs as an acceptable means of meeting the storm water MEP standard.

d. RGOs are significant sources of pollutants in storm water runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other developed areas.

e. Industrial sites are significant sources of pollutants in runoff. Pollutant concentrations and loads in runoff from industrial sites are similar or exceed pollutant concentrations and loads in runoff from other land uses, such as commercial or residential land uses. As with other land uses, LID site design,

source control, and treatment control BMPs are needed at industrial sites in order to meet the MEP standard. These BMPs are necessary where the industrial site is larger than 10,000 square feet. The 10,000 square feet threshold is appropriate, since it is consistent with requirements in other Phase I NPDES storm water regulations throughout California.

f. If not properly designed or maintained, certain BMPs implemented or required by municipalities for runoff management may create a habitat for vectors (e.g. mosquitoes and rodents). Proper BMP design and maintenance to avoid standing water, however, can prevent the creation of vector habitat. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities, local vector control agencies, and the California Department of Public Health during the development and implementation of runoff management programs.

g. The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in storm water runoff and the volume of storm water runoff. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by natural vegetated soil. Hydromodification measures for discharges to hardened channels are needed for the future restoration of the hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and beneficial uses of local receiving waters.

**3. Construction and Existing Development**

a. In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (State and local) storm water regulation. Under this dual system, each Copermittee is responsible for enforcing its local permits, plans, and ordinances, and the San Diego Water Board is responsible for enforcing the General Construction Activities Storm Water Permit, State Water Board Order 2009-0009-DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, State Water Board Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit) and any reissuance of these permits. NPDES municipal regulations require that municipalities develop and implement measures to address runoff from industrial and construction activities. Those measures may include the implementation of other BMPs in addition to those BMPs that are required under the statewide general permits for activities subject to both State and local regulation.

b. Identification of sources of pollutants in runoff (such as municipal areas and activities, industrial and commercial sites/sources, construction sites, and residential areas), development and implementation of BMPs to address those sources, and updating ordinances and approval processes are necessary for the Copermittees to ensure that discharges of pollutants from its MS4 in storm water are reduced to the MEP and that non-storm water discharges are not occurring. Inspections and other compliance verification methods are needed to ensure minimum BMPs are implemented. Inspections are especially important at areas that are at high risk for pollutant discharges.

c. Historic and current development makes use of natural drainage patterns and features as conveyances for runoff. Urban streams used in this manner are part of the municipalities' MS4s regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the urban stream is both an MS4 and receiving water.

d. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or otherwise control. These discharges may cause or contribute to a condition of contamination or a violation of water quality standards.

e. Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutant discharges from storm water into MS4s must be reduced using a combination of management measures, including source control and an effective MS4 maintenance program implemented by each Copermittee.

f. Enforcement of local runoff related ordinances, permits, and plans is an essential component of every runoff management program and is specifically required in the federal storm water regulations and this Order. Each Copermittee is individually responsible for adoption and enforcement of ordinances and/or policies, implementation of identified control measures/BMPs needed to prevent or reduce pollutants in storm water runoff, and for the allocation of funds for the capital, operation and maintenance, administrative, and enforcement expenditures necessary to implement and enforce such control measures/BMPs under its jurisdiction. Education is an important aspect of every effective runoff management program and the basis for changes in behavior at a societal level. Education of municipal planning, inspection, and maintenance department staffs is especially critical to ensure that in-house staffs understand how their activities impact water quality, how to accomplish their jobs while protecting water quality, and understand their specific roles and responsibilities for compliance with this

Order. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions affect receiving water quality and how adverse effects can be minimized.

g. Public participation during the development of runoff management programs is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered.

h. Retrofitting existing development with storm water treatment controls, including LID, is necessary to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards. Although SSMP BMPs are required for redevelopment, the current rate of redevelopment will not address water quality problems in a timely manner. Cooperation with private landowners is necessary to effectively identify, implement and maintain retrofit projects for the preservation, restoration, and enhancement of water quality.

**4. Watershed Runoff Management**

a. Since runoff within a watershed can flow from and through multiple land uses and political jurisdictions, watershed-based runoff management can greatly enhance the protection of receiving waters. Such management provides a means to focus on the most important water quality problems in each watershed. By focusing on the most important water quality problems, watershed efforts can maximize protection of beneficial use in an efficient manner. Effective watershed-based runoff management actively reduces pollutant discharges and abates pollutant sources causing or contributing to watershed water quality problems. Watershed-based runoff management that does not actively reduce pollutant discharges and abate pollutant sources causing or contributing to watershed water quality problems can necessitate implementation of the iterative process outlined in section A.3 of this Order. Watershed management of runoff does not require Copermittees to expend resources outside of their jurisdictions. In some cases, however, this added flexibility provides more, and possibly more effective, alternatives for minimizing waste discharges. Watershed management requires the Copermittees within a watershed to develop a watershed-based management strategy, which can then be implemented on a jurisdictional basis.

b. Some runoff issues, such as general education and training, can be effectively addressed on a regional basis. Regional approaches to runoff management can improve program consistency and promote sharing of resources, which can result in implementation of more efficient programs.

c. It is important for the Copermittees to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittee coordination with other watershed stakeholders, especially the State of California Department of Transportation, the U.S. federal government, sovereign American Indian tribes, and water and sewer districts, is also important.

## E. STATUTE AND REGULATORY CONSIDERATIONS

**1.** The RWL language specified in this Order is consistent with language recommended by the USEPA and established in State Water Board Order WQ-99-05, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03, NPDES Permit No. CAS0108740*, adopted by the State Water Board on June 17, 1999. The RWL language in this Order requires compliance with water quality standards, which for storm water discharges is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Compliance with receiving water limits based on applicable water quality standards is necessary to ensure that MS4 discharges will not cause or contribute to violations of water quality standards and the creation of conditions of pollution, contamination, or nuisance.

**2.** The Basin Plan, identifies the following existing and potential beneficial uses for surface waters in Riverside County: Municipal and Domestic Supply (MUN), Agricultural Supply (AGR), Industrial Process Supply (PROC), Hydropower Generation (POW), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1), Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Spawning, Reproduction and/or Early Development (SPWN) and Preservation of Biological Habitats of Special Significance (BIOL).

**3.** This Order is in conformance with State Water Board Resolution No. 68-16, *Statement of Policy with Respect to Maintaining High Quality Waters in California*, and the federal Antidegradation Policy described in 40 CFR 131.12.

**4.** Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The adoption and implementation of this NPDES permit relieves the Copermittee from developing a non-point source plan, for the urban category, under CZARA. The San Diego Water Board addresses septic systems through the administration of other programs.

**5.** Section 303(d)(1)(A) of the CWA requires that "Each state shall identify those waters within its boundaries for which the effluent limitations…are not stringent enough to implement any water quality standard (WQS) applicable to such waters." The CWA also requires states to establish a priority ranking of impaired water bodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired water bodies is called the Section 303(d) List. The 2006 Section 303(d) List was approved by the State Water Board on October 25, 2006. On June 28, 2007, the 2006 303(d) List for California was given final approval by the USEPA. The 303(d) List was recently updated, and on December 16, 2009, the 2008 303(d) List was approved by the San Diego Water Board. The 2008 303(d) List for the San Diego Region was approved by the State Water Board on August 4, 2010. The 2008 303(d) List is awaiting USEPA approval.

**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 CWA §402. (33 U.S.C. § 1342(p)(3)(B).) Second, the local agency Copermittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental and new dischargers who are issued NPDES permits for storm water and non-storm water discharges. Third, the local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. Fourth, the Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA §301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their MS4 discharges (i.e. effluent limitations). 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. Likewise, the provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. sec. 1313(d).) Once the USEPA 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. sec. 122.44(d)(1)(vii)(B).)

**7.** Runoff treatment and/or mitigation must occur prior to the discharge of runoff into receiving waters. Treatment BMPs must not be constructed in waters of the U.S. or State unless the runoff flows are sufficiently pretreated to protect the values and functions of the water body. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of an runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the

construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. Without federal authorization (e.g., pursuant to CWA § 404), waters of the U.S. may not be converted into, or used as, waste treatment or conveyance facilities. Similarly, waste discharge requirements pursuant to CWC §13260 are required for the conversion or use of waters of the State as waste treatment or conveyance facilities. Diversion from waters of the U.S./State to treatment facilities and subsequent return to waters of the U.S. is allowable, provided that the effluent complies with applicable NPDES requirements.

**8.** The issuance of waste discharge requirements and an NPDES permit for the discharge of runoff from MS4s to waters of the U.S. is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with the CWC section 13389.

**9.** Storm water discharges from developed and developing areas in Riverside County are significant sources of certain pollutants that cause, may be causing, threatening to cause or contributing to water quality impairment in the waters of Riverside County. Furthermore, as delineated in the CWA section 303(d) list in Table 2, the San Diego Water Board has found that there is a reasonable potential that municipal storm water and non-storm water discharges from MS4s cause or may cause or contribute to an excursion above water quality standards for the following pollutants: Indicator Bacteria (including Fecal Coliform and E. Coli), Copper, Manganese, Iron, Chlorpyrifos, Diazinon, Sulfates, Phosphorous, Nitrogen, Total Dissolved Solids (TDS), and Toxicity. In accordance with CWA section 303(d), the San Diego Water Board is required to establish TMDLs for these pollutants to these waters to eliminate impairment and attain water quality standards. Therefore, certain early pollutant control actions and further pollutant impact assessments by the Copermittees are warranted and required pursuant to this Order.

**10.** This Order requires each Copermittee to effectively prohibit all types of unauthorized discharges of non-storm water into its MS4. However, historically pollutants have been identified as present in dry weather non-storm water discharges from the MS4s through 303(d) listings, monitoring conducted by the Copermittees under Order No. R9-2004-0001, and there are others expected to be present in dry weather non-storm water discharges because of the nature of these discharges. This Order includes action levels for pollutants in non-storm water, dry weather discharges from the MS4. The non-storm water action levels are designed to ensure that the Order's requirement to effectively prohibit all types of unauthorized discharges of non-storm water into the MS4 is being complied with. Non-storm water action levels in the Order are based upon numeric or narrative water quality objectives and criteria as defined in the Basin Plan, the State Water Board's Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). An exceedance of an action level

requires specified responsive action by the Copermittees. This Order describes what actions the Copermittees must take when an exceedance of an action level is observed. Exceedances of non-storm water action levels do not alone constitute a violation of this Order but could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions established in this Order. Failure to undertake required source investigation and elimination action following an exceedance of a non-storm water action level (NAL or action level) is a violation of this Order. The San Diego Water Board recognizes that use of action levels will not necessarily result in detection of all unauthorized sources of non-storm water discharges because there may be some discharges in which pollutants do not exceed established action levels. However, establishing NALs at levels appropriate to protect water quality standards is expected to lead to the identification of significant sources of pollutants in dry weather non-storm water discharges.

**11.** In addition to federal regulations cited in the Fact Sheet / Technical Report for the Order No. R9-2010-0016, monitoring and reporting required under Order No. R9-2010-0016 is required pursuant to authority under CWC section 13383.

**12.** With this Order, the San Diego Water Board has completed the re-issuance of the fourth iteration of the Phase I MS4 NPDES Permits for the Copermittees in the portions of San Diego County, Orange County, and Riverside County within the San Diego Region. The NPDES Permit requirements issued to the Copermittees in each county have substantially the same core requirements such as discharge prohibitions, receiving water limitations, jurisdictional components, and monitoring. In addition, the Copermittees cooperate regionally to develop monitoring with the Southern California Stormwater Monitoring Coalition and to develop program effectiveness with the California Stormwater Quality Association. Regional programs could improve the Copermittees' compliance with other permit components such as development of the Hydromodification Management Plans and Retrofitting Existing Development with more consistent implementation and cost sharing. Re-issuing the NPDES Permit requirements within five years for three counties under three different permits requires the San Diego Water Board to expend significant time and resources for issuance of the permits through three separate public proceedings, thereby greatly reducing the time and resources available to oversee compliance. Multiple permits also create confusion for determining compliance among regulated entities, especially the land development community. The San Diego Water Board recognizes that issuing a single MS4 permit for all Phase I entities in the San Diego Region will provide consistent implementation, improve communication among agencies within watersheds crossing multiple jurisdictions, and minimize staff resources spent with each permit renewal. The San Diego Water Board plans to develop a single regional MS4 permit prior to the expiration of this Order that will transfer the Copermittees' enrollment to the regional permit upon expiration of this Order.

## F. PUBLIC PROCESS

**1.** The San Diego Water Board has notified the Copermittees, all known interested parties, and the public of its intent to consider adoption of an Order prescribing waste discharge requirements that would serve to renew an NPDES permit for the existing MS4 discharges of pollutants in waters of the U.S.

**2.** The San Diego Water Board has held a public hearing on November 10, 2010 and heard and considered all comments pertaining to the terms and conditions of this Order.

**IT IS HEREBY ORDERED** that the Copermittees, in order to meet the provisions contained in Division 7 of the CWC and regulations adopted thereunder, and the provisions of the CWA and regulations adopted thereunder, must each comply with the following:

## A. PROHIBITIONS AND RECEIVING WATER LIMITATIONS

**1.** Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in receiving waters of the state are prohibited.[3]

**2.** Storm water discharges from MS4s containing pollutants which have not been reduced to the MEP are prohibited.[3]

**3.** Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses, water quality objectives developed to protect beneficial uses, and the State policy with respect to maintaining high quality waters) are prohibited.

a. Each Copermittee must comply with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order through timely implementation of control measures and other actions to reduce pollutants in storm water discharges in accordance with this Order, including any modifications. If exceedance(s) of water quality standards persist notwithstanding implementation of this Order, the Copermittee must assure compliance with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order by complying with the following procedure:

(1) Upon a determination by either the Copermittee or the San Diego Water Board that storm water MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Copermittee must notify the San Diego Water Board within 30 days and thereafter submit a report to the San Diego Water Board that describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report may be incorporated in the Annual Report unless the San Diego Water Board[4] directs an earlier submittal. The report must include an implementation

[3] This prohibition does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants in storm water discharges to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer). Runoff treatment and/or mitigation must occur prior to the discharge of runoff into receiving waters per finding E.7.

[4] The San Diego Water Board by prior resolution has delegated all matters that may legally be delegated to its Executive Officer to act on its behalf pursuant to CWC §13223. Therefore, the Executive Officer is authorized to act on the San Diego Water Board's behalf on any matter within this Order unless such delegation is unlawful under CWC §13223 or this Order explicitly states otherwise.

schedule. The San Diego Water Board may require modifications to the report

(2) Submit any modifications to the report required by the San Diego Water Board within 30 days of notification;

(3) Within 30 days following acceptance of the report described above by the San Diego Water Board, the Copermittee must revise its JRMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required; and

(4) Implement the revised JRMP and monitoring program in accordance with the approved schedule.

b. The Copermittee must repeat the procedure set forth above to comply with the receiving water limitations for continuing or recurring exceedances of the same water quality standard(s) following implementation of scheduled actions unless directed to do otherwise by the San Diego Water Board's Executive Officer.

c. Nothing in section A.3 prevents the San Diego Water Board from enforcing any provision of this Order while the Copermittee prepares and implements the above report.

**4.** In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order.

## B. NON-STORM WATER DISCHARGES

**1.** Each Copermittee must effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit; or not prohibited in accordance with sections B.2 and B.3 below.

