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December 14, 2017

VIA DROP BOX

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

Re: *California Regional Water Quality Control Board, San Diego Region,
Order No. R9-2010-0016, 11-TC-03, Filing of Rebuttal Comments*

Dear Ms. Halsey:

I am filing herewith the Rebuttal Comments of test claimants Riverside County Flood Control and Water Conservation District, County of Riverside and the Cities of Murrieta, Temecula and Wildomar ("Joint Test Claimants") with respect to the above-referenced Joint Test Claim.

The documents being filed are the Rebuttal Comments, Attachments (1 to 3) in Support of the Rebuttal Comments and Documents in Support of Rebuttal Comments.

Please have your staff contact me if they have any questions with respect to this filing or if there is any difficulty in reading the filing. Thank you.

Very truly yours,

A handwritten signature in blue ink, appearing to read "David W. Burhenn".

David W. Burhenn

DB:dwb

**REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS,
CALIFORNIA REGIONAL WATER QUALITY CONTROL
BOARD, SAN DIEGO REGION, ORDER NO. R9-2010-0016,
11-TC-03**

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REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO. R9-2010-0016, 11-TC-03

Joint Test Claimants Riverside County Flood Control and Water Conservation District (“District”), County of Riverside and Cities of Murrieta, Temecula and Wildomar (collectively, “Claimants”), herewith file this Rebuttal to the comments of the State Water Resources Control Board and the California Regional Water Quality Control Board, San Diego Region (“San Diego Water Board”) (collectively, “Water Boards”) and the Department of Finance (“DOF”) concerning Test Claim 11-TC-03, *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016* (the “Joint Test Claim”).

This Rebuttal will address each of the comments made by the Water Boards and the DOF concerning the validity of the Joint Test Claim. In summary, the Water Boards contend that Claimants are not entitled to a subvention of state funds for the mandates contained in Order No. R9-2010-0016 (the “2010 Permit”) because (a) the mandates were neither “new programs” nor represent “higher levels of service;” (b) the mandates were federal, not state in nature; (c) the 2010 Permit did not impose requirements unique to local agencies and the Claimants voluntarily agreed to the Permit; and (d) Claimants had fee authority to fund the mandates. Water Boards’ Comments (“WB Comments”) at 9-18. The DOF argues only that the Claimants had fee authority to fund the mandates, and does not otherwise address the validity of the Joint Test Claim. (DOF Comments at 1-2).

These arguments have already been made, and addressed, in other test claims pending before the Commission, including with respect to a municipal stormwater permit also issued by the San Diego Water Board in 2009 to municipalities in South Orange County (California Regional Water Quality Control Board, San Diego Region, Order No. R9-9009-0002, 10-TC-11). These Rebuttal Comments address the comments of the Water Boards and the DOF and demonstrate that their arguments lack factual or legal support and that a subvention of funds for the mandates contained in the Permit is required under article XIII B, section 6 of the California Constitution.

REBUTTAL TO COMMENTS OF WATER BOARDS

I. GENERAL COMMENTS

This section addresses general arguments made by the Water Boards. Most of those arguments are addressed further in Section II below, which responds to comments on each mandate in the 2010 Permit. This section generally addresses a number of misstatements of fact and law in general comments made by the Water Boards (WB Comments at 1-19).

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

The Water Boards argue (WB Comments at 2-4) that the issues in this Joint Test Claim can be distinguished from the case before the California Supreme Court in *Department of Finance v.*

REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS, 11-TC-03

Commission on State Mandates (2016) 1 Cal. 5th 749 (“*Dept. of Finance*”), the seminal case on what constitutes a state, versus a federal, mandate in determining the existing of an unfunded state mandate. While some of these alleged distinctions are simply irrelevant to this Joint Test Claim,¹ the Water Boards argue that the San Diego Water Board made the findings required under *Dept. of Finance* to establish that “each of the challenged permit terms was *necessary* to comply with the federal requirement that MS4 permits impose controls that reduce the discharge of pollutants to the MEP [maximum extent practicable], and were based entirely on federal authority.” WB Comments at 3 (emphasis in original) (footnote omitted). The San Diego Water Board did not in fact make such findings, as will be discussed below.

The holdings in *Dept. of Finance* are directly applicable to this Joint Test Claim, and most particularly the following three holdings:²

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

The Supreme Court set forth this test:

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

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

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

The Supreme Court emphatically refused to grant such deference. The Court found that in issuing the Los Angeles County permit at issue in that case, “the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. [citation omitted]. It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.” *Id.* at 768. The Court cited as authority its decision in *City of Burbank v. State Water Resources Control Board* (2005) 5 Cal. 4th 613, 627-28,³ where it held that a federal National Pollution Discharge Elimination System (“NPDES”) permit issued by a regional water board (such as the 2010 Permit) may contain State-imposed conditions that are more stringent than federal law requirements.

¹ For example, the 2010 Permit does not contain a TMDL, or “Total Maximum Daily Load” provision, as alleged in the WB Comments at 3.

² See also the discussion in Claimants’ Section 5 Narrative Statement at 10-15.

³ Attached in Documents in Support of Rebuttal Comments of Joint Test Claimants (“Rebuttal Documents”), Tab 1.

The Court squarely addressed the Water Boards' argument here that the Commission should defer to the San Diego Water Board's determination that the challenged requirements in the 2010 Permit were federally mandated. Finding that this determination "is largely a question of law," the Court distinguished situations where the question involved the regional board's authority to *impose* specific permit conditions from those involving the question of who would *pay* for such conditions. In the former situation, "the board's findings regarding what conditions satisfied the federal [MEP] standard would be entitled to deference." 1 Cal. 5th at 768. But, the Court held,

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

Id. at 769.

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

The Supreme Court placed the burden of establishing that a mandate was federal, rather than state, on the Water Boards. In placing that burden, the Court held that because article XIII B, section 6 of the Constitution established a "general rule requiring reimbursement of all state-mandated costs," a party claiming an exception to that general rule, such as the federal mandate exception in Govt. Code § 17556(c), "bears the burden of demonstrating that it applies." *Id.* at 769.

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

The only circumstance under which the Court found that deference to the Water Boards' expertise would be appropriate was if a regional board had "found, when imposing the disputed permit conditions, that those conditions were the only means by which the [MEP] standard could be implemented," which must be a "case specific" finding, taking into account "local factual circumstances." 1 Cal. 5th at 768 and n.15. As discussed below, there are no such explicit findings in the 2010 Permit, despite assertions by the Water Boards to the contrary.

The Supreme Court further found that in assessing whether federal law or regulation required the imposition of a particular requirement, it was important to examine the scope of the regulatory language. In discussing inspection requirements in the federal stormwater regulations, for example, the Court rejected the Water Boards' argument that all permit-required inspections

were federally mandated “because the CWA [Clean Water Act] required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required.” *Id.* at 771. In response, the Court held that the mere fact that the federal regulations “contemplated some form of inspections, however, does not mean that federal law required the scope and detail of inspections required by the Permit conditions.” *Id.*

This last holding is important for the Commission in assessing the federal versus state character of the specific requirements at issue in the Joint Test Claim. Repeatedly, the Water Boards cite general regulatory language as providing federal authority to impose specific and prescriptive requirements in the 2010 Permit. However, as the Supreme Court held, the existence of general federal regulatory language does not mean that those regulations “required the scope and detail” of the 2010 Permit provisions at issue in this Joint Test Claim.

B. *The 2010 Permit is Not an “MEP” Permit – Its Overriding Compliance Requirement, to Meet Water Quality Standards, is a State Requirement*

The Water Boards contend that since the San Diego Water Board made various general findings relating to the alleged adherence of 2010 Permit requirements to the MEP standard, this showed that the permit requirements at issue in this Joint Test Claim were mandated by federal, not state, requirements. *See, e.g.*, WB Comments at 13-14. In Section II, Claimants demonstrate that the record reflects that these requirements were imposed by the Water Board without any particularized examination of whether the requirements constituted the only way to attain the MEP standard, the Supreme Court’s test for affording deference to the Water Boards’ claim of this defense to subvention.

But, as importantly, the 2010 Permit itself is not an “MEP Permit,” where the MEP standard found in Section 402(p) of the Clean Water Act (“CWA”), 33 U.S.C. § 1342(p)(3)(B)(iii), governs the conduct of the permittees under the 2010 Permit. This is so because, as the San Diego Water Board set forth in the permit language and accompanying Fact Sheet,⁴ the permittees were required to meet water quality standards established in State-developed Basin Plans. The decision to require such compliance was an exercise of state, not federal, authority.

1. It is Settled That Under Federal Law, Municipal Stormwater Permittees Must Meet The MEP Standard to Control Pollutants in Discharges From Their MS4s; It is Also Settled That States Have the *Discretion* to Require Adherence to Water Quality Standards By Those Permittees

The CWA prescribes different requirements for NPDES permits covering municipal stormwater permittees and industrial dischargers. The latter are required to have permits requiring discharges to adhere to strict numeric effluent limitations. Thus, if discharges from a steel mill or oil refinery are subject to a permit condition restricting the concentration of a particular pollutant,

⁴ Fact Sheets in NPDES permits are required, *inter alia*, to set forth a “brief summary of the basis for the draft permit conditions including references to applicable statutory and regulatory provisions” 40 CFR § 124.8(b)(4) (Rebuttal Documents, Tab 2).

a monitored exceedance of that pollutant renders the steel mill and refinery in violation of the permit condition and the CWA. *See* 33 U.S.C. § 1342(p) and discussion next below.

Municipal stormwater permits are different. As the United States Court of Appeals for the Ninth Circuit held in *Defenders of Wildlife v. Browner* (1999) 191 F.3^d 1159 (9th Cir.), the CWA establishes different standards for industrial and municipal stormwater permittees. With respect to the former, because they were required to “meet all applicable provisions of . . . section 1311 of this title,” this meant that industrial discharges were subject to the requirement to meet water quality standard. *Id.* at 1164-65 (industrial discharges “shall . . . achieve . . . any more stringent limitation, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 1370 of this title)” (quoting 33 U.S.C. § 1311(b)(1)(C) (emphasis by Ninth Circuit)).

By contrast, the Ninth Circuit noted that the compliance standard for municipal stormwater dischargers was completely different, in that they must “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 . . . determines appropriate for the control of such pollutants.” 191 F.3^d at 1164 (quoting 33 U.S.C. § 1342(p) (emphasis by Ninth Circuit)).

The court held that the specific “MEP” language in Section 1342(p)(3)(B) quoted above, the structure of the CWA, as well as previous decisions of the Ninth Circuit, “all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).” 191 F.3^d at 1166.

Browner went on, however, to hold that the Administrator of the federal Environmental Protection Agency had *discretion* under the “such other provisions as the Administrator” clause of Section 1342(p)(3)(B)(iii) to require municipal stormwater permittees to meet numeric water quality standards. 191 F.3^d at 1166. The Administrator’s discretionary power devolves to the states when, as in California, they are authorized under CWA § 1342(b) to issue NPDES permits, such as the 2010 Permit.

2. The 2010 Permit’s Overarching Compliance Standard is Not the Federal MEP Requirement But a State-Imposed Requirement to Meet Water Quality Standards

As discussed, the State has the power to mandate that municipalities comply with numeric water quality standards⁵ applicable in the receiving waters into which their MS4s discharge. The 2010 Permit in fact requires this, in Section A.3:

⁵ This power is not independent, however, of the need to comply with State law in so doing. *City of Burbank, supra*, 35 Cal.4th at 627.

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.

In addition, the 2010 Permit contained numerous new individual provisions in Section F that required permittees, in the development and execution of various substantive permit programs, to achieve a level of control to prevent “discharges from the MS4 from causing or contributing to a violation of water quality standards.” *E.g.*, 2010 Permit Section F.3.d (discussed in Section II.M, below).

While 2010 Permit Finding E.1 states that compliance with water quality standards “is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time,”⁶ the permit actually required strict compliance with the water quality standards from the first day of the permit’s effectiveness. This strict compliance requirement is clear from the San Diego Water Board’s explanation of Finding E.1 in the Fact Sheet:

While implementation of the iterative BMP process is a means to achieve compliance with water quality objectives for storm water MS4 discharges, it does not shield the discharger from enforcement actions for continued non-compliance with water quality standards. Consistent with USEPA guidance, regardless of whether or not an iterative process is being implemented, discharges that cause or contribute to a violation of water quality standards are in violation of Order No. R9-20120-0016.

Fact Sheet at 90 (footnote omitted).⁷

Thus, the guiding principle and compliance standard for the requirements of the 2010 Permit at issue in this Joint Test Claim is a State-imposed standard requiring achievement of water quality standards, not the federal MEP standard referenced in the WB Comments.

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

The Water Boards assert that the 2010 Permit provisions contained in the Joint Test Claim do not impose new programs or require higher levels of service by the Claimants (WB Comments at 9-12). This assertion is belied by the facts and the law.

⁶ This requirement does not reference the MEP standard, and should not, because the requirement even to implement iterative BMPs is one that exceeds the MEP standard, which does not require attainment of water quality standards. Because the 2010 Permit makes that requirement, it exceeds the MEP standard. *See Browner, supra*, 191 F.3^d at 1166-67 (finding that a similar requirement in an EPA-issued Arizona NPDES stormwater permit to use BMPs to attain water quality standards was within the EPA Administrator’s discretion).

⁷ The 1998 “USEPA guidance” referenced in the Fact Sheet was, in light of the *Browner* case decided one year later, erroneous. As a matter of federal law, municipal stormwater discharges do not have to meet water quality standards.

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First, as set forth in the Narrative Statement filed in support of the Joint Test Claim dated April 28, 2017 (“Narrative Statement”), the requirements of the 2010 Permit at issue here were new programs because they were not contained in the previous, 2004 MS4 permit issued by the San Diego Water Board. These are the provisions relating to: the removal of categorical exemptions for irrigation runoff, non-stormwater action levels (“NALs”), stormwater action levels (“SALs”), BMP maintenance tracking requirements, new requirements for sediment control and the review of monitoring data at construction sites, requirements relating to best management practices (“BMPs”) for unpaved roads, the review of monitoring data in the inspection of industrial/commercial facilities, requirements relating to the retrofitting of existing residential development, requirements to conduct special studies, and various requirements requiring standards of performance for Permit programs. Alternatively, the requirements were new programs through the addition of new obligations to requirements first established in the 2004 Permit. These additional requirements include for watershed water quality workplans and JRMP annual reports.