**2.** The following categories of non-storm water discharges are not prohibited unless a Copermittee or the San Diego Water Board identifies the discharge category as a source of pollutants to waters of the U.S. Where the Copermittee(s) have identified a category as a source of pollutants, the category must be addressed as an illicit discharge and prohibited through ordinance, order or similar means. The San Diego Water Board may identify categories of discharge that either require prohibition, or other controls for non-anthropogenic sources. For a discharge category determined to be a source of pollutants, the Copermittee, under direction of the San Diego Water Board, must either prohibit the discharge category or develop and implement appropriate control measures for non-anthropogenic sources to prevent the discharge of pollutants to the MS4 and report to the San Diego Water Board pursuant to Section K.1 and K.3 of this Order. The discharge categories are:

a. Diverted stream flows;
b. Rising ground waters;
c. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to MS4s;
d. Uncontaminated pumped ground water[5];
e. Foundation drains[5];
f. Springs;
g. Water from crawl space pumps[5];
h. Footing drains[5];
i. Air conditioning condensation;
j. Flows from riparian habitats and wetlands;
k. Water line flushing[6,7];
l. Discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks;
m. Individual residential car washing; and
n. Dechlorinated swimming pool discharges[8].

**3.** Emergency fire fighting flows (i.e., flows necessary for the protection of life or property) do not require BMPs and need not be prohibited.

a. As part of the JRMP, each Copermittee must develop and implement a program to address pollutants from non-emergency fire fighting flows (i.e., flows from controlled or practice blazes and maintenance activities) identified as significant sources of pollutants to waters of the U.S.

b. Building fire suppression system maintenance discharges (e.g. sprinkler line flushing) contain waste. Therefore, such discharges are to be prohibited by the Copermittees as illicit discharges through ordinance, order, or similar means.

**4.** Each Copermittee must examine all dry weather effluent analytical monitoring results collected in accordance with section F.4 of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2010-0016 to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in section B.2. Follow-up investigations must be conducted to identify and control, pursuant to section B.2, any non-prohibited discharge category(ies) listed above.

[5] Requires enrollment under Order R9-2008-002. Discharges into the MS4 require authorization from the owner and operator of the MS4 system.
[6] This exemption does not include fire suppression sprinkler system maintenance and testing discharges. Those discharges may be regulated under Section B.3.
[7] Requires enrollment under Order R9-2002-0020.
[8] Excluding saline swimming pool discharges.

## C. NON-STORM WATER DRY WEATHER ACTION LEVELS

**1.** Each Copermittee, beginning no later than July 1, 2012, must implement the non-storm water dry weather action level (NAL) monitoring as described in Attachment E of this Order.

**2.** In response to an exceedance of an NAL, the Copermittee(s) having jurisdiction must investigate and seek to identify the source of the exceedance in a timely manner. However, if any Copermittee identifies a number of NAL exceedances that prevents it from adequately conducting source investigations at all sites in a timely manner, then that Copermittee may submit a prioritization plan and timeline that identifies the timeframe and planned actions to investigate and report its findings on all of the exceedances. Depending on the source of the pollutant exceedance, the Copermittee(s) having jurisdiction must take action as follows:

a. If the Copermittee identifies the source of the exceedance as natural (non-anthropogenically influenced) in origin and in conveyance into the MS4; then the Copermittee must report its findings and documentation of its source investigation to the San Diego Water Board in its Annual Report.

b. If the Copermittee identifies the source of the exceedance as an illicit discharge or connection, then the Copermittee must eliminate the discharge to its MS4 pursuant to Section F.4.f and report the findings, including any enforcement action(s) taken, and documentation of the source investigation to the San Diego Water Board in the Annual Report. If the Copermittee is unable to eliminate the source of discharge prior to the Annual Report submittal, then the Copermittee must submit, as part of its Annual Report, its plan and timeframe to eliminate the source of the exceedance. Those dischargers seeking to continue such a discharge must become subject to a separate NPDES permit prior to continuing any such discharge.

c. If the Copermittee identifies the source of the exceedance as an exempted category of non-storm water discharge, then the Copermittees must determine if this is an isolated circumstance or if the category of discharges must be addressed through the prevention or prohibition of that category of discharge as an illicit discharge. The Copermittee must submit its findings including a description of the steps taken to address the discharge and the category of discharge, to the San Diego Water Board for review in its Annual Report. Such description must include relevant updates to or new ordinances, orders, or other legal means of addressing the category of discharge, and the anticipated schedule for doing so. The Copermittees must also submit a summary of its findings with the Report of Waste Discharge.

d. If the Copermittee identifies the source of the exceedance as a non-storm water discharge in violation or potential violation of an existing separate NPDES permit

(e.g. the groundwater dewatering permit), then the Copermittee must report, within three business days, the findings to the San Diego Water Board including all pertinent information regarding the discharger and discharge characteristics.

e. If the Copermittee is unable to identify the source of the exceedance after taking and documenting reasonable steps to do so, then the Copermittee must perform additional focused sampling. If the results of the additional sampling indicate a recurring exceedance of NALs with an unidentified source, then the Copermittee must update its programs within a year to address the common contributing sources that may be causing such an exceedance. The Copermittee's annual report must include these updates to its programs including, where applicable, updates to their watershed workplans (Section G.2), retrofitting consideration (Section F.3.d) and program effectiveness work plans (Section J.4).

f. The Copermittees, or any interested party, may evaluate existing NALs and propose revised NALs for future Board consideration.

**3.** NALs can help provide an assessment of the effectiveness of the prohibition of non-storm water discharges and of the appropriateness of exempted non-storm water discharges. An exceedance of an NAL does not alone constitute a violation of the provisions of this Order. An exceedance of an NAL may indicate a lack of compliance with the requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions set forth in Sections A and B of this Order. Failure to timely implement required actions specified in this Order following an exceedance of an NAL constitutes a violation of this Order. Neither the absence of exceedances of NALs nor compliance with required actions following observed exceedances, excuses any non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s or any non-compliance with the prohibitions in Sections A and B of this Order. During any annual reporting period in which one or more exceedances of NALs have been documented the Copermittee must report in response to Section C.2 above, a description of whether and how the observed exceedances did or did not result in a discharge from the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters.

**4.** Monitoring of effluent will occur at the end-of-pipe prior to discharge into the receiving waters, with a focus on Major Outfalls, as defined in 40 CFR 122.26(B 5-6) and Attachment E of this Order. The Copermittees must develop their monitoring plans to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. At a minimum, outfalls that exceed any NALs once during any year must be monitored in the subsequent year. Any station that does not exceed an NAL, or only has exceedances that are identified as natural in origin and conveyance into the MS4 pursuant to Section C.2.a, for 3 successive years may be replaced with a different station.

**5.** Each Copermittee must monitor for the non-storm water dry weather action levels, which are incorporated into this Order as follows:

Action levels for discharges to inland surface waters:

Table 3.a: General Constituents

| Parameter | Units | AMAL | MDAL | Instantaneous Maximum | Basis |
|---|---|---|---|---|---|
| Fecal Coliform | MPN/ 100 ml | 200[A] 400[B] | - | | BPO |
| Enterococci | MPN/ 100 ml | 33 | - | 61[C] | BPO |
| Turbidity | NTU | - | 20 | | BPO |
| pH | Units | Within limit of 6.5 to 8.5 at all times | | | BPO |
| Dissolved Oxygen | mg/L | Not less than 5.0 in WARM waters and not less than 6.0 in COLD waters | | | BPO |
| Total Nitrogen | mg/L | - | 1.0 | See MDAL | BPO |
| Total Phosphorus | mg/L | - | 0.1 | See MDAL | BPO |
| Methylene Blue Active Substances | mg/L | - | 0.5 | See MDAL | BPO |
| Iron | mg/L | - | 0.3 | See MDAL | BPO |
| Manganese | mg/L | - | 0.05 | See MDAL | BPO |

A – Based on a minimum of not less than five samples for any 30-day period
B – No more than 10 percent of total samples may exceed 400 per 100 ml during any 30 day period
C – This Value has been set to Basin Plan Criteria for Designated Beach Areas
BPO – Basin Plan Objective
MDAL – Maximum Daily Action Level
AMAL – Average Monthly Action Level

Table 3.b: Priority Pollutants

| | | Freshwater (CTR) | |
|---|---|---|---|
| Parameter | Units | MDAL | AMAL |
| Cadmium | ug/L | ** | ** |
| Copper | ug/L | * | * |
| Chromium III | ug/L | ** | ** |
| Chromium VI (hexavalent) | ug/L | 16 | 8.1 |
| Lead | ug/L | * | * |
| Nickel | ug/L | ** | ** |
| Silver | ug/L | * | * |
| Zinc | ug/L | * | * |

CTR – California Toxic Rule
*- Action Levels developed on a case-by-case basis (see below)
**- Action Levels developed on a case-by-case basis (see below), but calculated criteria are not to exceed Maximum Contaminant Levels under the California Code of Regulations[9]

[9] California Code of Regulations, Title 22, Division 4, Chapter 15, Article 4, Section 64431.

The NALs for Cadmium, Copper, Chromium (III), Lead, Nickel, Silver and Zinc will be developed on a case-by-case basis because the freshwater criteria are based on site-specific water quality data (receiving water hardness). For these priority pollutants, the following equations (40 CFR 131.38.b.2) will be required:

| | |
|---|---|
| Cadmium (Total Recoverable) | = exp(0.7852[ln(hardness)] -2.715) |
| Chromium III (Total Recoverable) | = exp(0.8190[ln(hardness)] + .6848) |
| Copper (Total Recoverable) | = exp(0.8545[ln(hardness)] - 1.702) |
| Lead (Total Recoverable) | = exp(1.273[ln(hardness)] - 4.705) |
| Nickel (Total Recoverable) | = exp(.8460[ln(hardness)] + 0.0584) |
| Silver (Total Recoverable) | = exp(1.72[ln(hardness)] - 6.52) |
| Zinc (Total Recoverable) | = exp(0.8473[ln(hardness)] + 0.884) |

## D. STORM WATER ACTION LEVELS

**1.** The Copermittees must implement the Wet Weather MS4 Discharge Monitoring as described in Attachment E of this Order, and beginning three years after the Order adoption date, the Copermittees must annually evaluate their data compared to the Stormwater Action Levels (SALs). At each monitoring station, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the U.S. that exceed the SALs for each of the pollutants listed in Table 4 (below) requires the Copermittee(s) having jurisdiction to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutants(s) to the MEP. The Copermittees must utilize the exceedance information when adjusting and executing annual work plans, as required by this Order. Copermittees must take the magnitude, frequency, and number of constituents exceeding the SAL(s), in addition to receiving water quality data and other information, into consideration when prioritizing and reacting to SAL exceedances in an iterative manner. Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not reduced pollutants in storm water discharges to the MEP.

Table 4. Storm Water Action Levels

| Pollutant | Action Level |
|---|---|
| Turbidity (NTU) | 126 |
| Nitrate & Nitrite total (mg/L) | 2.6 |
| P total (mg/L) | 1.46 |
| Cd total (µg/L) | 3.0 |
| Cu total (µg/L) | 127 |
| Pb total (µg/L) | 250 |
| Zn total (µg/L) | 976 |

**2.** The end-of-pipe assessment points for the determination of SAL compliance are major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6) and Attachment E of this Order. The Copermittees must develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceed SALs must be monitored in the subsequent year. Any station that does not exceed an SAL for 3 successive years may be replaced with a different station. SAL samples must be 24 hour time-weighted composites.

**3.** The absence of SAL exceedances does not relieve the Copermittees from implementing all other required elements of this Order.

**4.** This Order does not regulate natural sources and conveyances into the MS4 of constituents listed in Table 5. To be relieved of the requirements to take action as described in D.1 above, the Copermittee must demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature. This demonstration does not need to be repeated for subsequent exceedances of the same SAL at the same monitoring station.

**5.** The SALs will be reviewed and updated at the end of every permit cycle. The data collected pursuant to D.2 above and Attachment E can be used to create SALs based upon local data. The purpose of establishing the SALs is that through the iterative and MEP process, outfall storm water discharges will meet all applicable water quality standards.

## E. LEGAL AUTHORITY

**1.** Each Copermittee must establish, maintain, and enforce adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. Nothing herein shall authorize a Copermittee or other discharger regulated under the terms of this order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water rights holders in the exercise of their water rights. This legal authority must, at a minimum, authorize the Copermittee to:

a. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies both to industrial and construction sites which have coverage under the statewide general industrial or construction storm water permits, as well as to those sites which do not. Grading ordinances must be updated and enforced as necessary to comply with this Order;
b. Prohibit all identified illicit discharges not otherwise allowed pursuant to section B.2;
c. Prohibit and eliminate illicit connections to the MS4;

d. Control the discharge of spills, dumping, or disposal of materials other than storm water to its MS4;
e. Require compliance with conditions in Copermittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows);
f. Utilize enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders;
g. Control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees;
h. Control of the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements with other owners of the MS4 such as the State of California Department of Transportation, the U.S. federal government, or sovereign Native American Tribes is encouraged;
i. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4. This means the Copermittee must have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites;
j. Require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s from storm water to the MEP; and
k. Require documentation on the effectiveness of BMPs implemented to reduce the discharge of storm water pollutants to the MS4 to the MEP.

**2.** Each Copermittee must submit on or before June 30, 2012, a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority within its jurisdiction to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order. These statements must include:

a. Citation of runoff related ordinances and the reasons they are enforceable;
b. Identification of the local administrative and legal procedures available to mandate compliance with runoff related ordinances and therefore with the conditions of this Order, and a statement as to whether enforcement actions can be completed administratively or whether they must be commenced and completed in the judicial system; and
c. A brief description of how runoff related ordinances are adopted and the process by which they may be challenged.

## F. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM (JRMP)

Each Copermittee must implement all requirements of section F of this Order no later than July 1, 2012, unless otherwise specified. Upon adoption of this Order and until an updated JRMP is developed and implemented or July 1, 2012, whichever occurs first, each Copermittee must at a minimum implement its JRMP document, as the document was developed and amended to comply with the requirements of Order No. R9-2004-001.

Each Copermittee must develop and implement an updated JRMP for its jurisdiction no later than July 1, 2012. Each updated JRMP must meet the requirements of section F of this Order, reduce the discharge of storm water pollutants from the MS4 to the MEP, effectively prohibit non-storm water discharges, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. In addition, each Copermittee's JRMP must identify all departments and positions within its jurisdiction that conduct runoff related activities, and their roles and responsibilities under this Order. This identification must include an up to date organizational chart specifying these departments and key personnel.

### 1. DEVELOPMENT PLANNING COMPONENT

Each Copermittee must implement a program which meets the requirements of this section and (1) reduces Development Project discharges of storm water pollutants from the MS4 to the MEP; (2) prevents Development Project discharges from the MS4 from causing or contributing to a violation of water quality standards; (3) prevents illicit discharges into the MS4; and (4) manages increases in runoff discharge rates and durations from Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

#### a. GENERAL PLAN

Each Copermittee must revise as needed its General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) to include water quality and watershed protection principles and policies that direct land-use decisions and require implementation of consistent water quality protection measures for all development, redevelopment, and retrofit projects. Examples of water quality and watershed protection principles and policies to be considered include the following:

(1) Minimize the amount of impervious surfaces and directly connected impervious surfaces in areas of new development and redevelopment and where feasible slow runoff and maximize on-site infiltration of runoff.

(2) Implement pollution prevention methods supplemented by pollutant source controls and treatment BMPs. Use small collection strategies located at, or as close as possible to, the source (i.e., the point where water initially meets the ground) to minimize the transport of urban runoff and pollutants offsite and into an MS4.

(3) Preserve, and where possible, create, or restore areas that provide important water quality benefits, such as riparian corridors, wetlands, and buffer zones. Encourage land acquisition of such areas.

(4) Limit disturbances of natural water bodies and natural drainage systems caused by development including roads, highways, and bridges.