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

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

As the Water Boards concede, a “program is ‘new’ if the local government had not previously been required to institute it.” WB Comments at 10-11, citing *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal. App.4th 1176, 1189. As noted above, all of the mandated programs identified in the Joint Test Claim are “new” in that they were not previously required to be performed by Claimants under the previous MS4 permit or were new obligations imposed on existing permit requirements.

Arguing that the requirements of the 2010 Permit were not new programs, the Water Boards cite “more than two decades” of NPDES stormwater permits which included such provisions as management plans, monitoring, reporting, land development, enforcement obligations and the afore-described State requirement “to comply with receiving water limitations and prohibitions through an iterative process.” WB Comments at 11. That is not the point. The fact that such permits may have included such programs does not mean that the *specific requirements* of the 2010 Permit at issue in this Joint Test Claim were also included in previous stormwater permits. They were not.

The question is whether such specific requirements were newly mandated through an executive order, *i.e.*, the 2010 Permit. The Commission, in previous test claims, has held that any new requirements not contained in a previous permit, even when those programs were expanding on a program contained in the previous permit, were a new program or higher level of service. *See, e.g., Statement of Decision, Case No. 07-TC-09, In re San Diego Regional Water Quality Control Board Order No. R9-2007-0001 (“SD County SOD”),*⁸ at 53-54 (even though previous MS4 permit required adoption of Model Standard Urban Storm Water Mitigation Plan (“SUSMP”) and local SUSMPs, requirement in succeeding permit to submit an Model SUSMP with specific

⁸ Rebuttal Documents, Tab 4.

Low Impact Development BMP requirements constituted a new program or higher level of service).

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

Claimants have previously demonstrated that all of the requirements of the 2010 Permit at issue here represented new programs, eligible for a subvention of funds. Having established this, Claimants need go no further. Yet, to the extent that such requirements instead represented a “higher level of service,” this fact also has been established. In the Narrative Statement, Claimants set forth precisely how the requirements of the 2010 Permit at issue were additional to the requirements of the 2004 Permit. These additional requirements imposed separate and additional costs on Claimants, as set forth in the Narrative Statement. These requirements were not simply a reallocation of existing Claimant responsibilities, as the Water Boards argue. WB Comments at 12.

As noted, the Commission has determined that requirements new to a municipal stormwater permit constitute both a new program and a higher level of service. For example, the Water Boards contend that the “iterative” process for improvement of the MEP standard means that higher levels of permit specificity are “consistent” with EPA guidance. WB Comments at 11. The Commission, however, has already rejected a similar argument. In the San Diego County test claim, the DOF argued that since additional permit requirements were necessary for the claimants to continue to comply with the CWA and reduce pollutants to the MEP, they were not new requirements. SD County SOD at 49. In response, the Commission stated that it did “not read the federal [CWA] so broadly” and that “[u]nder the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service.” *Id.* The Commission rejected that standard and found that the requirements in question in fact represented a new program or higher level of service. *Id.* at 49-50.

The Water Boards also argue that the “costs incurred must involve programs previously funded exclusively by the state.” WB Comments at 11. This argument, and the cited cases, are inapposite to the issues in this Joint Test Claim. For example, *City of San Jose v. State of California* (1996) 45 Cal. App.4th 1802 involved a statute which authorized counties to charge cities and other local entities for the costs of booking persons into county jails. The court determined that the financial and administrative responsibility for the operation of county jails and detention of prisoners had been the sole responsibility of counties even before adoption of the statute. The shifting of responsibility was thus from the county to the cities, not from the state to the cities. *Id.* at 1812. As such, the statute did not represent an imposition of a state mandate. *Id.* Here, the requirements in the Joint Test Claim involve imposition of a mandate by a state agency on local government, *e.g.*, the San Diego Water Board on Claimants.

Similarly, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264 is inapposite. The court found there that the statute at issue merely reallocated property tax revenues for public education, which for years had been a shared state and local responsibility, and that there was no evidence of any increased costs imposed on local government by operation of the statute. *Id.* at 1283. Again, this Joint Test Claim involves the adoption of specific new

provisions in an executive order which require the Claimants to incur new costs. *See* Narrative Statement at 15-67.

The requirements of the 2010 Permit at issue in this Joint Test Claim represent the imposition of a higher level of service on the Claimants.

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

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

The Water Boards assert that because the CWA authorized it to “exercise its discretion, as required by federal law” to “meet the MEP standard in this Permit supports the conclusion that the permit provisions are federal, not state mandates.” WB Comments at 13. This statement, however, ignores *Dept. of Finance*. It is the very exercise of that discretion (and as discussed elsewhere, the discretion to impose requirements that *exceed* the MEP standard) which the Supreme Court found to be a state mandate.

Additionally, the record does not reflect any finding by the San Diego Water Board that in adopting the 2010 Permit mandates at issue in this Joint Test Claim, the Board found that such mandates represented the *only* method for achieving the MEP standard.

1. **The San Diego Water Board’s Findings as to the Federal Law Basis for 2010 Permit Requirements Are Not Entitled to Deference**

The Water Boards contend that the San Diego Water Board was “exercising its duty under federal law” to adopt the 2010 Permit (WB Comments at 12) and that the Board made a specific finding that “when issuing the Permit, the San Diego Water Board implemented *only federal law*.” WB Comments at 13, emphasis in original. The Water Boards then go on to quote various findings in Section E of the 2010 Permit and Fact Sheet, including from a finding stating that “*it is entirely federal authority that forms the legal basis to establish the permit provisions*.” WB Comments at 14, emphasis in original. Citing this language, the Water Boards conclude that the “San Diego Water Board made findings in connection with specific challenged provisions, that such provisions were necessary to implement the maximum extent practicable standard.” *Id.*

The record, however, does not support this conclusion nor does it reveal findings which meet the Supreme Court’s exacting standard for giving deference to a regional board, which requires the board to find that “those conditions were the *only* means by which the maximum extent practicable standard could be implemented.” 1 Cal. 5th at 768 (emphasis supplied).

In addition to the fact that the 2010 Permit’s compliance standard is not adherence to the federal MEP standard but rather to water quality standards established in a State basin plan (*see* Section I.B.2 above), the language of the 2010 Permit and Fact Sheet establish that *both* federal *and* state law provisions formed the basis for the provisions at issue in this Joint Test Claim. And,

the language cited by the Water Boards (WB Comments at 13-14) as support for the alleged “federal law only” finding is boilerplate, inserted in multiple stormwater permits across the state (*See* Declaration of David W. Burhenn, filed herewith as Attachment 1, and exhibits thereto).

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

The San Diego Water Board’s first finding in the 2010 Permit, Finding A.1, states:

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*.

2010 Permit at 1 (emphasis supplied). Each of the italicized authorities in Finding A.1 represents *California*, not *federal*, authority. *See also* 2010 Permit, Attachment A (setting forth Basin Plan prohibitions pursuant to Water Code § 13243).

In addition to the express language of Finding A.1, further evidence that the 2010 Permit was in fact based on California law is provided in the Fact Sheet. In discussing Finding A.1, the Fact Sheet specifically cites the San Diego Water Board’s authority under both federal *and* state law to adopt the Permit. As to state law authority, it states:

Porter-Cologne (section 13240) directs the Regional Water Boards to set water quality objectives via adoption of Water Quality Control Plans (Basin Plans) that conform to all State policies for water quality control.

As a means for achieving those water quality objectives, Porter-Cologne (section 13243) further authorizes the Regional Water Boards to establish waste discharge requirements (WDRs) to prohibit waste discharges in certain conditions or areas. . . . The Order will renew Order No. R9-2004-001 to comply with the CWA *and attain water quality objectives in the Basin Plan*. . . .

Fact Sheet at 20 (emphasis supplied). The Porter-Cologne Water Quality Act (“Porter-Cologne Act”), Water Code § 13000 *et seq.*, was adopted, *inter alia*, to protect the quality of the waters of the state. Water Code § 13000.⁹

The italicized reference to the Basin Plan, a State-required water quality control plan for the San Diego region, reflects again that the 2010 Permit was adopted to meet both California and federal requirements, not simply the latter. Moreover, Fact Sheet Section VII, discussing the legal authority for the 2010 Permit, cites as authority California Water Code § 13377, which provides that when a regional board issues NPDES permits, the board can include not only federal requirements but also *more stringent state requirements, i.e.*, “any more stringent effluent

⁹ Rebuttal Documents, Tab 3.

standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.” Fact Sheet at 19.

As will be discussed in Section II, Water Code § 13377 was frequently cited by the San Diego Water Board as authority for the requirements of the 2010 Permit at issue in this Joint Test Claim.

3. The 2010 Permit Finding E.6 Language Cited by the Water Boards Is Boilerplate Language, Not Entitled to Deference

Despite textual evidence that the 2010 Permit is based on both federal and state law, the Water Boards contend that language found in Finding E.6 is entitled to deference. Permit Finding E.6 begins: “This Order does not constitute an unfunded local governmental mandate subject to subvention under Article XIII B, Section 6 of the California Constitution” and then lists five arguments in support. 2010 Permit at 14.

This finding is entitled to no deference or weight for several reasons. First, as noted above, *Dept. of Finance* explicitly rejected the Water Boards’ contention that board findings on whether a requirement is federal or state are entitled to deference: “We also disagree that the Commission should have deferred to the Regional Board’s conclusion that the challenged requirements were federally mandated.” 1 Cal. 5th at 768. “The State’s proposed rule, requiring the Commission to defer to the Regional Board, would leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature’s intent in creating the Commission.” *Id.* at 769.

Second, the Water Boards’ argument (and the finding) ignore the Commission’s exclusive jurisdiction to determine if a mandate is entitled to reimbursement under article XIII B, section 6. Govt. Code § 17552; *Kinlaw v. State of California* (1991) 54 Cal.3^d 326, 333.

Third, the finding (and the longer explanation contained in the Fact Sheet at 93-95) does not refer to, nor appear to be based on, the specific requirements of the 2010 Permit. The San Diego Water Board made no reference to evidence in the record to support the finding. Instead, the finding repeated, almost word for word, findings placed in other municipal stormwater permits issued across the state. For example, Finding E.7 in the municipal stormwater permit issued by the Los Angeles Regional Board to Ventura County dischargers, issued in May 2009 *prior* to the issuance of the 2010 Permit, contains nearly the same language as in the 2010 Permit’s Fact Sheet explanation of Finding E.6.¹⁰ The Ventura County permit was not the first where this language appeared. One year earlier, on June 12, 2008, the Central Valley Regional Board incorporated a

¹⁰ Compare Ventura County Municipal Separate Storm Sewer System Permit, Order No. 09-0057, Finding E.7 (pages 11-13) with 2010 Permit Fact Sheet at 93-95. An excerpt of the permit is attached as Exhibit A to the Declaration of David W. Burhenn (“Burhenn Dec.”), attached hereto as Attachment 1. As with all such exhibits, the Commission may take administrative notice of this evidence pursuant to Evidence Code § 452(c) (official acts of the legislative departments of any state of the United States) (Rebuttal Documents, Tab 3), Govt. Code § 11515 (Rebuttal Documents, Tab 3) and Cal. Code Regs., tit.2, section 1187.5, subd. (c).

finding in the municipal stormwater permit for the City of Modesto that again tracks with the discussion of Finding E.6 in the Fact Sheet.¹¹

Other water boards have inserted this same language. In the municipal stormwater permit issued by the San Francisco Bay Regional Board for San Francisco Bay municipalities (as revised in 2011), the Fact Sheet discussion of why the Permit “does not constitute an unfunded local government mandate” is again nearly the same as the Fact Sheet discussion of Finding E.6.¹² A fourth regional board, the Santa Ana Regional Board, adopted a nearly identical discussion in a fact sheet for a permit issued to Riverside County municipalities in early 2010.¹³ Finally, a nearly identical finding and fact sheet discussion was adopted by the San Diego Water Board in a municipal stormwater permit issued to dischargers in Orange County in 2009.¹⁴

This pattern establishes that Finding E.6, despite the claims made for it by the Water Boards, is not based on any specific San Diego Water Board determination as to the alleged federal mandate requirements of the 2010 Permit, but rather was a boilerplate finding inserted by regional boards across the state.

For all of these reasons, Finding E.6 is not the kind of specific finding which the Supreme Court identified in *Dept. of Finance* as one as to which the Commission should defer, *i.e.*, where a regional board finds that the requirements “were the only means by which the maximum extent practicable standard could be implemented” a case specific finding taking into account local circumstances. 1 Cal.5th at 768 and n.15.

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

The Water Boards contend (WB Comments at 15) that *Dept. of Finance* was limited to a consideration of the MEP standard as it applied to trash receptacle and inspection requirements in a Los Angeles County MS4 permit. Thus, they argue, the holdings in that case do not extend to

¹¹ Compare Waste Discharge Requirements for City of Modesto, Order No. R5-2008-0092, Finding 30 with 2010 Permit Fact Sheet at 93-95. An excerpt of this permit is attached as Exhibit B to the Burhenn Dec., attached hereto.

¹² Compare Fact Sheet, Municipal Regional Stormwater Permit, Order No. R2-2009-0074 (as revised November 28, 2011), Pages App I-12 to 14 with 2010 Permit Fact Sheet at 93-95. An excerpt of this fact sheet is attached as Exhibit C to the Burhenn Dec., attached hereto.

¹³ Compare Order No. R8-2010-0033, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge requirements for the Riverside County Flood Control and Water Conservation District, the County of Riverside, and the Incorporated Cities of Riverside County within the Santa Ana Region, Finding B.10, with 2010 Permit Fact Sheet at 93-95. An excerpt of this permit is attached as Exhibit D to the Burhenn Dec., attached hereto.