(5) Prior to making land use decisions, utilize methods available to estimate increases in pollutant loads and flows resulting from projected future development. Require incorporation of BMPs to mitigate the projected increases in pollutant loads and flows.

(6) Avoid development of areas that are particularly susceptible to erosion and sediment loss; or establish development guidance that identifies these areas and protects them from erosion and sediment loss.

(7) Reduce pollutants associated with vehicles and increasing traffic resulting from development.

(8) Post-development runoff from a site must not contain pollutant loads that cause or contribute to an exceedance of receiving water quality objectives and which have not been reduced to the MEP.

b. **ENVIRONMENTAL REVIEW PROCESS**

Each Copermittee must revise as needed its current environmental review processes to accurately evaluate water quality impacts and cumulative impacts and identify appropriate measures to avoid, minimize, and mitigate those impacts for all Development Projects.

c. **APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR ALL DEVELOPMENT PROJECTS**

For all proposed Development Projects, each Copermittee, during the planning process, and prior to project approval and issuance of local permits, must prescribe the necessary requirements so that Development Project discharges of storm water pollutants from the MS4 will be reduced to the MEP, will not cause or

contribute to a violation of water quality standards, and will comply with the Copermittee's ordinances, permits, plans, and requirements, and with this Order.

Performance Criteria: Discharges from each approved development project must be subject to the following management measures:

(1) Source control BMPs that reduce storm water pollutants of concern in runoff; prevent illicit discharges into the MS4; prevent irrigation runoff; storm drain system stenciling or signage; properly design outdoor material storage areas; properly design outdoor work areas; and properly design trash storage areas.

(2) The following LID BMPs listed below must be implemented at all Development Projects where applicable and feasible.

(a) Conserve natural areas, including existing trees, other vegetation, and soils;
(b) Construct streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided that public safety is not compromised;
(c) Minimize the impervious footprint of the project;
(d) Minimize soil compaction to landscaped areas;
(e) Minimize disturbances to natural drainages (e.g., natural swales, topographic depressions, etc.); and
(f) Disconnect impervious surfaces through distributed pervious areas.

(3) Buffer zones for natural water bodies, where technically feasible. Where buffer zones are technically infeasible, require project proponent to implement other buffers such as trees, access restrictions, etc.

(4) Other measures necessary so that grading or other construction activities meet the provisions specified in section F.2 of this Order.

(5) Submittal of documentation of a mechanism under which ongoing long-term maintenance of all structural post-construction BMPs will be conducted.

(6) Infiltration and Groundwater Protection

To protect groundwater quality, each Copermittee must apply restrictions to the use of treatment control BMPs that are designed to primarily function as large, centralized infiltration devices (such as large infiltration trenches and infiltration basins). Such restrictions must be designed so that the use of such infiltration treatment control BMPs does not cause or contribute to an exceedance of groundwater quality objectives. At a minimum, each treatment control BMP designed to primarily function as a centralized infiltration device must meet the restrictions below, unless the Development Project demonstrates to the Copermittee that a restriction is not necessary to protect groundwater quality. The Copermittees may collectively or individually

develop alternative restrictions on the use of treatment control BMPs which are designed to primarily function as centralized infiltration devices. Alternative restrictions developed by the Copermittees can partially or wholly replace the restrictions listed below. The restrictions do not apply to small infiltration systems dispersed throughout a development project.

(a) Runoff must undergo pretreatment such as sedimentation or filtration prior to infiltration;

(b) All dry weather flows containing significant pollutant loads must be diverted from infiltration devices and treated through other BMPs;

(c) Pollution prevention and source control BMPs must be implemented at a level appropriate to protect groundwater quality at sites where infiltration treatment control BMPs are to be used;

(d) Infiltration treatment control BMPs must be adequately maintained so that they remove storm water pollutants to the MEP;

(e) The vertical distance from the base of any infiltration treatment control BMP to the seasonal high groundwater mark must be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained;

(f) The soil through which infiltration is to occur must have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of runoff for the protection of groundwater beneficial uses;

(g) Infiltration treatment control BMPs must not be used for areas of industrial or light industrial activity; and other high threat to water quality land uses and activities as designated by each Copermittee unless first treated or filtered to remove pollutants prior to infiltration; and

(h) Infiltration treatment control BMPs must be located a minimum of 100 feet horizontally from any water supply wells.

(7) Where feasible, landscaping with native or low water species shall be preferred in areas that drain to the MS4 or to waters of the U.S.

(8) Rain water harvesting and water reuse, where feasible, must be encouraged as part of the site design and construction to reduce pollutants in storm water discharges to the MEP.

d. **STANDARD STORM WATER MITIGATION PLANS (SSMPS) – APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR PRIORITY DEVELOPMENT PROJECTS**

On or before June 30, 2012, the Copermittees must submit an updated SSMP, to the San Diego Water Board's Executive Officer for a 30 day public review and comment period. The San Diego Water Board's Executive Officer has the discretion to determine whether to hold a public hearing or to limit public input to written comments. Within 180 days of determination that the SSMP is in compliance with this Order's provisions, each Copermittee must amend its local ordinances consistent with the updated SSMP, and begin implementing the updated SSMP. Any updated local ordinances must be submitted to the San Diego Water Board with the Annual Report. The SSMP must meet the requirements of section F.1.d of this Order to (1) reduce Priority Development Project discharges of storm water pollutants from the MS4 to the MEP, and (2) prevent Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.[10]

(1) Definition of Priority Development Project:

Priority Development Projects are:

(a) All new Development Projects that fall under the project categories or locations listed in section F.1.d.(2), and

(b) Those redevelopment projects that create, add, or replace at least 5,000 square feet of impervious surfaces on an already developed site and the existing development and/or the redevelopment project falls under the project categories or locations listed in section F.1.d.(2). Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to SSMP requirements, the numeric sizing criteria discussed in section F.1.d.(6) applies only to the addition or replacement, and not to the entire development. Where redevelopment

[10] Updated SSMP and hydromodification requirements must apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updated SSMP or hydromodification requirement commences. If lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is illegal, the updated SSMP or hydromodification requirement need not apply to the project. Updated Development Planning requirements set forth in Sections F.1. (a) through (h) of this Order must apply to all projects or phases of projects, unless, at the time any updated Development Planning requirement commences, the projects or project phases meet any one of the following conditions: (i) the project or phase has begun grading or construction activities; or (ii) a Copermittee determines that lawful prior approval rights for a project or project phase exist, whereby application of the Updated Development Planning requirement to the project is legally infeasible. Where feasible, the Permittees must utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in its plans.

results in an increase of more than fifty percent of the impervious surfaces of a previously existing development, the numeric sizing criteria applies to the entire development.

(c) One acre threshold: In addition to the Priority Development Project Categories identified in section F.1.d.(2), Priority Development Projects must also include all other post-construction pollutant-generating new Development Projects that result in the disturbance of one acre or more of land by July 1, 2012.[11]

(2) Priority Development Project Categories

Where a new Development Project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SSMP requirements.

(a) New development projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site) including commercial, industrial, residential, mixed-use, and public projects. This category includes development projects on public or private land which fall under the planning and building authority of the Copermittees.

(b) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(c) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet must meet all SSMP requirements except for structural treatment BMP and numeric sizing criteria requirement F.1.d.(6) and hydromodification requirement F.1.h.

(d) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(e) Environmentally Sensitive Areas (ESAs). All development located within, or directly adjacent to, or discharging directly to an ESA (where

[11] Pollutant generating Development Projects are those projects that generate pollutants at levels greater than natural background levels.

discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10 percent or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(f) Impervious parking lots 5,000 square feet or more and potentially exposed to runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(g) Street, roads, highways, and freeways. This category includes any paved impervious surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. To the extent that the Copermittees develop revised standard roadway design and post-construction BMP guidance that comply with the provisions of Section F.1 of the Order, then public works projects that implement the revised standard roadway sections do not have to develop a project specific SSMP. The standard roadway design and post-construction BMP guidance must be submitted with the Copermittee's updated SSMP.

(h) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

(3) Pollutants of Concern

As part of its local SSMP, each Copermittee must implement an updated procedure for identifying pollutants of concern for each Priority Development Project. The procedure must address, at a minimum: (1) Receiving water quality (including pollutants for which receiving waters are listed as impaired under CWA section 303(d)); (2) Land-use type of the Development Project and pollutants associated with that land use type; and (3) Pollutants expected to be present on site.

(4) Low Impact Development BMP Requirements

Each Copermittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss.

(a) The Copermittees must take the following measures to ensure that LID BMPs are implemented at Priority Development Projects:

(i) Each Copermittee must require LID BMPs or make a finding of technical infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(7);

(ii) Each Copermittee must incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for Priority Development Projects; and

(iii) On or before July 1, 2012, each Copermittee must review its local codes, policies, and ordinances and identify barriers therein to implementation of LID BMPs. Following the identification of these barriers to LID implementation, where feasible, the Copermittee must take, by the end of the permit cycle, appropriate actions to remove such barriers. The Copermittees must include this review with the updated JRMP.

(b) The following LID BMPs must be implemented at each Priority Development Project:

(i) Maintain or restore natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams) to the extent feasible[12].

(ii) Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate, retain and/or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas must be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.

(iii) Projects with low traffic areas and appropriate soil conditions must be constructed with permeable surfaces.

[12] Priority Development Projects proposing to dredge or fill materials in waters of the U.S. must obtain a CWA Section 401 Water Quality Certification. Priority Development Projects proposing to dredge or fill waters of the State must obtain Waste Discharge Requirements.

(c) LID BMPs sizing criteria:

(i) LID BMPs must be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event[13] ("design capture volume");

(ii) If onsite retention[14] LID BMPs are technically infeasible per section F.1.d.(7)(b), other LID BMPs may treat any volume that is not retained onsite provided that the total volume of the other LID BMPs, including pore spaces and pre-filter detention volume, are sized to hold at least 0.75 times the portion of the design capture volume that is not retained onsite. The LID BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP.

(d) If it is shown to be technically infeasible per Section F.1.d.(7)(b) to retain and/or treat the remaining volume up to and including the design capture volume using LID BMPs, then the project must implement conventional treatment control BMPs in accordance with Section F.1.d.(6) below and must participate in the LID waiver program in Section F.1.d.(7).

(e) All LID BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(5) Source Control BMP Requirements

Each Copermittee must require each Priority Development Project to implement applicable source control BMPs. The source control BMPs to be required must:

(a) Prevent illicit discharges into the MS4;
(b) Minimize storm water pollutants of concern in runoff;
(c) Eliminate irrigation runoff;

[13] This volume is not a single volume to be applied to all of Riverside County. The size of the 85th percentile storm event is different for various parts of the County. The Copermittees are encouraged to calculate the 85th percentile storm event for each of its jurisdictions using local rain data pertinent to its particular jurisdiction (0.6 inch standard is a rough average for the County and should only be used where appropriate rain data is not available). In addition, isopluvial maps may be used to extrapolate rainfall data to areas where insufficient data exists in order to determine the volume of the local 85th percentile storm event in such areas. Where the Copermittees will use isopluvial maps to determine the 85th percentile storm event in areas lacking rain data, the Copermittees must describe their method for using isopluvial maps in its SSMPs.

[14] Infiltration LID BMPs are the preferred method for onsite retention, but does not preclude the use and implementation of all other retention LID BMPs (e.g. evapotranspiration, evaporation, and/or harvest), where technically feasible, prior to considering biofiltration LID BMPs for treatment of the design capture volume that is not otherwise retained onsite.

(d) Include storm drain system stenciling or signage;
(e) Include properly designed outdoor material storage areas;
(f) Include properly designed outdoor work areas;
(g) Include properly designed trash storage areas; and
(h) Include water quality protection requirements applicable to individual priority project categories.

(6) Treatment Control BMP Requirements

Each Copermittee must require each Priority Development Project that meets the Copermittee's technical infeasibility criteria in Section F.1.d(7) below, to implement conventional treatment control BMPs to treat the portion of the "design capture volume" that was not treated by LID BMPs per Section F.1.d(4) above. Conventional treatment control BMPs must meet the following requirements:

(a) All treatment control BMPs for a single Priority Development Project must collectively be sized to comply with the following numeric sizing criteria:

(i) Volume-based treatment control BMPs must be designed to mitigate (infiltrate, filter, or treat) the remaining portion of the design capture volume that was not retained and/or treated with LID BMPs; or

(ii) Flow-based treatment control BMPs must be designed to mitigate (filter, or treat) either: a) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event; or b) the maximum flow rate of runoff produced by the $85^{th}$ percentile hourly rainfall intensity (for each hour of a storm event), as determined from the local historical rainfall record, multiplied by a factor of two.

(b) All treatment control BMPs for Priority Development Projects must, at a minimum:

(i) Be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern, as the pollutant removal efficiencies are identified in the Copermittees' SSMP. Treatment control BMPs with a low removal efficiency ranking must only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.
(ii) Be correctly sized and designed so as to remove storm water pollutants to the MEP.

(c) Target removal of pollutants of concern from runoff.

(d) Be implemented close to pollutant sources, and prior to discharging into waters of the U.S.

(e) Include proof of a mechanism under which ongoing long-term maintenance will be conducted to ensure proper maintenance for the life of the project. The mechanisms may be provided by the project proponent or Copermittee.

(f) Be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(7) Low Impact Development (LID) BMP Waiver Program

The Copermittees must develop, collectively or individually, a LID waiver program for incorporation into the SSMP, which would allow a Priority Development Project to substitute implementation of all or a portion of required LID BMPs in Section F.1.d(4) with implementation of treatment control BMPs and either 1) on-site mitigation, 2) an off-site mitigation project, and/or 3) other mitigation developed by the Copermittees. The Copermittees must submit the LID waiver program as part of their updated SSMP. At a minimum, the program must meet the requirements below:

(a) Prior to implementation, the LID waiver program must clearly exhibit that it will not allow Priority Development Projects to result in a net impact (after consideration of any mitigation) from pollutant loadings over and above the impact caused by projects meeting the onsite LID retention requirements;

(b) For each Priority Development Project participating, the Copermittee must find that it is technically infeasible to implement LID BMPs that comply with the requirements of Section F.1.(d)(4). The Copermittee(s) must develop criteria to determine the technical feasibility of implementing LID BMPs . Each Priority Development Project participating must demonstrate that LID BMPs were implemented as much as feasible given the site's unique conditions. Technical infeasibility may result from conditions including, but not limited to:

(i) Locations that cannot meet the infiltration and groundwater protection requirements in section F.1.c.(6) for large, centralized infiltration BMPs. Where infiltration is technically infeasible, the project must still examine the feasibility of other onsite LID BMPs;
(ii) Insufficient demand for storm water reuse;

(iii) Smart growth and infill or redevelopment locations where the density and/or nature of the project would create significant difficulty for compliance with the LID BMP requirements; and

(iv) Other site, geologic, soil, or implementation constraints identified in the Copermittees updated SSMP document.

(c) Each Priority Development Project that participates in the LID waiver program must mitigate for the pollutant loads expected to be discharged due to not implementing the LID retention BMPs in section F.1.d.(4). The pollutant loading must be estimated for each project participating in the LID waiver program. The estimated impacts from not implementing the required LID retention BMPs in section F.1.d.(4) must be fully mitigated. Mitigation projects must be implemented within the same hydrologic unit as the Priority Development Project. Mitigation projects outside of the hydrologic subarea but within the same hydrologic unit may be approved provided that the project proponent demonstrates that mitigation projects within the same hydrologic subarea are infeasible and that the mitigation project will address similar beneficial use impacts as expected from the Priority Development Projects pollutant load. Onsite mitigation may include increasing the conventional treatment sizing factors to achieve pollutant load removal equal to or greater than the pollutant load removal expected from implementing onsite retention of the design capture volume. Offsite mitigation projects may include green streets projects, existing development retrofit projects, retrofit incentive programs, regional BMPs and/or riparian restoration projects. Project applicants seeking to utilize these alternative compliance provisions may propose other offsite mitigation projects, which the Copermittees may approve if they meet the requirements of this subpart.