¹⁴ Compare Order No. R9-2009-0002, Water Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4) Draining the Watershed of the County of Orange, The Incorporated Cities of Orange County, and The Orange County Flood Control District Within the San Diego Region (“OC Permit”), Finding E.6, with 2010 Permit Finding E.6 and compare OC Permit Fact Sheet, pages 91-92 with 2010 Permit Fact Sheet at 93-95. An excerpt of this permit and fact sheet are attached as Exhibit E to Burhenn Dec., attached hereto.

the federal CWA requirement that MS4 permittees effectively prohibit the discharge of non-stormwater to the MS4.

This argument, however, ignores both the plain language of *Dept. of Finance* and how the Supreme Court derived the test for when a mandate is federal, as opposed to state. The Court derived its test from three unfunded mandates cases, none of which involved stormwater permits, *City of Sacramento v. State of California* (1990) 50 Cal.3^d 51, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal. App. 4th 805 and *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564. *Dept. of Finance*, 1 Cal. 5th at 765 (“From *City of Sacramento*, *County of Los Angeles*, and *Hayes*, we distill the following principle”).

The Supreme Court’s statement of that principle, that if “federal law gives the state discretion whether to impose a particular implement requirement, and the state exercises its discretion to impose the requirement by virtue of a ‘true choice,’ the requirement is not federally mandated,” is without any linkage to stormwater permit requirements, much less the specific MEP standard. And, to illustrate the principle, the Court went on to cite yet another non-CWA case, *Division of Occupational Safety & Health v. State Bd. Of Control* (1987) 189 Cal. App. 3^d 794.¹⁵

It is thus incorrect for the Water Boards to argue that “the Supreme Court decision has limited application when the federal standard compelling a challenged permit provision is wholly separate from the MEP standard and those specific implementing regulations.” WB Comments at 15. To the contrary, the Supreme Court spoke broadly and in light of existing mandates jurisprudence when it formulated its test. That test is as applicable to provisions allegedly justified by the “effective prohibition” requirement for non-stormwater as it is to requirements allegedly based on the MEP standard.

5. The One EPA-Issued Permit Cited by the Water Boards Does Not Support the Water Boards’ Argument that the Mandates in this Joint Test Claim are Federally Mandated

The Water Boards further contend (WB Comments at 15-16) that U.S. EPA has “issued permits requiring substantially similar provisions” to some of the mandates in the Joint Test Claim, thus demonstrating that “[i]f the State had not issued the Permit, the U.S. EPA would have done so,” and that “the San Diego Water Board effectively administered federal requirements concerning permit requirements.”

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

[T]he State contends the Permit itself is the best indication of what requirements *would have been imposed* by the EPA if the Regional Board had not done so

We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the Permit. In issuing the Permit, the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required.

¹⁵ Rebuttal Documents, Tab 1.

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

Moreover, as set forth in the Declaration of Karen Ashby filed herewith and the exhibits thereto (Attachment 3 to these Rebuttal Comments), the specific mandates in the Joint Test Claim are *not* contained in the one permit cited by the Water Boards, one covering stormwater discharges in the District of Columbia (“D.C. permit”). The Supreme Court rightly cited the lack of such evidence as undermining “the argument that the requirement was federally mandated.” *Id.* at 772. The non-applicability of the requirements of the D.C. permit, and other permits issued by the U.S. EPA, to the specific mandates set forth in this Joint Test Claim are discussed in Section II below.

Similarly, the inclusion by the Water Boards (WB Comments at 16) of comments from a letter written by an EPA official does not mean that the Commission must be guided by such comments in their determination of the MEP issue. In fact, that same letter was mentioned by the Supreme Court in *Dept. of Finance* (1 Cal. 5th at 761). The letter proved unpersuasive to the Supreme Court. It is unpersuasive when cited by the Water Boards now.¹⁶

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

The Water Boards argue that the requirements of the 2010 Permit are “not imposed uniquely upon local government.” WB Comments at 16. This is a remarkable statement, given that the Commission previously has held that such permits do in fact impose unique requirements on local agencies. *See* SD County SOD at 36 (regarding municipal stormwater permit issued to San Diego County and cities therein). The 2010 Permit, issued as it is only to local agencies operating MS4s (an acronym which stands for “*municipal* separate storm sewer systems”), and whose scope applies only to such local agencies (*see* 2010 Permit, Finding B), is an executive order applying uniquely to local agencies.

F. *The 2010 Permit Was Not Voluntary*

Another argument made by the Water Boards which has been previously rejected by the Commission is that the obtaining of the 2010 Permit by Claimants was somehow “voluntary.” WB Comments at 17.

The issuance of the 2010 Permit was not the result of a voluntary act by the permittees. Under federal and state law, all operators of municipal storm sewer systems are required to have an NPDES permit and/or Waste Discharge Requirements issued by the Regional Board.¹⁷

¹⁶ The Water Boards argue, in a single sentence and without citation to any evidence, that the costs to implement the mandates at issue in the Joint Test Claim “are *de minimis*” and therefore not entitled to subvention. WB Comments at 16. As a matter of fact, the actual costs to implement those mandated requirements are not *de minimis*. *See* Section 6 Declarations filed in Support of Joint Test Claim, at Paragraphs 5(a)-(m).

¹⁷ 33 U.S.C. § 1342(p); Water Code §§ 13260, 13263, 13376 and 13377. *See* also 40 CFR §§ 122.21(a) and 123.25(a)(4) (requiring any person who discharges or proposes to discharge pollutants to submit an application for issuance of a permit). An NPDES permit is required where there is a discharge of a pollutant

As the Commission found in the test claims on the 2001 Los Angeles Regional Water Quality Control Board permit (*Statement of Decision*, Case Nos. 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, *In re Los Angeles Regional Water Quality Control Board Order No. 01-182* (“LA County SOD”),¹⁸ at 19-21) and the 2007 San Diego Regional Water Quality Control Board permit for the County of San Diego and certain cities contained therein (SD County SOD at 33-35), municipal stormwater permittees do not voluntarily participate in the NPDES permit and therefore the content of prescriptive permit conditions imposed by regional boards were not the result of the permittees’ discretion.

There is no support for the Water Boards’ argument, as the Commission previously has found.

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

The Claimants respond to the funding arguments made by the Water Boards on pages 18-19 of the WB Comments in the Response to the Comments of the DOF and the Water Boards’ Regarding Fund Issues (“Funding Rebuttal”), below.

II. SPECIFIC RESPONSES

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

- The 2010 Permit is not an “MEP Permit,” and instead enforces a State-imposed requirement for compliance with water quality standards;
- The mandates at issue in the Joint Test Claim represent new programs and/or higher levels of service imposed on Claimants;
- The findings made by the San Diego Water Board in adopting the 2010 Permit as to its allegedly federal character are not entitled to deference under the Supreme Court’s test in *Dept. of Finance*;
- The 2010 Permit is an order imposing unique requirements on local agencies and was not entered into voluntarily by Claimants; and
- Claimants do not have fee authority to fund the mandates at issue in the Joint Test Claim.

from a “point source” to a water of the United States. 33 U.S.C. § 1342(a). Copies of statutes and regulations not originally submitted with the Joint Test Claim are included in Tabs 2 and 3 of the Rebuttal Documents.

¹⁸ Rebuttal Documents, Tab 4.