(d) A Copermittee may choose to implement additional mitigation programs (e.g., pollutant credit system, mitigation fund) as part of the LID waiver program provided that the mitigation program clearly exhibits that it will not allow Priority Development Projects to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements. Any additional mitigation programs that a Copermittee chooses to implement must be submitted to the San Diego Water Board Executive Officer for review and acceptance prior to implementation.

(8) <u>LID and Treatment Control BMP Standards</u>

(a) As part of the SSMP, each Copermittee must develop and require Priority Development Projects to implement siting, design, and maintenance criteria for each LID and treatment control BMP listed in the SSMP to determine feasibility and applicability and so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal, runoff control, and vector minimization. Development of

BMP design worksheets which can be used by project proponents is encouraged.

(b) LID and treatment control BMPs implemented at any Priority Development Projects must mitigate (treat through infiltration, settling, filtration or other unit processes) the required volume or flow of runoff from all developed portions of the project, including landscaped areas.

(c) All LID and treatment control BMPs must be located so as to remove pollutants from runoff prior to its discharge to any receiving waters. Multiple Priority Development Projects may use shared post-construction BMPs as long as construction of any shared BMP is completed prior to the use or occupation of any Priority Development Project from which the BMP will receive runoff. Post construction BMPs must not be constructed within a waters of the U.S. or waters of the State.

(9) Implementation Process

(a) As part of its local SSMP, each Copermittee must implement a process to verify compliance with SSMP requirements. The process must identify at what point in the planning process Priority Development Projects will be required to meet SSMP requirements and at a minimum, the Priority Development Project must implement the required post-construction BMPs prior to occupancy and/or the intended use of any portion of that project. The process must also include identification of the roles and responsibilities of various municipal departments in implementing the SSMP requirements, as well as any other measures necessary for the implementation of SSMP requirements.

(b) Each Copermittee must establish a mechanism not only to track post-construction BMPs, but also to ensure that appropriate easements and ownerships are properly recorded in public records and the information is conveyed to all appropriate parties when there is a change in project or site ownership.

(10) Post-construction BMP Review

(a) The Copermittees must review and update the BMPs that are listed in their SSMP as options for treatment control. At a minimum, the update must include removal of obsolete or ineffective BMPs and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update must also add appropriate LID BMPs to any tables or discussions in the local SSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update must include review and revision where necessary of treatment control BMP pollutant removal efficiencies.

(b) The update must incorporate findings from BMP effectiveness studies conducted by the Copermittees for projects funded wholly or in part by the State Water Board or Regional Water Boards.

(c) Each Copermittee must implement a mechanism for annually incorporating findings from local treatment BMP effectiveness studies (e.g., ones conducted by, or on-behalf of, public agencies in Riverside County) into SSMP project reviews and permitting.

e. **BMP CONSTRUCTION VERIFICATION**

Prior to occupancy and/or intended use of any portion of the Priority Development Project subject to SSMP requirements, each Copermittee must inspect the constructed site design, source control, and treatment control BMPs applicable to the constructed portion of the project to verify that they have been constructed and are operating in compliance with all specifications, plans, permits, ordinances, and this Order.

f. **BMP MAINTENANCE TRACKING**

(1) Inventory of SSMP projects: Each Copermittee must develop and maintain a watershed-based database to track and inventory all projects constructed within their jurisdiction, that have a final approved SSMP (SSMP projects), and its structural post-construction BMPs implemented therein since July, 2005. LID BMPs implemented on a lot by lot basis at single family residential houses, such as rain barrels, are not required to be tracked or inventoried. At a minimum, the database must include information on BMP type(s), location, watershed, date of construction, party responsible for maintenance, dates and findings of maintenance verifications, and corrective actions, including whether the site was referred to the local vector control agency or department.

(2) Each Copermittee must verify that approved post-construction BMPs are operating effectively and have been adequately maintained by implementing the following measures:

(a) The designation of high priority SSMP Projects must consider the following:

(i) BMP size,
(ii) Recommended maintenance frequency,
(iii) Likelihood of operational and maintenance issues,
(iv) Location,

(v) Receiving water quality,
(vi) Compliance record,
(vii) Land use, and
(viii) Other pertinent factors;

At a minimum, high priority projects include those projects that generate pollutants (prior to treatment) within the tributary area of and within the same hydrologic subarea as a 303(d) listed waterbody impaired for that pollutant; or those projects generating pollutants within the tributary area for and within the same hydrologic subarea as an observed action level exceedance of that pollutant.

(b) Beginning on July 1, 2012, each Copermittee must verify that the required structural post-construction BMPs on the inventoried SSMP projects have been implemented, are maintained, and are operating effectively through inspections, self-certifications, surveys, or other equally effective approaches with the following conditions:

(i) The implementation, operation, and maintenance of all (100 percent) approved and inventoried final project public and private SSMPs (a.k.a. WQMPs) must be verified every five years;
(ii) All (100 percent) projects with BMPs that are high priority must be inspected by the Copermittee annually prior to each rainy season;
(iii) All (100 percent) Copermittee projects with BMPs must be inspected by the Copermittee annually;
(iv) At the discretion of the Copermittee, its inspections may be coordinated with the facility inspections implemented pursuant to section F.3. of this Order;
(v) For verifications performed through a means other than direct Copermittee inspection, adequate documentation must be submitted to the Copermittee to provide assurance that the required maintenance has been completed;
(vi) Appropriate follow-up measures (including re-inspections, enforcement, maintenance, etc.) must be conducted to ensure the treatment BMPs continue to reduce storm water pollutants as originally designed; and
(vii) Inspections must note observations of vector conditions, such as mosquitoes. Where conditions are identified as contributing to mosquito production, the Copermittee must notify its local vector control agency.

g. **ENFORCEMENT OF DEVELOPMENT SITES**

Each Copermittee must enforce its storm water ordinance for all development projects as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following tools or their equivalent: Non-monetary penalties, fines, bonding requirements, liens, and/or permit or occupancy denials for non-compliance.

h. **HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS**[15]

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects. The HMP must be incorporated into the SSMP and implemented by each Copermittee so that estimated post-project runoff discharge rates and durations must not exceed pre-development discharge rates and durations. Where the proposed project is located on an already developed site, the pre-project discharge rate and duration must be that of the pre-developed, naturally occurring condition. The draft HMP must be submitted to the San Diego Water Board on or before June 30, 2013. The HMP will be made available for public review and comment and the San Diego Water Board Executive Officer will determine whether to hold a public hearing before the full San Diego Water Board or whether public input will be through written comments to the Executive Officer only.

(1) The HMP must:

(a) Identify a method for assessing susceptibility and geomorphic stability of channel segments which receive runoff discharges from Priority Development Projects. A performance standard must be established that ensures that the geomorphic stability within the channel will not be compromised as a result of receiving runoff discharges from Priority Development Projects.

[15] Updated SSMP and hydromodification requirements must apply to all Priority Development Projects or phases of Priority Development Projects which have not yet begun grading or construction activities at the time any updated SSMP or hydromodification requirement commences. If a Copermittee determines that lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is legally infeasible, the updated SSMP or hydromodification requirement need not apply to the project. The Copermittees must utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in its plans.

(b) Identify a range of runoff flows[16] based on continuous simulation of the entire rainfall record (or other analytical method proposed by the Copermittees and deemed acceptable by the San Diego Water Board) for which Priority Development Project post-project runoff flow rates and durations must not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses. The lower boundary of the range of runoff flows identified must correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches. In the case of an artificially hardened (concrete lined, rip rap, etc.) channel, the lower boundary of the range of runoff flows identified must correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks of a comparable natural channel (i.e. non-hardened, pre-development).

(c) Identify a method to assess and compensate for the loss of sediment supply to streams due to development. A performance and/or design standard must be created and required to be met by Priority Development Projects to ensure that the loss of sediment supply due to development does not cause or contribute to increased erosion within channel segments downstream of Priority Development Project discharge points.

(d) Designate and require Priority Development Projects to implement control measures so that (1) post-project runoff flow rates and durations do not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent for the range of runoff flows identified under section F.1.h.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses; (2) post-project runoff flow rates and durations do not result in channel conditions which do not meet the channel standard developed under section F.1.h.(1)(a) for channel segments downstream of Priority Development Project discharge points; and (3) the design of the project and/or control measures compensate for the loss of sediment supply due to development.

[16] The identified range of run off flows to be controlled should be expressed in terms of peak flow rates of rainfall events, such as “10% of the pre-development 2-year runoff event up to the pre-development 10-year runoff event.”

(e) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects to meet the range of runoff flows identified under Section F.1.h.(1)(b).

(f) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent runoff from the projects from increasing and/or continuing unnatural rates of erosion of channel beds and banks, silt pollutants generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(g) Include a review of pertinent literature.

(h) Identify areas within the Santa Margarita Hydrologic Unit for potential opportunities to restore or rehabilitate stream channels with historic hydromodification of receiving waters that are tributary to documented low or very low Index of Biotic Integrity (IBI) scores.

(i) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(j) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(k) Include technical information, including references, supporting any standards and criteria proposed.

(l) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(m) Include a description of monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP. Monitoring and other program evaluations must include an evaluation of changes to physical (e.g., cross-section, slope, discharge rate, vegetation, pervious/impervious area) and biological (e.g., habitat quality, benthic flora and fauna, IBI scores) conditions of receiving water channels as areas with Priority Development Projects are constructed (i.e. pre- and post-project), as appropriate.

(n) Include mechanisms for assessing and addressing cumulative impacts of Priority Development Projects within a watershed on channel morphology.

(2) In addition to the control measures that must be implemented by Priority Development Projects per section F.1.h.(1)(d), the HMP must include a suite of management measures that can be used on Priority Development Projects to mitigate hydromodification impacts, protect and restore downstream beneficial uses and prevent or further prevent adverse physical changes to downstream channels. The measures must be based on a prioritized consideration of the following elements in this order:

(a) Site design control measures;
(b) On-site management measures;
(c) Regional control measures located upstream of receiving waters; and
(d) In-stream management and control measures.

Where stream channels are adjacent to, or are to be modified as part of a Priority Development Project, management measures must include buffer zones and setbacks. The suite of management measures must also include stream restoration as a viable option to achieve the channel standard in section F.1.h.(1)(a). In-stream controls used as management measures to protect and restore downstream beneficial uses and for preventing or minimizing further adverse physical changes must not include the use of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc. to reinforce stream channels.

(3) As part of the HMP, the Copermittees may develop a waiver program that allows a redevelopment Priority Development Project, as defined in Section F.1.d.(1)(b), to implement offsite mitigation measures. A waiver may be granted if onsite management and control measures are technically infeasible to fully achieve post-project runoff flow rates and durations that do not exceed the pre-development (naturally occurring) runoff flow rates and durations. Redevelopment projects that are granted a waiver under the program must not have post-project runoff flow rates and durations that exceed the pre-project runoff flow rates and durations. The estimated incremental hydromodification impacts from not achieving the pre-development (naturally occurring) runoff flow rates and durations for the project site must be fully mitigated. The offsite mitigation must be within the same stream channel system to which the project discharges. Mitigation projects not within the same stream channel system but within the same hydrologic unit may be approved provided that the project proponent demonstrates that mitigation within the same stream channel is infeasible and that the mitigation project will address similar impacts as expected from the project.

(4) Each individual Copermittee has the discretion to not require Section F.1.h. at Priority Development Projects where the project:

(a) Discharges storm water runoff into underground storm drains discharging directly to water storage reservoirs and lakes;

(b) Discharges storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs and lakes; or

(c) Discharges storm water runoff into other areas identified in the HMP as acceptable to not need to meet the requirements of Section F.1.h by the San Diego Water Board Executive Officer.

(5) HMP Reporting and Implementation

(a) On or before June 30, 2013, the Copermittees must submit to the San Diego Water Board a draft HMP that has been reviewed by the public, including the identification of the appropriate limiting range of flow rates per section F.1.h.(1)(b).

(b) Within 180 days of receiving San Diego Water Board comments on the draft HMP, the Copermittees must submit a final HMP that addressed the San Diego Water Board's comments.

(c) Within 90 days of receiving a determination of adequacy from the San Diego Water Board, each Copermittee must incorporate and implement the HMP for all Priority Development Projects.

(d) Prior to acceptance of the HMP by the San Diego Water Board, the early implementation measures likely to be included in the HMP must be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria

Immediately following adoption of this Order and until the final HMP required by this Order has been determined by the San Diego Water Board to be adequate, each Copermittee must ensure that all Priority Development Projects are implementing the hydromodification (aka Hydrologic Condition of Concern) requirements found in Section 4.4 of the 2006 Riverside County WQMP (updated in 2009) unless one of the following conditions in lieu of those specified in the WQMP are met:

(a) Runoff from the Priority Development Project discharges (1) directly to a conveyance channel or storm drain that is concrete lined all the way from the point of discharge to the ocean, bay, lagoon, water storage reservoir or lake; and (2) the discharge is in full compliance with Copermittee requirements for connections and discharges to the MS4 (including both quality and quantity requirements); and (3) the discharge will not cause increased upstream or downstream erosion or adversely impact downstream habitat; and (4) the discharge is authorized by the Copermittee.

(b) The Priority Development Project disturbs less than one acre. The Copermittee has the discretion to require a project specific WQMP to address hydrologic condition concerns on projects less than one acre on a case by case basis. The disturbed area calculation should include all disturbances associated with larger common plans of development.

(c) The runoff flow rate, volume, velocity, and duration for the post-development condition of the Priority Development Project do not exceed the pre-development (i.e. naturally occurring) condition for the 2-year, 24-hour and 10-year, 24-hour rainfall events. This condition must be substantiated by hydrologic modeling acceptable to the Copermittee.

Once a final HMP is determined to be adequate and is required to be implemented, compliance with the final HMP is required by this Order and compliance with the 2004 WQMP (updated in 2009) or the in-lieu interim hydromodification criteria set forth above no longer satisfies the requirements of this Order.

(7) No part of section F.1.h eliminates the Copermittees' responsibilities for implementing the Low Impact Development requirements under section F.1.d.(4).

### i. UNPAVED ROADS DEVELOPMENT

The Copermittees must develop, where they do not already exist, and implement or require implementation of erosion and sediment control BMPs after construction of new unpaved roads. At a minimum, the BMPs must include the following, or alternative BMPs that are equally effective:

(1) Practices to minimize road related erosion and sediment transport;
(2) Grading of unpaved roads to slope outward where consistent with road engineering safety standards;
(3) Installation of water bars as appropriate; and
(4) Unpaved roads and culvert designs that do not impact creek functions and where applicable, that maintain migratory fish passage.

## 2. CONSTRUCTION COMPONENT

Each Copermittee must implement a construction program which meets the requirements of this section, prevents illicit discharges into the MS4, implements and maintains structural and non-structural BMPs to reduce pollutants in storm water runoff from construction sites to the MS4, reduces construction site discharges of storm water pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards.

### a. ORDINANCE UPDATE

By July 1, 2012, each Copermittee must review and update its grading ordinances and other ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs and other measures.

### b. SOURCE IDENTIFICATION

Each Copermittee must maintain an updated watershed-based inventory of all construction sites within its jurisdiction. The use of an automated database system, such as Geographical Information Systems (GIS) is strongly encouraged.

### c. SITE PLANNING AND PROJECT APPROVAL PROCESS

Each Copermittee must incorporate consideration of potential water quality impacts prior to approval and issuance of construction and grading permits.

(1) Each construction and grading permit must require proposed construction sites to implement designated BMPs and other measures so that illicit discharges into the MS4 are prevented, storm water pollutants discharged from the site will be reduced to the MEP, and construction discharges from the MS4 are prevented from causing or contributing to a violation of water quality standards.

(2) Prior to permit issuance, the project proponent's runoff management plan (or equivalent construction BMP plan) must be required to comply, and reviewed to verify compliance with the local grading ordinance, other applicable local ordinances, and this Order.

(3) Prior to permit issuance, each Copermittee must verify that project proponents subject to California's statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities, (hereinafter General Construction Permit), have existing coverage under the General Construction Permit.

d. **BMP IMPLEMENTATION**

(1) Designate BMPs: Each Copermittee must designate a minimum set of BMPs and other measures to be implemented at all construction sites. The designated minimum set of BMPs must include:

(a) Management Measures:

(i) Pollution prevention, where appropriate;
(ii) Development and implementation of a runoff management plan;
(iii) Minimization of areas that are cleared and graded to only the portion of the site that is necessary for construction;
(iv) Minimization of exposure time of disturbed soil areas;
(v) Minimization of grading during the rainy season and correlation of grading with seasonal dry weather periods to the extent feasible;
(vi) Limitation of grading to a maximum disturbed area as determined by each Copermittee before either temporary or permanent erosion controls are implemented to prevent storm water pollution. The Copermittee has the option of temporarily increasing the size of disturbed soil areas by a set amount beyond the maximum, if the individual site is in compliance with applicable storm water regulations and the site has adequate control practices implemented to prevent storm water pollution;
(vii) Temporary stabilization and reseeding of disturbed soil areas as rapidly as feasible;
(viii) Wind erosion controls;
(ix) Tracking controls;
(x) Non-stormwater management measures to prevent illicit discharges and control storm water pollution sources;
(xi) Waste management measures;
(xii) Preservation of natural hydrologic features where feasible;
(xiii) Preservation of riparian buffers and corridors where feasible;
(xiv) Evaluation and maintenance of all BMPs, until removed; and
(xv) Retention, reduction, and proper management of all storm water pollutant discharges on site to the MEP standard.

(b) Erosion and Sediment Controls:

(i) Erosion prevention. Erosion prevention is to be used as the most important measure for keeping sediment on site during construction;
(ii) Sediment controls. Sediment controls are to be used as a supplement to erosion prevention for keeping sediment on-site during construction;

(iii) Slope stabilization must be used on all active slopes during rain events regardless of the season and on all inactive slopes during the rainy season and during rain events in the dry season;
(iv) Permanent revegetation or landscaping as early as feasible; and
(v) Erosion and sediment controls must be required during the construction of unpaved roads.

(2) Each Copermittee must implement, or require implementation of, enhanced[17] measures to address the threat to water quality posed by all construction sites tributary to CWA section 303(d) water body segments impaired for sediment or turbidity. Each Copermittee must also implement, or require implementation of, enhanced, measures for construction sites within, or adjacent to, or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(3) Active/Passive Sediment Treatment (AST): Each Copermittee must require implementation of AST for sediment at construction sites (or portions thereof) that are determined by the Copermittee to be an exceptional threat to water quality. In evaluating the threat to water quality, the following factors must be considered by the Copermittee:

(a) Soil erosion potential or soil type;
(b) The site's slopes;
(c) Project size and type;
(d) Sensitivity of receiving water bodies;
(e) Proximity to receiving water bodies;
(f) Non-storm water discharges;
(g) Ineffectiveness of other BMPs;
(h) Proximity and sensitivity of aquatic threatened and endangered species of concern;
(i) Known effects of AST chemicals; and
(j) Any other relevant factors.

(4) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round. BMP implementation requirements, however, can vary based on wet and dry seasons. Dry season BMP implementation must plan for and address unseasonal rain events that may occur during the dry season (May 1 through September 30).

[17] Enhanced BMPs are control actions specifically targeted to the pollutant or condition of concern and of higher quality and effectiveness than the minimum control measures otherwise required. Enhanced in this Order means better, not simply more, BMPs.

e. **INSPECTION OF CONSTRUCTION SITES**

Each Copermittee must conduct construction site inspections for compliance with its ordinances (grading, storm water, etc.), permits (construction, grading, etc.), and this Order. Priorities for inspecting sites must consider the nature and size of the construction activity, topography, and the characteristics of soils and receiving water quality.

(1) During the rainy season, each Copermittee must inspect at least every two weeks, all construction sites within its jurisdiction meeting any of the following criteria:

(a) All sites 30 acres or more in size with rough grading or with active, unstabilized slopes occurring during the rainy season;

(b) All sites one acre or more, and within the same hydrologic subarea and tributary to a CWA section 303(d) water body segment impaired for sediment; or within, directly adjacent to, or discharging directly to a receiving water within an ESA; and

(c) Other sites determined by the Copermittees or the San Diego Water Board as a significant threat to water quality. In evaluating threat to water quality, the following factors must be considered: (1) soil erosion potential; (2) site slope; (3) project size and type; (4) sensitivity of receiving water bodies; (5) proximity to receiving water bodies; (6) non-storm water discharges; (7) known past record of non-compliance by the operators of the construction site; and (8) any other relevant factors.

(2) During the rainy season, each Copermittee must inspect at least monthly, all construction sites with one acre or more of soil disturbance not meeting the criteria specified above in section F.2.e.(1).

(3) During the rainy season, each Copermittee must inspect construction sites less than one acre in size as needed to ensure compliance with its ordinances and this Order.

(4) Each Copermittee must inspect all construction sites as needed during the dry season. Sites meeting the criteria in section F.2.e.(1) must be inspected at least once in August or September each year.

(5) Re-inspections: Based upon site inspection findings, each Copermittee must implement all follow-up actions (i.e., re-inspection, enforcement) necessary to comply with this Order. Reinspection frequencies must be determined by each Copermittee based upon the severity of deficiencies, the nature of the construction activity, and the characteristics of soils and receiving water quality.

(6) Inspections of construction sites must include, but not be limited to:

(a) Check for coverage under the General Construction Permit (Notice of Intent (NOI) and/or Waste Discharge Identification No.) during initial inspections;
(b) Assessment of compliance with Copermittee ordinances and permits related to runoff, including the implementation and maintenance of designated minimum BMPs;
(c) Assessment of BMP effectiveness;
(d) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
(e) Review of site monitoring data results, if the site monitors its runoff
(f) Education and outreach on storm water pollution prevention, as needed; and
(g) Creation of a written or electronic inspection report.

(7) The Copermittees must track the number of inspections for each inventoried construction site throughout the reporting period to verify that each site is inspected at the minimum frequencies required.

f. **ENFORCEMENT OF CONSTRUCTION SITES**

(1) Each Copermittee must develop and implement an escalating enforcement process that achieves prompt corrective actions at construction sites for violations of the Copermittee's water quality protection permits, requirements, and ordinances. This enforcement process must include authorizing the Copermittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process must include appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

(2) Each Copermittee must be able to respond to construction complaints received from third-parties and to ensure the San Diego Water Board that corrective actions have been implemented, if warranted.

g. **REPORTING OF NON-COMPLIANT SITES**

(1) In addition to the notification requirements in Attachment B, each Copermittee must notify the San Diego Water Board when the Copermittee issues high level enforcement (as defined in the Copermittee's JRMP) to a construction site that poses a significant threat to water quality in its jurisdiction as a result of violations of its storm water ordinances.

(2) Each Copermittee must annually notify the San Diego Water Board, prior to the commencement of the rainy season, of all construction sites with alleged violations that pose a significant threat to water quality. Information may be

provided as part of the JRMP annual report if submitted prior to the rainy season. Information provided must include, but not be limited to, the following:

(a) WDID number if enrolled under the General Construction Permit
(b) Site Location, including address
(c) Current violations or suspected violations

## 3. EXISTING DEVELOPMENT COMPONENT

### a. MUNICIPAL

Each Copermittee must implement a municipal program for the Copermittee's areas and activities that meets the requirements of this section, prevents illicit discharges into the MS4, reduces municipal discharges of storm water pollutants from the MS4 to the MEP, and prevents municipal discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification / Inventory

Each Copermittee must maintain an updated watershed-based inventory of all its municipal areas and those activities that have the potential to generate pollutants. The inventory must include the name, address (if applicable), and a description of the area/activity; which pollutants are potentially generated by the area/activity; whether the area/activity is adjacent to an ESA; and identification of whether the area/activity is tributary to and within the same hydrologic subarea as a CWA section 303(d) water body segment and generates pollutants for which the water body segment is impaired. Linear facilities, such as roads, streets, and highways, do not need to be individually inventoried. The use of an automated database system, such as Geographical Information Systems (GIS) is highly recommended.

(2) General BMP Implementation

(a) Pollution Prevention: Each Copermittee must implement pollution prevention methods in its municipal program and must require their use by appropriate departments, personnel, and contractors.

(b) Designate Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all municipal areas and those activities that have the potential to generate pollutants. The designated minimum BMPs for municipal areas and activities must be area or activity specific as appropriate.

(c) Each Copermittee must designate BMPs for special events that are expected to generate significant trash and litter. Controls to consider must include:

(i) Temporary screens on catch basins and storm drain inlets;
(ii) Temporary fencing to prevent windblown trash from entering adjacent water bodies and MS4 channels;
(iii) Proper management of trash and litter;
(iv) Catch basin cleaning following the special event and prior to an anticipated rain event;
(v) Street sweeping of roads, streets, highways and parking facilities following the special event; and
(vi) Other equivalent controls.

(d) Designate BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for its municipal areas and activities tributary to and within the same hydrologic subarea as CWA section 303(d) impaired water body segments when an area or those activities have the potential to generate pollutants for which the water body segment is impaired. Each Copermittee must also designate additional controls for its municipal areas and activities within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(e) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on its inventory to comply with this Order for each of its municipal area and those activities that have the potential to discharge pollution.

(3) <u>BMP Implementation for Management of Pesticides, Herbicides, and Fertilizers</u>

Each Copermittee must implement BMPs to reduce the contribution of storm water pollutants to the MEP associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from its municipal areas and activities to MS4s and receiving waters. Such BMPs must include, at a minimum:

(a) Educational activities, permits, certifications and other measures for municipal applicators and distributors;
(b) Integrated Pest Management (IPM) measures that rely on non-chemical solutions;
(c) The use of native vegetation;
(d) Schedules for irrigation and chemical application; and

(e) The collection and proper disposal of unused pesticides, herbicides, and fertilizers.

(4) BMP implementation for Flood Control Structures

(a) Each Copermittee must implement procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies.

(b) Each Copermittee must include water quality protection measures, where feasible, when retrofitting existing flood control structural devices.

(c) Each Copermittee must evaluate its existing flood control structures as part of ongoing routine maintenance, identify structures causing or contributing to a condition of pollution, implement measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device. The inventory and evaluation must be completed by and submitted to the San Diego Water Board in each JRMP Annual Report.

(5) BMP Implementation for Sweeping of Municipal Areas

Where municipal area sweeping is implemented as an MS4 BMP for municipal roads, streets, highways, and parking facilities, each Copermittee must design and implement the program based on the following criteria:

(a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris must be swept at least two times per month.

(b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris must be swept at least monthly.

(c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris must be swept as necessary, but no less than once per year.

(6) Operation and Maintenance of Municipal Separate Storm Sewer System (MS4) and Treatment Controls

(a) Treatment Controls: Each Copermittee must implement a schedule of inspection and maintenance activities to verify proper operation of all its municipal structural treatment controls designed to reduce storm water pollutant discharges to or from its MS4s and related drainage structures.

(b) MS4 and Facilities: Each Copermittee must implement a schedule of maintenance activities for its MS4 and facilities (including but not limited to catch basins, storm drain inlets, detention basins, etc). The maintenance activities must, at a minimum, include:

(i) Inspection and removal of accumulated waste at least once a year between May 1 and September 30 of each year for all MS4 facilities;
(ii) Additional facilities cleaning as necessary between October 1 and April 30 of each year;
(iii) Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year;
(iv) Open channels and basins must be cleaned of observed anthropogenic litter in a timely manner;
(v) Maintenance activities within open channels must not adversely impact beneficial uses;
(vi) Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed;
(vii) Proper disposal of waste removed pursuant to applicable laws; and
(viii) Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

(7) Infiltration From Sanitary Sewer to MS4/Provide Preventive Maintenance

(a) Each Copermittee must implement controls and measures to prevent and eliminate infiltration of seepage from sanitary sewers to MS4s through thorough, routine preventive maintenance of the MS4. Each Copermittee that operates both a municipal sanitary sewer system and a MS4 must implement controls and measures to prevent and eliminate infiltration of seepage from the sanitary sewers to the MS4s that must include overall sanitary sewer and MS4 surveys and thorough, routine preventive maintenance of both.

(b) Each Copermittee must implement controls to limit infiltration of seepage from sanitary sewers to municipal separate storm sewer systems where necessary. Such controls must include:

(i) Adequate plan checking for construction and new development;
(ii) Incident response training for its municipal employees that identify sanitary sewer spills;
(iii) Code enforcement inspections;
(iv) MS4 maintenance and inspections;
(v) Interagency coordination with sewer agencies; and

(vi) Proper education of its municipal staff and contractors conducting field operations on the MS4 or its municipal sanitary sewer (if applicable).

(8) Inspection of Municipal Areas and Activities

(a) At a minimum, each Copermittee must inspect the following high priority municipal areas and activities annually:

(i) Roads, Streets, Highways, and Parking Facilities;
(ii) Flood Management Projects and Flood Control Devices not otherwise inspected per Section F.3.a.(6)(b);
(iii) Areas and activities tributary to and within the same hydrologic subarea as a CWA section 303(d) impaired water body segment, where an area or activity generates pollutants for which the water body segment is impaired;
(iv) Areas and activities within or adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order);
(v) Municipal Facilities:
[a] Active or closed municipal landfills;
[b] Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewage collection systems;
[c] Solid waste transfer facilities;
[d] Land application sites;
[e] Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles; and
[f] Household hazardous waste collection facilities.
(vi) Municipal airfields;
(vii) Parks and recreation facilities;
(viii) Special event venues following special events (festivals, sporting events, etc.);
(ix) Power washing activities; and
(x) Other municipal areas and activities that the Copermittee determines may contribute a significant pollutant load to the MS4.

(b) Other municipal areas and activities must be inspected as needed and in response to water quality data, valid public complaints, and findings from municipal or contract staff.

(c) Based upon site inspection findings, each Copermittee must implement all follow-up actions necessary to comply with this Order.

(9) Enforcement of Municipal Areas and Activities

Each Copermittee must enforce its storm water ordinance for all its municipal areas and activities as necessary to maintain compliance with this Order.

(10) Copermittee Maintained Unpaved Roads Maintenance

(a) The Copermittees must develop, where they do not already exist, and implement or require implementation of BMPs for erosion and sediment control measures during their maintenance activities on Copermittee maintained unpaved roads, particularly in or adjacent to receiving waters.

(b) The Copermittees must develop and implement or require implementation of appropriate BMPs to minimize impacts on streams and wetlands during their unpaved road maintenance activities.

(c) The Copermittees must maintain as necessary their unpaved roads adjacent to streams and riparian habitat to reduce erosion and sediment transport;

(d) Re-grading of unpaved roads during maintenance must be sloped outward where consistent with road engineering safety standards or alternative equally effective BMPs must be implemented to minimize erosion and sedimentation from unpaved roads; and

(e) Through their maintenance of unpaved roads, the Copermittees must examine the feasibility of replacing existing culverts or design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology.