A. *Removal of Categories of Irrigation Runoff from Non-Prohibited Non-Stormwater Discharges*

Section B.1 of the 2010 Permit provides that the Claimants must effectively prohibit all types of non-stormwater discharges into their MS4. Section B.2 sets forth several categories of non-stormwater discharges which are excepted from this prohibition, but no longer includes three categories of irrigation runoff which had been excepted under the 2004 Permit: landscape irrigation, irrigation water, and lawn water.

1. **The Removal of Categories of Irrigation Runoff Was Not Federally Mandated**

The federal stormwater regulations require a permit application to contain a description of a program to implement and enforce an ordinance, orders or similar means to prevent “illicit discharges” to the MS4. Under the regulation, however, certain categories of non-stormwater discharges or flows need be addressed only “where such discharges are identified by the municipality as sources of pollutants to waters of the United States. 40 CFR § 122.26(d)(2)(iv)(B)(1). Included in these exempt categories are “landscape irrigation,” “irrigation water,” and “lawn watering.” *Id.*

The Water Boards contend that Claimants identified landscape irrigation, irrigation water and lawn watering as sources of pollutants to waters of the United States, citing the County of Riverside’s “Only Rain in the Storm Drain” educational program. WB Comments at 20. The Water Boards also rely on a state statute, the Water Conservation and Landscaping Act, Govt. Code § 65591 *et seq.* (“A.B. 1881”).¹⁹

The evidence cited by the Water Boards does not support a finding that the Claimants identified irrigation waters as a source of pollutants of waters of the United States. As set forth in the Narrative Statement at 17, the “Only Rain in the Storm Drain” educational outreach materials were prepared as a preventative measure, to educate the public and prevent these discharges from becoming problematic. These materials were not specific to the Santa Margarita River watershed covered by the 2010 Permit, and nothing in these materials constituted a finding that irrigation waters were a source of pollutants to waters of the United States in this watershed.

Indeed, in comments submitted to the San Diego Water Board in response to this proposed finding, the permittees stated that they had not identified these irrigation waters as a source of pollutants or conveyance of pollutants to waters of the United States.²⁰ Indeed, Claimants noted that the Santa Margarita Region is an ephemeral watershed that includes Marietta and Temecula Creeks which in some places the flow is continuous but in others it is ephemeral. *Id.* These educational materials were not a finding that these irrigation waters were a source of pollutants to waters of the United States in the watershed.

¹⁹ Rebuttal Documents, Tab 3.

²⁰ See Comments of District on behalf of all permittees on Tentative Order No. R9-2010-0016, September 7, 2010 (“District Comment Letter”), Attachment 6, at 2 (attached as Tab 6 to documents in support of Joint Test Claim, filed November 10, 2011).

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The Water Board's citation to A.B. 1881 is inapposite. This is a state statute, not an identification of a source of pollutants by Claimants, and therefore does not fall within the ambit of 40 CFR § 122.26(d)(2)(iv)(B)(1) ("where such discharges are identified by the municipality as sources of pollutants"). Moreover, A.B. 1881 was enacted to facilitate water conservation, not stormwater pollution. As the Legislature stated in its findings and declarations in support of the Act, "It is the policy of the state to promote the conservation and efficient use of water and to prevent the waste of this valuable resource." 2006 Cal. Stats. Ch. 559 sec. 3. Accordingly, this statute is not evidence that the Claimants found irrigation waters to be a source of pollutants to waters of the United States in the Santa Margarita watershed.

Indeed, A.B. 1881 specifically recognized that it may be imposing a state mandate. "If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to [Government Code § 17500 et. seq.]." ²¹ 2006 Cal. Stats. Ch. 559 sec. 6.

Moreover, there is additional evidence demonstrating that this requirement is not federally mandated. First, the federal stormwater regulation requires that if there is a finding of a significant pollutant source, the Claimants must *address* the discharge. See Narrative Statement at 18. This can be done through public information and education or other means. The regulations do not require a strict prohibition of such discharges. By mandating that Claimants must prohibit these discharges, the San Diego Water Board usurped Claimants' ability to design their own program and imposed requirements that exceed the federal regulation. See *Long Beach Unified*, 225 Cal.App.3d at 173.

Second, EPA's Guidance Manual indicates that the control of non-stormwater discharges can be directed towards individual dischargers of irrigation waters, not the entire category of irrigation waters (*see* discussion in Narrative Statement at 17). This is evidence that the federal regulations did not compel the Regional Board to address irrigation waters as it did. Instead it was a discretionary decision by the Board. As the Supreme Court found in *Dept. of Finance*, "If federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated." 1 Cal.5th at 765.

Finally, none of the stormwater permits issued by EPA contains this prohibition, including permits issued to Albuquerque in 2014, to Boise in 2012, to Washington D.C. in 2011 (modified in 2012) to Boston in 1999 and Worcester in 1998. See Declaration of Karen Ashby, ¶ 8. As the

²¹ In the Fact Sheet, the San Diego Water Board also asserted that Orange County and the City of Carlsbad in San Diego County, as well as certain other cities in San Diego County, found irrigation water to be a source of pollutants. Fact Sheet at 108-11. The 2010 Permit, however, covers the Santa Margarita River watershed in Riverside County, not watersheds in Orange or San Diego County. As discussed above, the 2010 Permit addresses a completely different type of watershed. See District Comment Letter, Attachment 6, at 1. The Fact Sheet's reference (Fact Sheet at 110-11) to a letter from the California Department of Water Resources addressing the model ordinance adopted pursuant to the Water Conservation and Landscaping Act is also inapposite. It, like A.B. 1881, does not constitute a finding by Claimants that irrigation waters are a source of pollutants to waters of the United States, as required under 40 CFR § 122.26(d)(2)(iv)(B)(1).

Supreme Court observed, the fact that EPA-issued permits do not contain similar prohibitions undermines the argument that the requirement is federally mandated. *Dept. of Finance*, 1 Cal. 5th at 772.

Accordingly, there is no evidence that any of the Claimants found the irrigation waters to be sources of pollutants to waters of the United States in the area covered by the 2010 Permit or that the prohibition against irrigation waters is federally mandated. The San Diego Water Board's imposition of this requirement is a state, not a federal mandate. *Dept. of Finance*, 1 Cal.5th at 765. The State has the burden of proving that a mandate is federal. *Id.* at 769. The Water Boards have not met their burden here.

2. The Prohibition of these Categories of Irrigation Runoff from Entering the MS4 Represented a New Program or Higher Level of Service

A mandate is “new” if the local government entity had not previously been required to institute it. *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877-78. A “higher level of service” exists where the mandate results in an increase in the actual level or quality of governmental services provided. *Id.* These determinations are made by comparing the mandate with pre-existing requirements. *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3^d 830, 835. *See also San Diego Unified School Dist., supra*, 33 Cal.4th at 878.

The Water Boards contend that the prohibition of these irrigation categories is not a new program or higher level of service, arguing that there is a general requirement to effectively prohibit non-stormwater discharges, and this general prohibition existed under the 2004 Permit WB Comments at 21. The Water Boards concede, however, that, under the 2004 Permit, these three irrigation categories were excepted from this prohibition. *Id.* This mandate is thus new.