**b. COMMERCIAL / INDUSTRIAL**

Each Copermittee must implement a commercial / industrial program that meets the requirements of this section, prevents illicit discharges into the MS4, reduces commercial / industrial discharges of storm water pollutants from the MS4 to the MEP, and prevents commercial / industrial discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification

(a) Each Copermittee must maintain an updated watershed-based inventory of all industrial and commercial sites/sources within its jurisdiction (regardless of ownership) that could contribute a significant pollutant load to the MS4. The inventory must include the following minimum

information for each industrial and commercial site/source: name; address; pollutants potentially generated by the site/source; and identification of whether the site/source is tributary to a CWA §303(d) water body segment and generates pollutants for which the water body segment is impaired; and a narrative description including SIC codes which best reflects the principal products or services provided by each facility.

At a minimum, the following sites/sources must be included in the inventory:

(i) Commercial Sites/Sources:

[a] Automobile repair, maintenance, fueling, or cleaning;
[b] Airplane repair, maintenance, fueling, or cleaning;
[c] Boat repair, maintenance, fueling, or cleaning;
[d] Equipment repair, maintenance, fueling, or cleaning;
[e] Automobile and other vehicle body repair or painting;
[f] Mobile automobile or other vehicle washing;
[g] Automobile (or other vehicle) parking lots and storage facilities;
[h] Retail or wholesale fueling;
[i] Pest control services;
[j] Eating or drinking establishments, including such retail establishments with food markets;
[k] Mobile carpet, drape or furniture cleaning;
[l] Cement mixing or cutting;
[m] Masonry;
[n] Painting and coating;
[o] Botanical or zoological gardens and exhibits;
[p] Landscaping;
[q] Nurseries and greenhouses;
[r] Golf courses, parks and other recreational areas/facilities;
[s] Cemeteries;
[t] Pool and fountain cleaning;
[u] Marinas;
[v] Portable sanitary services;
[w] Building material retailers and storage;
[x] Animal boarding facilities and kennels;
[y] Mobile pet services;
[z] Power washing services;
[aa] Plumbing services; and
[bb] Other sites and sources with a history of un-authorized discharges to the MS4.

(ii) Industrial Sites/Sources:

[a] Industrial Facilities, as defined at 40 CFR § 122.26(b)(14), including those subject to the General Industrial Permit or other individual NPDES permit;
[b] Operating and closed landfills;
[c] Facilities subject to SARA Title III; and
[d] Hazardous waste treatment, disposal, storage and recovery facilities.

(iii) ESAs and 303(d) Listed Waterbodies: All other commercial or industrial sites/sources tributary to and within the same hydrologic subarea as a CWA Section 303(d) impaired water body segment, where the site/source generates pollutants for which the water body segment is impaired. All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order) or that generate pollutants tributary to and within the same hydrologic subarea as an observed exceedance of an action level.

(iv) All other commercial or industrial sites/sources that the Copermittee determines may contribute a significant pollutant load to the MS4.

(2) <u>General BMP Implementation</u>

(a) Pollution Prevention: Each Copermittee must require the use of pollution prevention methods by the inventoried industrial and commercial sites/sources.

(b) Designate / Update Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all inventoried industrial and commercial sites/sources. Where BMPs have already been designated, each Copermittee must review and update its existing BMPs for adequacy no later than with the submittal of the JRMP. Copermittees may continue to regularly review and update their designated BMPs for adequacy and subsequently submit any updates in their Annual Report. The designated minimum BMPs must be specific to facility types and pollutant-generating activities, as appropriate.

(c) Designate Enhanced BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for inventoried industrial and commercial sites/sources tributary to and within the same hydrologic subarea as CWA section 303(d) impaired water body segments (where a site/source generates pollutants for which the water body segment is

impaired). Each Copermittee must also designate additional controls for industrial and commercial sites/sources within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order). Copermittees may continue to regularly review and update their designated enhanced BMPs for adequacy and subsequently submit any updates in their next Annual Report.

(d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on inspections, incident responses, and water quality data to comply with this Order at each industrial and commercial site/source within its jurisdiction.

(3) Mobile Businesses Program

(a) Each Copermittee must develop and implement a program to reduce the discharge of storm water pollutants from mobile businesses to the MEP and to prohibit non-storm water discharges pursuant to Section B of this Order. Each Copermittee must keep as part of its commercial source inventory a listing of mobile businesses known to operate within its jurisdiction that conduct services listed above in section F.3.b.(1)(a). The program must include:

(i) Development and implementation of minimum standards and BMPs to be required for each of the various types of mobile businesses;
(ii) Development and implementation of an enforcement strategy which specifically addresses the unique characteristics of mobile businesses;

(iii) Notification of those mobile businesses known to operate within the Copermittee's jurisdiction of the minimum standards and BMP requirements;
(iv) Development and implementation of an outreach and education strategy; and
(v) Inspection of mobile businesses as needed to implement the program.

(b) If they choose to, the Copermittees may cooperate in developing and implementing their programs for mobile businesses, including sharing of mobile business inventories, BMP requirements, enforcement action information, and education.

(4) Inspection of Industrial and Commercial Sites/Sources

Each Copermittee must conduct industrial and commercial site inspections for compliance with its ordinances, permits, and this Order. Mobile businesses must be inspected as needed pursuant to section F.3.b.(3).

(a) Inspection Procedures: Inspections must include but not be limited to:

(i) Review of BMP implementation plans not including SSMPs required pursuant to section F.1.d, if the site uses or is required to use such a plan;
(ii) Review of facility monitoring data, if the site monitors its runoff;
(iii) Check for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification Number), if applicable;
(iv) Assessment of compliance with Copermittee ordinances and Copermittee issued permits related to runoff;
(v) Assessment of the implementation, maintenance and effectiveness of the designated minimum and/or enhanced BMPs;
(vi) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff; and
(vii) Education and training on storm water pollution prevention, as conditions warrant.

(b) Frequencies: At a minimum all sites determined to pose a high threat to water quality must be inspected each year. All inventoried sites must be inspected at least once during a five year period. In evaluating threat to water quality, each Copermittee must consider, at a minimum, the following:

(i) Type of activity (SIC code);
(ii) Materials used at the facility;
(iii) Wastes generated;
(iv) Pollutant discharge potential, including whether the facility generates a pollutant that exceeds an action level;
(v) Non-storm water discharges;
(vi) Size of facility;
(vii) Proximity to receiving water bodies;
(viii) Sensitivity of receiving water bodies;
(ix) Whether the facility is subject to the General Industrial Permit or an individual NPDES permit;
(x) Whether the facility has filed a No Exposure Certification/Notice of Non-Applicability;
(xi) Facility design;

(xii) Total area of the site, portion of the site where industrial or commercial activities occur, and area of the site exposed to rainfall and runoff;
(xiii) The facility's compliance history; and
(xiv) Any other relevant factors.

(c) Third-Party Certifications: Each Copermittee may propose to develop and implement a third party certification program subject to San Diego Water Board Executive Officer acceptance. This program would verify industrial and commercial site/source compliance with the Copermittees' ordinances, permits, and this Order. To the extent that third party certifications are conducted to fulfill the requirements of Section F.3.b.(4) above, the Copermittee retains responsibility for compliance with this Order and will be responsible for conducting and documenting quality assurance and quality control of the third-party certifications.

The Copermittee's proposed third party certification program must include the following:

(i) A description of the procedures and measures for quality assurance and quality control;
(ii) A listing of sites/sources that may and may not participate in the program;
(iii) The representative percentage of certifications that would qualify to satisfy the inspection requirements in section F.3.b(4)(c) above;
(iv) Photo documentation of potential storm water violations identified during the third party inspection;
(v) Reporting to the Copermittee of identified significant potential violations, including imminent or observed illegal discharges, within 24 hours of the third party inspection;
(vi) Reporting to the Copermittee of all findings within one week of the inspection being conducted; and
(vii) Copermittee follow-up and/or enforcement actions for identified potential storm water violations within two business days of the potential violation report receipt.

(d) Based upon site inspection findings, each Copermittee must implement all follow-up actions and enforcement necessary to comply with this Order.

(e) To the extent that the San Diego Water Board has conducted an inspection of an industrial site during a particular year, the requirement for the responsible Copermittee to inspect this facility during the same year is deemed satisfied.

(f) The Copermittees must track the number of inspections for the inventoried industrial and commercial sites/sources throughout the reporting period to verify that the sites/sources are inspected at the minimum frequencies listed in this Order.

(5) Enforcement of Industrial and Commercial Sites/Sources

Each Copermittee must enforce its storm water ordinance for all industrial and commercial sites/sources as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following tools or their equivalent: Non-monetary penalties, fines, bonding requirements, liens and/or permit denials for non-compliance.

(6) Reporting of Non-Compliant Sites

Each Copermittee must annually notify the San Diego Water Board, prior to the commencement of the wet season, of any unresolved high level enforcement action (as defined in the Copermittees' JRMP) that poses a significant threat to water quality in its jurisdiction as a result of violations of their storm water ordinances.

### c. RESIDENTIAL

Each Copermittee must implement a residential program that meets the requirements of this section, prevents illicit discharges into the MS4, reduces residential discharges of storm water pollutants from the MS4 to the MEP, and prevents residential discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Threat to Water Quality Prioritization

Each Copermittee must identify residential areas and activities that pose a high threat to water quality. At a minimum, these must include:

(a) Automobile repair, maintenance, washing, and parking;
(b) Home and garden care activities and product use (pesticides, herbicides, and fertilizers);
(c) Disposal of trash, pet waste, green waste, and household hazardous waste (e.g., paints, cleaning products);
(d) Any other residential source that the Copermittee determines may contribute a significant pollutant load to the MS4;

(e) Any residential areas tributary to and within the same hydrologic subarea as a CWA section 303(d) impaired water body, where the residence generates pollutants for which the water body is impaired; and

(f) Any residential areas within or directly adjacent to or discharging directly to receiving waters within an environmentally sensitive area (as defined in Attachment C of this Order)

(2) BMP Implementation

(a) Pollution Prevention: Each Copermittee must actively encourage the use of pollution prevention methods by residents.

(b) Designate BMPs: Each Copermittee must designate minimum BMPs for high-threat-to-water quality residential areas and activities. The designated minimum BMPs for high-threat-to-water quality residential areas and activities must be area or activity specific.

(c) Hazardous Waste BMPs: Each Copermittee must facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes. Such facilitation must include educational activities, public information activities, and establishment of collection sites operated individually and/or jointly by the Copermittee(s) or a private entity. Curbside collection of household hazardous wastes is encouraged.

(d) Implement BMPs: Each Copermittee must implement, or require implementation of, the designated minimum BMPs and any additional measures necessary to comply with Sections A and B of this Order.

(e) Each Copermittee must implement, or require implementation of, BMPs for residential areas and activities that have not been designated a high threat to water quality, as necessary.

(3) Enforcement of Residential Areas and Activities

Each Copermittee must enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this Order.

(4) Common Interest Areas (CIA) / Home Owner Association (HOA) Areas, and Mobile Home Parks

Each Copermittee must ensure that effective measures exist and are implemented or required to be implemented to ensure that runoff within and from common interest developments, including areas managed by associations and mobile home parks, and meets the objectives of this section and Order.

(a) BMP Implementation: Each Copermittee must implement or require implementation of management measures based on a review of pertinent factors, including:

(i) Maintenance duties and procedures typically used by CIA/HOA maintenance associations within its jurisdiction;
(ii) Whether streets and storm drains are publicly or privately owned within the CIA/HOA or mobile home park;
(iii) Whether the CIA/HOA area or mobile home park has been identified as a high priority residential area based on an evaluation of the site potential to generate pollutants contributing to a 303(d) listed waterbody or an observed action level exceedance; and
(iv) Other activities conducted or authorized by the HOA that may pose a significant risk to inland receiving waters.

(b) Legal Authority and Enforcement: By July 1, 2012, each Copermittee must review, and if necessary update, its Municipal Code to verify that they have the legal authority to implement and enforce its ordinances within CIA/HOA areas and mobile home parks.

### d. RETROFITTING EXISTING DEVELOPMENT

Each Copermittee must develop and implement a retrofitting program that meets the requirements of this section. The goals of the existing development retrofitting program are to address the impacts of existing development through retrofit projects that reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards. Where feasible, at the discretion of the Copermittee, the existing development retrofitting program may be coordinated with flood control projects and other infrastructure improvement programs.

(1) The Copermittee(s) must identify and inventory existing areas of development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting. Potential retrofitting candidates must include but are not limited to:

(a) Areas of development that generate pollutants of concern to a TMDL or an ESA;
(b) Receiving waters that are channelized or otherwise hardened;
(c) Areas of development tributary to receiving waters that are channelized or otherwise hardened;

(d) Areas of development tributary to receiving waters that are significantly eroded; and
(e) Areas of development tributary to an ASBS or SWQPA.

(2) Each Copermittee must evaluate and rank the inventoried areas of existing developments to prioritize retrofitting. Criteria for evaluation must include but is not limited to:

(a) Feasibility;
(b) Cost effectiveness;
(c) Pollutant removal effectiveness, including reducing pollutants exceeding action level;
(d) Tributary area potentially treated;
(e) Maintenance requirements;
(f) Landowner cooperation;
(g) Neighborhood acceptance;
(h) Aesthetic qualities;
(i) Efficacy at addressing concern; and
(j) Potential improvements on public health and safety.

(3) Each Copermittee must consider the results of the evaluation in prioritizing work plans for the following year in accordance with Sections G.1 and J. Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs. Where feasible, the retrofit projects may be designed in accordance with the SSMP requirements within sections F.1.d.(3) through F.1.d.(8) and the Hydromodification requirements in Section F.1.h.

(4) The Copermittees must cooperate with private landowners to encourage site specific retrofitting projects. The Copermittee must consider the following practices in cooperating and encouraging private landowners to retrofit their existing development:

(a) Demonstration retrofit projects;
(b) Retrofits on public land and easements that treat runoff from private developments;
(c) Education and outreach;
(d) Subsidies for retrofit projects;
(e) Requiring retrofit projects as enforcement, mitigation or ordinance compliance;
(f) Public and private partnerships; and
(g) Fees for existing discharges to the MS4 and reduction of fees for retrofit implementation.

(5) The known completed retrofit BMPs must be tracked in accordance with Section F.1.f. Retrofit BMPs on publicly owned properties must be inspected per section F.1.f . Privately owned retrofit BMPs must be inspected as needed.

(6) Where constraints on retrofitting preclude effective BMP deployment on existing developments at locations critical to protect receiving waters (as identified in section F.3.d.(1)), a Copermittee may propose a regional mitigation project to improve water quality. Such regional projects may include but are not limited to:

(a) Regional water quality treatment BMPs;
(b) Urban creek or wetlands restoration and preservation;
(c) Daylighting and restoring underground creeks;
(d) Localized rainfall storage and reuse to the extent such projects are fully protective of downstream water rights;
(e) Hydromodification project; and
(f) Removal of invasive plant species.

(7) A retrofit project or regional mitigation project may qualify as a Watershed Water Quality Activity provided it meets the requirements in section G. Watershed Workplan.

## 4. ILLICIT DISCHARGE DETECTION AND ELIMINATION

Each Copermittee must implement a program that meets the requirements of this section to actively detect and eliminate illicit discharges and disposal into the MS4. The program must address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Copermittee in accordance with section B of this Order.

### a. PREVENT AND DETECT ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee must implement measures to prevent and detect illicit discharges to the MS4.

(1) Legal Authority: Each Copermittee must retain legal authority to prevent and eliminate illicit discharges and connections to the MS4.

(2) Inspections: Each Copermittee must include use of appropriate Copermittee personnel and contractors to assist in identifying illicit discharges and connections during their daily activities.

(a) Visual inspections for illegal discharges and connections must be conducted during routine maintenance of all MS4 facilities.

(b) Copermittee staff and contractors conducting non-MS4 field operations must be trained to report suspected illegal discharges and connections to proper Copermittee staff.

b. **MAINTAIN MS4 MAP**

Each Copermittee must maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. The use of GIS is strongly encouraged. The MS4 map must include all segments of the storm sewer system owned, operated, and maintained by the Copermittee, as well as all known locations of inlets that discharge and/or collect runoff into the Copermittee's MS4, all known locations of connections with other MS4s (e.g. Caltrans), and all known locations of all the outfalls that discharge runoff from the Copermittee's MS4. The accuracy of the MS4 map must be confirmed during dry weather field screening and analytical monitoring and must be updated at least annually. The MS4 map including any GIS layers must be submitted with the updated JRMP.

c. **FACILITATE PUBLIC REPORTING OF ILLICIT DISCHARGES AND CONNECTIONS - PUBLIC HOTLINE**

Each Copermittee must promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s. Each Copermittee must facilitate public reporting through development and operation of a public hotline. Public hotlines can be Copermittee-specific or shared by Copermittees. All storm water hotlines must be capable of receiving reports in both English and Spanish 24 hours per day and seven days per week. All reported incidents, and how each was resolved, must be summarized in each Copermittee's Annual Report.

d. **DRY WEATHER FIELD SCREENING AND ANALYTICAL MONITORING**

Each Copermittee must conduct dry weather field screening and analytical monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2010-0016 in Attachment E of this Order.

e. **INVESTIGATION / INSPECTION AND FOLLOW-UP**

Each Copermittee must implement procedures to investigate and inspect portions of its MS4 that, based on the results of field screening, analytical monitoring, or other appropriate information, indicate a reasonable potential of containing illicit discharges, illicit connections, or other sources of pollutants in non-storm water.

(1) Develop response criteria for data: Each Copermittee must develop, update, and use numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed in response to water quality monitoring. The criteria must include required non-storm water action levels (see Section C) and a consideration of 303(d)-listed waterbodies and environmentally sensitive areas (ESAs) as defined in Attachment C.

(2) Respond to data: Each Copermittee must investigate portions of the MS4 for which water quality data or conditions indicates a potential illegal discharge or connection.

(a) Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) must be investigated immediately.

(b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittee(s) having jurisdiction must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation must be included in the Annual Report.

(c) Analytical data: Within five business days of receiving analytical laboratory results that exceed action levels, the Copermittee(s) having jurisdiction must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation must be included in the Annual Report.

(3) Respond to notifications: Each Copermittee must respond to and resolve each reported incident (e.g., public hotline, staff notification, etc.) made to the Copermittee in a timely manner. Criteria may be developed to assess the validity of, and prioritize the response to, each report.

f. **ELIMINATION OF ILLICIT DISCHARGES AND CONNECTIONS**

Each Copermittee must take immediate action to initiate steps necessary to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections after detection within its jurisdiction. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated immediately.

g. **ENFORCE ORDINANCES**

Each Copermittee must implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4 and to eliminate detected illicit discharges and connections to its MS4.

h. **PREVENT AND RESPOND TO SEWAGE SPILLS (INCLUDING FROM PRIVATE LATERALS AND FAILING SEPTIC SYSTEMS) AND OTHER SPILLS**

Each Copermittee must implement management measures and procedures (including a notification mechanism) to prevent, respond to, contain and clean up all sewage (see below) and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems). Copermittees must coordinate with spill response teams to prevent entry of spills into the MS4 and contamination of surface water, ground water and soil. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate Copermittee departments, programs and agencies so that maximum water quality protection is available at all times.

## 5. PUBLIC PARTICIPATION COMPONENT

Each Copermittee must incorporate a mechanism for public participation in the updating, development, and implementation of the JRMP.

## 6. EDUCATION COMPONENT

Each Copermittee must implement education programs to (1) measurably increase the knowledge regarding MS4s, impacts of runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutants in storm water discharges and eliminate prohibited non-storm water discharges to MS4s and the environment. At a minimum, the education programs must meet the requirements of this section and address the following target communities:

- Copermittee Departments and Personnel
- New Development / Redevelopment Project Applicants, Developers, Contractors, Property Owners, and other Responsible Parties
- Construction Site Owners and Operators
- Commercial Owners and Operators
- Industrial Owners and Operators
- Residential Community and General Public

a. **GENERAL REQUIREMENTS**

(1) At a minimum, the Copermittee education programs must educate each target community on the following topics, as appropriate to the target community's potential storm water and non-storm water discharges to the MS4:

(a) Applicable water quality laws, regulations, permits, and requirements;
(b) Best management practices;
(c) General runoff concepts;
(d) Existing water quality, including local water quality conditions, impaired waterbodies and environmentally sensitive areas; and
(e) Other topics, as determined by the Copermittee(s), such as public reporting mechanisms, water conservation, low-impact development techniques, and public health and vector issues associated with runoff.

(2) Each Copermittee must implement educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials.

b. **SPECIFIC REQUIREMENTS**

(1) <u>Copermittee Departments and Personnel</u>

(a) Each Copermittee must implement an education program so its staff and contractors (and Planning Boards and Elected Officials, if applicable) responsible for implementing the requirements of this Order have an understanding of the following topics as applicable to their responsibilities:

(i) Applicable water quality laws and regulations;
(ii) The potential effects and impacts that Copermittee departments and personnel activities related to their job duties can have on water quality);
(iii) Plan review policies and procedures to verify consistent application;
(iv) Methods of minimizing impacts to receiving water quality resulting from development, construction, and other potential pollutant generating activities;

(v) Proper implementation of erosion and sediment control, source control, treatment control, and other BMPs to minimize the impacts to receiving water quality resulting from development, construction, and other potential pollutant generating activities;
(vi) Applicable recordkeeping and tracking mechanisms; and
(vii) Inspection and enforcement procedures, BMP implementation, and review of monitoring data.

(b) Each Copermittee must train its staff responsible for oversight and conducting storm water compliance inspections and enforcement of construction activities (e.g. construction, building, code enforcement, grading review staffs, inspectors, and other responsible construction staff) annually prior to the rainy season.

(c) Each Copermittee must train its staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year.

(2) New Development / Redevelopment and Construction Sites

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee must notify parties responsible for the project about the importance of educating all construction workers in the field about storm water issues and BMPs, in addition to the topics under Section F.6.a.(1).

(3) Commercial and Industrial Sites / Sources

At least once during the five-year period of this Order, each Copermittee must notify the owner/operator of each of its inventoried commercial and industrial site/source of the BMP requirements applicable to the site/source.

(4) Residential and General Public

Each Copermittee shall collaboratively conduct or participate in development and implementation of a program to educate residential and general public target communities. The Copermittee residential and general public education programs must address potential pollutant generating activities (e.g., car washing, mobile operations, yard maintenance) and pollutant generating products (e.g., pesticides, fertilizers, household chemicals). The target audiences of the residential and general public education programs must include underserved target audiences (e.g., disadvantaged communities), residents and managers of CIA/HOA areas, and owners and residents of mobile home parks.

## G. WATERSHED WATER QUALITY WORKPLAN

Each Copermittee must collaborate with other Copermittees to develop and implement a Watershed Water Quality Workplan (Watershed Workplan) to identify, prioritize, address, and mitigate the highest priority water quality issues/pollutants in the Upper Santa Margarita Watershed.

### 1. Watershed Workplan Components

The work plan must, at a minimum:

a. Characterize the receiving water quality in the watershed. Characterization must include assessment and analysis of regularly collected water quality data, reports, monitoring and analysis generated in accordance with the requirements of the Receiving Waters Monitoring and Reporting Program, as well as applicable information available from other public and private organizations. This characterization must include an updated watershed map.

b. Identify and prioritize water quality problem(s) in terms of constituents by location, in the watershed's receiving waters. In identifying water quality problem(s), the Copermittees must, at a minimum, give consideration to TMDLs, receiving waters listed on the CWA section 303(d) list, waters with persistent violations of water quality standards, toxicity, or other impacts to beneficial uses, and other pertinent conditions.

c. Identify the likely sources, pollutant discharges and/or other factors causing the highest water quality problem(s) within the watershed. Efforts to determine such sources must include, but not be limited to: use of information from the construction, industrial/commercial, municipal, and residential source identification programs required within the JRMP of this Order; water quality monitoring data collected as part of the Receiving Water Monitoring and Reporting Program required by this Order, and additional focused water quality monitoring to identify specific sources within the watershed.

d. Develop a watershed BMP implementation strategy to attain receiving water quality objectives in the identified highest priority water quality problem(s) and locations. The BMP implementation strategy must include a schedule for implementation of the BMPs to abate specific receiving water quality problems and a list of criteria to be used to evaluate BMP effectiveness. Identified watershed water quality problems may be the result of jurisdictional discharges that will need to be addressed with BMPs applied in a specific jurisdiction in order to generate a benefit to the watershed. This implementation strategy must include a map of any implemented and/or proposed BMPs.

e. Develop a strategy to monitor improvements in receiving water quality directly

resulting from implementation of the BMPs described in the Watershed Workplan. The monitoring strategy must review the necessary data to report on the measured pollutant reduction that results from proper BMP implementation. Monitoring must, at a minimum, be conducted in the receiving water to demonstrate reduction in pollutant concentrations and progression towards attainment of receiving water quality objectives.

f. Establish a schedule for development and implementation of the Watershed strategy outlined in the Workplan. The schedule must, at a minimum, include forecasted dates of planned actions to address Provisions E.2(a) through E.2(e) and dates for watershed review meetings through the remaining portion of this Permit cycle. Annual watershed workplan review meetings must be open to the public and appropriately publically noticed such that interested parties may come and provide comments on the watershed program.

**2. Watershed Workplan Implementation**

Watershed Copermittee's must implement the Watershed Workplan within 90 days of submittal unless otherwise directed by the San Diego Water Board.

**3. Copermittee Collaboration**

Watershed Copermittees must collaborate to develop and implement the accepted Watershed Workplan. Watershed Copermittee collaboration must include frequent regularly scheduled meetings. The Copermittees must pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-Copermittee owners of the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4. The Copermittees must, as appropriate, participate in watershed management efforts to address water quality issues within the entire Santa Margarita Watershed (such as the County of San Diego and U.S. Marine Corps Camp Pendleton).

**4. Public Participation**

Watershed Copermittees must implement a watershed-specific public participation mechanism within each watershed. A required component of the watershed-specific public participation mechanism must be a minimum 30-day public review of and opportunity to comment on the Watershed Workplan prior to submittal to the San Diego Water Board. The Workplan must include a description of the public participation mechanisms to be used and identification of the persons or entities anticipated to be involved during the development and implementation of the Watershed Workplan.

### 5. Watershed Workplan Review and Updates

Watershed Copermittees must review and update the Watershed Workplan annually to identify needed changes to the prioritized water quality problem(s) listed in the workplan. All updates to the Watershed Workplan must be presented during an Annual Watershed Review Meeting. Annual Watershed Review Meetings must occur once every calendar year and be conducted by the Watershed Copermittees. Annual Watershed Review Meetings must be open to the public and adequately noticed. Individual Watershed Copermittees must also review and modify their jurisdictional programs and JRMP Annual Reports, as necessary, so that they are consistent with the updated Watershed Workplan.

### 6. Pyrethroid Toxicity Reduction Evaluation

The Watershed Copermittees must incorporate the pyrethroid pollutant reduction program[18] into the Watershed Workplan. The pyrethroid pollutant reduction program must include the following elements:

a. Pursue state and federal regulatory change;
b. Implement a set of source controls targeted specifically at urban pyrethroid use;
c. Through the annual reporting process, monitor the implementation of those controls, assess effectiveness, and identify sources or areas where additional effort is needed;
d. Implement additional controls as needed; and
e. Continue to monitor implementation, as well as conditions within the target receiving waters, assess effectiveness, and re-evaluate control programs.

## H. FISCAL ANALYSIS

**1.** Secure Resources: Each Copermittee must exercise its full authority to secure the resources necessary to meet all requirements of this Order.

**2.** Annual Analysis: Each Copermittee must conduct an annual fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs required by this Order. The analysis must include estimated expenditures for the current reporting period, the preceding period, and the next reporting period.

a. Each analysis must include a description of the source of funds that are proposed to meet the necessary expenditures.
b. Each analysis must include a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.

[18] The pyrethroid pollutant reduction program is described in the "Riverside County – Santa Margarita Region Pyrethroid Source Identification Toxicity Reduction Evaluation, Final Phase II Report", January 2009 by MACTEC.

**3.** Annual Reporting: Each Copermittee must submit its annual fiscal analysis with the annual JRMP report.

## I. TOTAL MAXIMUM DAILY LOADS

**1.** The waste load allocations (WLAs) of fully approved and adopted TMDLs are incorporated as Water Quality Based Effluent Limitations on a pollutant by pollutant, watershed by watershed basis. Early TMDL requirements, including monitoring, may be required and inserted into this Order pursuant to Finding E.10.

**2.** The Cities of Wildomar and Murrieta must comply with the requirements and WLAs assigned to the discharges from their MS4s contributing to the Lake Elsinore/Canyon Lake (San Jacinto Watershed) Nutrient TMDLs as specified in Section VI.D.2 of the Santa Ana Water Board's Order R8-2010-0033, including relevant sections of the fact sheet and findings, and subsequent revisions thereto.

## J. PROGRAM EFFECTIVENESS ASSESSMENT AND REPORTING

Beginning with the Annual Report due in 2013, each Copermittee must annually assess and report upon the effectiveness of its JRMP and Watershed Workplan implementation to (1) reduce the discharge of storm water pollutants from its MS4 to the MEP; (2) prohibit non-stormwater discharges; and (3) prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.

### 1. Program Effectiveness Assessments

#### a. IDENTIFY EFFECTIVENESS ASSESSMENTS

With the JRMP and Watershed Workplan submittal, each Copermittee must establish assessment measures or methods for each of the six outcome levels described by CASQA[19], using data from each JRMP program component, the MRP, and the Watershed Workplan.

(1) Assessment interval: For each established assessment measure or method, an assessment interval must be established as appropriate to the measure or method.

(2) Projected Timeframe: For each established assessment measure or method, each Copermittee must identify the projected timeframe within which the associated outcome level can adequately assess change.

[19] Effectiveness assessment outcome levels as defined by CASQA are defined in Attachment C of this Order. See "*Municipal Stormwater Program Effectiveness Assessment Guidance"* (CASQA, May 2007) for guidance for assessing program activities at the various outcome levels.

b. **PERFORM ASSESSMENTS**

(1) Annually: Each year, the Copermittee must perform each applicable assessment based on the associated assessment interval, and determine whether the desired outcome has been met.

(2) With the submittal of the Report of Waste Discharge, the Copermittees must determine whether their program implementation is resulting in the protection and/or improvement of water quality through an Integrated Assessment.