Moreover, even were it not new, this mandate certainly imposes a higher level of service; Claimants did not have to address this irrigation water before, but now have to do so. *San Diego Unified School Dist.*, 33 Cal.4th at 878 (requirements constitute a higher level of service where “the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to enactment of [the statutes].”

B. Requirement to Meet Non-Stormwater Action Levels (“NALs”)

Sections C and F.4.d and e of the 2010 Permit required Claimants to analyze non-stormwater discharges to determine if those discharges contained pollutants above permit-designated “non-stormwater dry weather action levels” or “NALs.” If exceedances of NALs were found, Claimants were then required to conduct follow-up source investigations, undertake reporting obligations (including a possible prioritization plan and timeline) as well as potential enforcement actions (Sections C.1 and 2).

1. The Permit's NALs Requirements Were Not Federally Mandated

No federal statute or regulation required the programs set forth in Section C and F of the 2010 Permit, and the Water Boards identify none. Indeed, the Water Boards themselves state that

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the action levels “are based on applicable water quality objectives from the Basin Plan and other water quality control plans . . .” and are included “to result in compliance with applicable water quality standards.” WB Comments at 21-22. The Water Boards cite to the California Ocean Plan as the “other water quality control plan.” WB Comments at 21 n.106.

The Basin Plan and Ocean Plan are State, not federal, water quality plans. *See* Water Code § 13170.2 (Ocean Plan); § 13240 (Basin Plan).²² Measures included in a stormwater permit to implement California water quality control plans obviously cannot constitute a federal mandate. Moreover, as discussed in Section I.B above, discharges from municipal storm sewers are not required to meet water quality standards. *Browner, supra*, 191 F.3^d at 1166. A water board may impose such requirements, but it does so as a matter of its discretion, not as part of a federal mandate to meet a CWA requirement. *See also* Narrative Statement at 22-23.

These requirements, moreover, constituted a shift of responsibility from the San Diego Water Board to Claimants of the Board’s responsibility under the Porter-Cologne Act to investigate and regulate discharges under Water Code §§ 13263 and 13267. The shifting of this responsibility constitutes a state mandate. *Dept. of Finance*, 1 Cal.5th at 770-71; *Hayes*, 11 Cal.App.4th at 1594.

The Water Boards assert that the federal nature of the NALs requirements was supported by U.S. EPA staff comments made on a different permit or to a different regional board (on the 2013 San Diego County regional permit and to the Santa Ana Regional Board) that were supportive of the action level concept. WB Comments at 22. Neither of these comments suggests that EPA viewed action levels as a federally mandated requirement, but simply a concept that EPA staff thought was a good idea. Mere statements of agency support or desired preferences do not constitute a legal or binding regulatory determination that NALs are required by the CWA. *Dept. of Finance*, 1 Cal.5th at 771 n.16. Indeed, no EPA-issued permit contains NALs or their related requirements. *See* *Ashby Dec.*, ¶ 9. The absence of NALs and their related requirements in EPA regulations and permits undermines the argument that these requirements are federally mandated. *Dept. of Finance*, 1 Cal. 5th at 772.

Finally, the Water Boards have not shown that the NALs and associated programs are the only way to effectively prohibit pollutants in non-stormwater from being discharged into the MS4. The San Diego Water Board, by imposing specific permit requirement instead of allowing Claimants to design their own programs, usurped the discretion that Claimants are given under the CWA regulations. *See* 40 CFR § 122.26(d)(2)(iv)(A) (permittees are to submit program to detect and remove illicit discharges, i.e. non-stormwater discharges into the storm sewer system). By usurping Claimants’ ability to design and implement their own programs and instead mandating what Claimants must do, the Board imposed state mandates that exceeded federal requirements. *Long Beach Unified, supra*, 225 Cal.App.3^d at 173.

NALs were not included in the 2004 Permit, were not required by any federal statute or regulation, and are not present in EPA-issued permits. The Water Boards have not shown that NALs and the accompanying programs are compelled by federal law. As specific requirements

²² Rebuttal Documents, Tab 3.

imposed on Claimants at the discretion of the Regional Board, the NALs requirements are state mandates. *Dept. of Finance, supra*, 1 Cal.5th at 765.

2. The NALs Requirements Were a New Program and/or Higher Level of Service

The Water Boards do not dispute that the NALs requirements were new requirements, not having previously been imposed on Claimants. Instead, they argue that the requirements “are designed to help achieve compliance with the federal standard [the effective prohibition of non-stormwater discharges into MS4s],” and for that reason should not be considered new. WB Comments at 23. In this regard, the Water Boards point to the fact that the 2004 Permit required Claimants to review their monitoring results to identify water quality problems, to conduct “follow-up” investigations as necessary and develop numeric criteria to determine when follow-up action should be taken. WB Comments at 23, n. 114.

The 2004 Permit, however, gave Claimants substantial discretion as to the design of their non-stormwater program and the steps they could take. Under the 2004 Permit, it was the permittees who determined when a follow-up investigation was required, as well as the scope of that investigation. *See* 2004 Permit, Sections B.4 and J.4. In the 2010 Permit, the San Diego Water Board established the NALs and required that permittees “must investigate and seek to identify the source of the exceedance . . .” and set forth detailed steps permittees “must” take, including elimination of the source and reporting (Section C. 2.b). Sections C.1-2 and F.4.d-e were much more extensive than the analogous 2004 Permit requirements and eliminated much of the discretion previously given to the permittees. Sections C.1-2 and F.4d-e constituted new programs. *Lucia Mar Unified School Dist., supra*, 44 Cal.3^d at 835 (requirements are new when they impose obligations that did not previously exist)

Indeed, even if these requirements were not viewed as a new program, they certainly constituted a “higher level of service” in that they reflect an increase in the actual level or quality of the governmental services being provided. *San Diego Unified School District*, 33 Cal.4th at 877. Sections C.1-2 and F.4.d-e also require of Claimants a higher level of service within the meaning of article XIII B, section 6.

3. No Other Mandate Exceptions Apply

In addition to the arguments addressed above, the Water Boards contend that other mandate exceptions apply. Specifically, the Water Boards contend that Claimants proposed a “similar process” to the NALs in Claimants’ report of waste discharge (“ROWD”), citing to Claimant’s proposed development of “municipal action levels” to assist in assessment of Claimants’ programs. WB Comments at 23.

The NAL provisions in the 2010 Permit were far different than the municipal action levels referenced in Claimant’s ROWD. First, the proposed municipal action levels were to be developed by Claimants themselves instead of being required by the San Diego Water Board, as was the case

in the 2010 Permit (AR 3095-96).²³ Second, the proposed municipal action levels were to be a measure of the effectiveness of programs, not trigger investigation of specific non-stormwater discharges. *Compare* AR 3095-96 and Appendix C with 2010 Permit Section C.2. Third, and most significantly, the ROWD specifically stated that a reasonable municipal action level *cannot* be developed with respect to percentage of non-stormwater discharge events that exceed criteria and require follow-up (AR 3135). Thus, the Water Boards' contention that the Claimants proposed a process similar to NALs is not correct.

The Water Boards also contend that Claimants could assess fees to fund the program necessary to carry out the NAL requirements. This contention is addressed below in the Funding Rebuttal comments below. As set forth therein, Claimants do not have the authority to assess fees or service charges to fund this program.