**2. Respond to Assessments**

a. Where the assessments indicate that the desired outcome level has not been achieved at the end of the projected timeframe, the Copermittee must review its applicable activities and BMPs to identify any modifications and improvements needed to maximize effectiveness, as necessary to comply with this Order. If the Copermittee determines that the existing activities/BMPs are adequate, or that the projected timeframe should be extended, justification and an updated timeframe for attainment of the outcome level must be provided in the Annual Report.

b. Each Copermittee must develop and implement a work plan and schedule to address any program modifications and improvements in response to the findings of its assessment. The work plan and schedule must be provided and updated with the applicable Annual Report. The work plan must include, at a minimum, the following:

(1) The problems and priorities identified during the assessment;
(2) A list of priority pollutants and known or suspected sources;
(3) A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts;
(4) A description and schedule for new and/or modified BMPs. The schedule is to include dates for significant milestones;
(5) A description of how the selected activities will address an identified high priority problem. This will include a description of the expected effectiveness and benefits of the new and/or modified BMPs;
(6) A description of implementation effectiveness metrics;
(7) A description of how efficacy results will be used to modify priorities and implementation; and
(8) A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments.

### 3. Assessment and Response Reporting

Each Copermittee must include a summary of its effectiveness assessments within each Annual Report. Beginning with the FY 2012-2013 Annual Report, the Program Effectiveness reporting must include:

a. The results of each of the effectiveness assessments performed pursuant to J.1.b, including the demonstrated CASQA effectiveness level(s);

b. Responses to effectiveness assessments: A description of any program modifications planned in accordance with section J.2, including the work plan and identified schedule for implementation. The description must include the basis for determining that each modified activity and/or BMP represents an improvement expected to result in improved water quality; and

c. A description of any steps to be implemented to improve the Copermittee's ability to assess program effectiveness.

## K. REPORTING

The Copermittees may propose alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance.

### 1. Runoff Management Plans

a. **JURISDICTIONAL RUNOFF MANAGEMENT PLANS**

(1) The written account of the overall program to be conducted by each Copermittee to meet the jurisdictional requirements of section F of this Order is referred to as the Jurisdictional Runoff Management Plan (JRMP). Each Copermittee must revise and update its existing JRMP so that it describes all activities the Copermittee will undertake to implement the requirements of this Order. Each Copermittee must submit its updated and revised JRMP to the San Diego Water Board no later than June 30, 2012.

(2) At a minimum, each Copermittee's JRMP must be updated and revised to demonstrate compliance with each applicable section of this Order.

b. **WATERSHED WORKPLANS**

Copermittees must update and revise the Watershed Workplan to describe any changes in water quality problems or priorities, and any necessary change to actions Copermittees will take to implement jurisdictional or watershed BMPs to address those identified. The Copermittees must assemble and submit the Watershed Workplan to the San Diego Water Board no later than June 30, 2012, and must implement the Workplan within 90 days unless otherwise directed by the San Diego Water Board.

## 2. Other Required Reports and Plans

a. **SSMP UPDATES**

(1) Copermittees must submit their updated SSMP in accordance with the applicable requirements of section F.1 with the JRMP by June 30, 2012.

(2) Within 180 days of determination that the SSMP is in compliance with this Order's provisions, each Copermittee must amend its ordinances consistent with the SSMP and implement the updated SSMP. Any amended or new ordinances must be submitted to the San Diego Water Board the applicable Annual Report.

b. **HMP**

(1) By June 30, 2013, the Copermittees must submit to the San Diego Water Board Executive Officer a draft HMP that has been reviewed by the public, including identification of the appropriate limiting range of flow rates in accordance with the applicable requirements of section F.1.h.

(2) Within 180 of receiving San Diego Water Board comments on the draft HMP, the Copermittees must submit a final HMP that addressed the San Diego Water Board's comments.

(3) Within 90 days of receiving a finding of adequacy from the Executive Officer each Copermittee must incorporate and implement the HMP for all Priority Development Projects.

(4) Prior to acceptance of the HMP by the San Diego Water Board, the early implementation measures likely to be included in the HMP shall be encouraged by the Copermittees.

c. **REPORT OF WASTE DISCHARGE**

The Copermittees must submit to the San Diego Water Board, no later than 180 days in advance of the expiration date of this Order, a Report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements. The fourth annual report for this Order may supplement the ROWD, provided the ROWD contains the minimum information below.

At a minimum, the ROWD must include the following: (1) Proposed changes to the Copermittees' runoff management programs; (2) Proposed changes to monitoring programs; (3) Justification for proposed changes; (4) Name and mailing addresses of the Copermittees; (5) Names and titles of primary contacts of the Copermittees; (6) Any other information necessary for the reissuance of this Order and (7) Any other information required by federal regulations for permit reapplications.

## 3. Annual Reports

**JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM (JRMP) ANNUAL REPORTS**

a. Each Copermittee must generate individual JRMP Annual Reports that cover implementation of its jurisdictional activities during the past annual reporting period. Each Annual Report must verify and document compliance with this Order as directed in this section. Each Copermittee must retain records in accordance with the Standard Provisions in Attachment B of this Order, available for review, that document compliance with each requirement of this Order. The reporting period for these annual reports must be the previous fiscal year.

b. Each Copermittee must submit its JRMP Annual Reports to the San Diego Water Board by October 31of each year, beginning on October 31, 2013.

c. Each JRMP Annual Report must contain, at a minimum, the following information, as applicable to the Copermittee:

(1) Information required to be reported annually in Section H (Fiscal Analysis) of this Order;
(2) Information required to be reported annually in Section J (Program Effectiveness) of this Order;
(3) The completed Reporting Checklist found in Attachment D; and
(4) Information for each program component as described in the following Table 5:

Table 5. Annual Reporting Requirements

| Program Component | Reporting Requirement |
|---|---|
| New Development | 1. All updated relevant sections of the General Plan and environmental review process and a description of any planned updates within the next annual reporting period, if applicable; |
| | 2. All revisions to the SSMP, including where applicable:<br>(a) Identification and summary of where the SSMP fails to meet the requirements of this Order;<br>(b) Updated procedures for identifying pollutants of concern for each Priority Development Project;<br>(c) Updated treatment BMP ranking matrix;<br>(d) Updated site design and treatment control BMP design standards; |
| | 3. Number of Priority Development Projects reviewed and approved during the reporting period. Brief description of BMPs required at approved Priority Development Projects. Verification that site design, source control, and treatment BMPs were required on all applicable Priority Development Projects; |
| | 4. Name and location of all Priority Development Projects that were granted a waiver from implementing LID BMPs pursuant to section F.1.d.(4) during the reporting period; |
| | 5. Updated watershed-based BMP maintenance tracking database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority Priority Development Projects; and verification that the requirements of this Order were met during the reporting period; |

Table 5. Annual Reporting Requirements (Cont'd)

| Program Component | Reporting Requirement |
|---|---|
| New Development (Cont'd) | 6. Name and brief description of all approved Priority Development Projects required to implement hydrologic control measures in compliance with section F.1.h including a brief description of the management measures planned to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels; |
| | 7. Number and description of all enforcement activities applicable to the new development and redevelopment component and a summary of the effectiveness of those activities. |
| Construction | 1. All updated relevant ordinances and description of planned ordinance updates within the next annual reporting period, if applicable; |
| | 2. A description of any changes to procedures used for identifying priorities for inspecting sites and enforcing control measures that consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; |
| | 3. Any changes to the designated minimum and enhanced BMPs; |
| | 4. Summary of the inspection program, including the following information:<br>(a) Total number and date of inspections conducted at each facility;<br>(b) Number, date, and types of enforcement actions by facility;<br>(c) Brief description of each high-level enforcement actions at construction sites including the effectiveness of the enforcement.<br>Supporting paper (or electronic) files must be maintained by the Copermittees and made available upon San Diego Water Board request. Supporting files must include a record of inspection dates, the results of each inspection, photographs (if any), and a summary of any enforcement actions taken. |
| Municipal | 1. Updated source inventory; |
| | 2. All changes to the designated municipal BMPs; |
| | 3. Descriptions of any changes to procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies; |
| | 4. Summary and assessment of BMP retrofits implemented at flood control structures, including:<br>(a) List of projects retrofitted;<br>(b) List and description of structures evaluated for retrofitting;<br>(c) List of structures still needing to be evaluated and the schedule for evaluation; |

Table 5. Annual Reporting Requirements (Cont'd)

| Program Component | Reporting Requirement |
|---|---|
| Municipal (Cont'd) | 5. Summary of the municipal structural treatment control operations and maintenance activities, including:<br>(a) Number of inspections and types of facilities;<br>(b) Summary of findings; |
| | 6. Summary of the MS4 and MS4 facilities operations and maintenance activities, including:<br>(a) Number and types of facilities maintained;<br>(b) Amount of material removed;<br>(c) List of facilities planned for bi-annual inspections and the justification; |
| | 7. Summary of the municipal areas/programs inspection activities, including:<br>(a) Number and date of inspections conducted at each facility;<br>(b) The BMP violations identified during the inspection by facility;<br>(c) Number, date and types of enforcement actions by facility;<br>(d) Summary of inspection findings and follow-up activities for each facility; |
| | 8. Description of activities implemented to address sewage infiltration into the MS4; |
| | 9. Description of BMPs and their implementation for unpaved roads construction and maintenance. |
| Commercial / Industrial | 1. Updated inventory of commercial / industrial sources; |
| | 2. Summary of the inspection program, including the following information:<br>(a) Number and date of inspections conducted at each facility or mobile business;<br>(b) The BMP violations identified during the inspection by facility;<br>(c) Number, date, and types of enforcement actions by facility or mobile business;<br>(d) Brief description of each high-level enforcement actions at commercial/industrial sites including the effectiveness of the enforcement and follow-up activities for each facility; |
| | 3. All changes to designated minimum and enhanced BMPs; |
| | 4. A list of industrial sites, including each name, address, and SIC code, that the Copermittee suspects may require coverage under the General Industrial Permit, but has not submitted an NOI. |

Table 5. Annual Reporting Requirements (Cont'd)

| Program Component | Reporting Requirement |
|---|---|
| Residential | 1. All updated minimum BMPs required for residential areas and activities; |
| | 2. Quantification and summary of applicable runoff and storm water enforcement actions within residential areas and activities; |
| | 3. Description of efforts to manage runoff and storm water pollution in common interest areas and mobile home parks. |
| Retrofitting Existing Development | 1. Updated inventory and prioritization of existing developments identified as candidates for retrofitting; |
| | 2. Description of efforts to retrofit existing developments during the reporting year; |
| | 3. Description of efforts taken to encourage private landowners to retrofit existing development; |
| | 4. A list of all retrofit projects that have been implemented, including site location, a description of the retrofit project, pollutants expected to be treated, and the tributary acreage of runoff that will be treated; |
| | 5. Any proposed retrofit or regional mitigation projects and timelines for future implementation; |
| | 6. Any proposed changes to the Copermittee's overall retrofitting program. |
| Illicit Discharge Detection and Elimination | 1. Any changes to the legal authority to implement Illicit Discharge Detection and Elimination activities; |
| | 2. Any Changes to the established investigation procedures; |
| | 3. Any changes to public reporting mechanisms, including phone numbers and web pages; |
| | 4. Summaries of illicit discharges (including spills and water quality data events) and how each significant case was resolved; |
| | 5. A description of instances when field screening and analytical data exceeded action levels, including those instances for which no investigation was conducted; |
| | 6. A description of follow-up and enforcement actions taken in response to investigations of illicit discharges and a description of the outcome of the investigation/enforcement actions. |
| Workplans | Updated workplans including priorities, strategy, implementation schedule and effectiveness evaluation. |

d. Each JRMP Annual Report must also include the following information regarding non-storm water discharges (see Section B.2. of this Order):

(1) Identification of non-storm water discharge categories identified as a source of pollutants to waters of the U.S;
(2) A description of any updates to ordinances, orders, or similar means to prohibit non-storm water discharge categories identified under section B.2 above ;
(3) Identification of any control measures to be required and implemented for

non-storm water discharge categories identified as needing controls by the San Diego Water Board; and

(4) A description of a program to address pollutants from non-emergency fire fighting flows identified by the Copermittee to be significant sources of pollutants.

**4. Interim Reporting Requirements**

For the reporting periods, prior to submittal of the JRMP, each JRMP Annual Report must be submitted in accordance with the requirements and deadlines described in Order No. 2004-001.

**5. Universal Reporting Requirements**

All submittals must include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal. The Principal Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal and the sections of the submittals for which it is responsible.

## L. MODIFICATION OF PROGRAMS

Modifications of JRMPs and/or Watershed Workplan may be initiated by the Executive Officer of the San Diego Water Board or by the Copermittees. Requests by Copermittees must be made to the Executive Officer, and must be submitted during the annual review process. Requests for modifications should be incorporated, as appropriate, into the Annual Reports or other deliverables required or allowed under this Order.

**1.** Minor modifications to JRMPs, and/or Watershed Workplan, may be accepted by the Executive Officer where the Executive Officer finds the proposed modification complies with all discharge prohibitions, receiving water limitations, and other requirements of this Order.

**2.** Proposed modifications that are not minor require amendment of this Order in accordance with this Order's rules, policies, and procedures.

## M. PRINCIPAL COPERMITTEE RESPONSIBILITIES

Within 180 days of adoption of this Order, the Copermittees must designate the Principal Copermittee and notify the San Diego Water Board of the name of the Principal Copermittee. The Principal Copermittee must, at a minimum:

**1.** Serve as liaison between the Copermittees and the San Diego Water Board on general permit issues, and when necessary and appropriate, represent the Copermittees before the San Diego Water Board.

**2.** Coordinate permit activities among the Copermittees and facilitate collaboration on the development and implementation of programs required under this Order.

**3.** Coordinate the submittal of the documents and reports as required by section K of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2010-0016 in Attachment E of this Order.

## N. RECEIVING WATERS AND MS4 DISCHARGE MONITORING AND REPORTING PROGRAM

Pursuant to CWC section 13267, the Copermittees must comply with all the requirements contained in Receiving Waters and MS4 Discharge Monitoring and Reporting Program (MRP) No. R9-2010-0016 in Attachment E of this Order.

## O. STANDARD PROVISIONS, REPORTING REQUIREMENTS, AND NOTIFICATIONS

**1.** Each Copermittee must comply with Standard Provisions, Reporting Requirements, and Notifications contained in Attachment B of this Order. This includes 24 hour/5 day reporting requirements for any instance of non-compliance with this Order as described in section 5.e of Attachment B.

**2.** All plans, reports and subsequent amendments submitted in compliance with this Order must be implemented immediately (or as otherwise specified). All submittals by Copermittees must be adequate to implement the requirements of this Order.

## P. ADDITIONAL PROVISIONS

The Executive Officer shall meet with Camp Pendleton and other stakeholders at six (6) month intervals to identify and investigate water quality impacts, flow impacts, and impacts to water rights that may derive from the implementation of Low Impact Development BMPs required by Order R9-2010-0016 as they are developed by the storm water Copermittees. Any key issues or amendments to the Order that derive from those analyses and discussions will be promptly brought to the San Diego Water Board for their consideration.

I, David W. Gibson, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on November 10, 2010.

David W. Gibson
Executive Officer

## DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

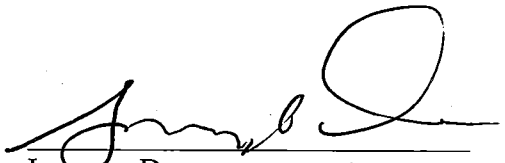
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 3, 2018, I served the:

- **Claimant's Rebuttal Comments filed January 2, 2018**

*California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108*, 11-TC-01.
County of Ventura and Ventura County Watershed Protection District, Co-Claimants

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 3, 2018 at Sacramento, California.



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# COMMISSION ON STATE MANDATES

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**Last Updated:** 12/21/17

**Claim Number:** 11-TC-01

**Matter:** California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108

**Claimants:** County of Ventura
Ventura County Watershed Protection District

**TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:**

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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