C. Requirement to Meet Stormwater Action Levels (“SALs”)

Section D of the 2010 Permit required Claimants to comply with a number of new requirements triggered by the presence of “Stormwater Action Levels” (“SALs”). Beginning in year three, when a running average of twenty percent or greater discharges exceed the designated SALs, claimants were required to adopt additional control measures to reduce the levels of pollutants in the discharges. Claimants also were required to develop a monitoring plan to sample discharges from major outfalls, including those at which the SALs have been exceeded, and to conduct that monitoring. Neither the SALs nor these requirements were contained in the 2004 Permit.

1. The Permit Requirements Associated with SALs Were Not Federally Mandated

No federal statute or regulation required the SALs requirements set forth in 2010 Permit Section D, and the Water Boards identify none. Instead, the Water Boards contend that the SALs are *required* “to encourage the Copermitees to take appropriate measures to control of pollutants in storm water to the maximum extent practicable standard.” WB Comments at 24.

The Water Boards have not met their burden of showing that SALs were required by federal law to meet the MEP standard. *Dept. of Finance*, 1 Cal.5th at 769. First, the Water Boards' argument is belied by the language in the 2010 Permit itself. According to the permit, the purpose of the SALs is not to meet the MEP standard, but that “through the iterative and MEP process, outfall storm water discharges will meet *all applicable water quality standards.*” 2010 Permit, Section D.5. at 25 (emphasis added). *See also* Fact Sheet, Finding D.1.h, at 68 (“Storm Water Action Levels are set at such a level that any exceedance of a SAL will clearly indicate BMPs being implemented are insufficient to protect the Beneficial Uses of waters of the State.”) Beneficial Uses are a component of water quality standards adopted by a regional board as part of its Basin Plan. Water Code §§ 13050(j)²⁴ and 13240.

²³ “AR” refers to the San Diego Water Board's administrative record on the 2010 Permit, received by the Commission on September 22, 2017.

²⁴ Rebuttal Documents, Tab 3.

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Thus, the purpose of the SALs was to meet state water quality standards. As set forth above, however, federal law does *not* require discharges from municipal storm water permittees to meet water quality standards. *Browner, supra*, 191 F.3^d at 1164-65. Thus, the text of 2010 Permit Section D.5 itself establishes that SALs are a state, not federal, mandate.²⁵

Second, even if SALs were directed toward encouraging compliance with the MEP standard, the Water Boards have not cited any evidence to support their contention that SALs and the SAL-related programs were required to meet the MEP standard. In order to meet this burden, the Water Boards must support their contention with case-specific evidence addressing local conditions. *Dept. of Finance*, 1 Cal.5th at 768 n. 15. The Water Boards, however, cite to no evidence in the record regarding the Santa Margarita River watershed or the outfalls or discharges being regulated that would establish that SALs were required to meet the MEP standard. Not having cited to such evidence, the Water Boards have not met their burden of proving that SALs and their related programs were federally mandated.

The Water Boards also argue that Permit Finding E.6 and U.S. EPA's support for the inclusion of SALs show that SALs are federally mandated. WB Comments at 25. As discussed in Section I.D.3 above, however, Finding E.6 is entitled to no weight. Indeed, it does not even mention SALs, and is not supported with case-specific evidence regarding the importance of SALs.

The September 7, 2010 EPA comment letter cited by the Water Boards (WB Comments at 25) also does not support the contention that SALs were federally required. EPA simply stated that it supported their inclusion, not that they were required by federal law.²⁶ In fact, no EPA issued permit contains SALs or their related requirements. *See Ashby Dec.*, ¶ 10. The absence of SALs and SAL-related requirements in EPA-issued permits undermines the argument that these requirements were federally mandated. *Dept. of Finance*, 1 Cal. 5th at 772.

Finally, as with the NALs, the Water Boards have not shown that the SALs and the SAL-related programs were the only ways to effectively reduce pollutants and discharges to the MEP standard. The San Diego Water Board, by directing that Claimants must implement SALs and SAL-related programs, which are not compelled by federal law, as opposed to allowing Claimants to design their own programs, has imposed a state mandate. *Long Beach Unified*, 225 Cal.App.3^d at 173.

SALs were not included in the 2004 Permit, were not required by any federal statute or regulation, and were not present in EPA-issued permits. The text of the 2010 Permit states that the SALs were included for the purpose of meeting water quality standards, not MEP, and the Water Boards have not submitted case-specific evidence indicating that SALs were required to meet the MEP standard. The SALs and the SAL-related programs are state mandates.

²⁵ To the extent that the SALs act as numeric effluent limits themselves, these limits would also not be federally mandated. *See Narrative Statement* at 25.

²⁶ Though cited by the Water Boards, this letter was not included in the Attachments to the WB Comments. The letter can be found at AR 5749, and the SALs comment is at AR 5751.

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2. Programs Associated with SALs or Triggered by Their Exceedance Represented New Programs and/or a Higher Level of Service

While the Water Boards argue that the SAL requirements are “necessary to achieve the decades-old federal standard applicable to municipal stormwater discharges” and are consistent with federal application requirements (WB Comments at 25), they do not dispute that these requirements are new requirements that had never been previously imposed on Claimants. Indeed, like the NALs, even if these requirements were not viewed as new program, they certainly constitute a “higher level of service” in that they reflect an increase in the actual level or quality of governmental services being provided. These requirements are a new program or higher level of service within the meaning of article XIII B, section 6. *San Diego Unified School District*, 33 Cal.4th at 877.

3. No Other Mandate Exceptions Apply

Contrary to the Water Boards’ contentions (WB Comments at 26), Claimants cannot raise fees to pay for the SALs and SAL-related programs, and the costs are not *de minimis*. Claimants’ inability to raise fees to pay for these programs is addressed in the Funding Rebuttal comments below. As set forth in Claimants’ declarations, Claimants incurred increased costs in implementing these programs of more than \$24,000 in FY 2010-11 and more than \$26,000 in FY 2011-12. These costs are not *de minimis*. Govt. Code § 17564(a).

D. Priority Development Project and Hydromodification Requirements

As set forth in the Narrative Statement at 25-37, the 2010 Permit required Claimants to update their Standard Stormwater Mitigation Plans (“SSMPs”), designed to mitigate the volume of stormwater discharged from Priority Development Projects (“PDPs”), and apply the updated SSMPs to two new categories of PDPs, municipal projects that resulted in the disturbance of 1 acre or more and municipal projects that created 10,000 square feet or more of impervious surface (Sections F.1.d(1)(c) and (2)(a)). The permit also required Claimants to develop a Low Impact Development (“LID”) waiver program, and apply that program to Claimants’ municipal projects that meet the definition of PDPs (Section F.1.d(7)). Finally, the permit required the development of a hydromodification plan (“HMP”), also designed to mitigate the volume of stormwater discharged from PDPs, and apply that HMP to municipal PDPs (Section F.1.h).

1. The Priority Development and Hydromodification Requirements were not Federally Mandated

No federal statute or regulation required the 2010 Permit’s Priority Development or HMP requirements and the Water Boards do not identify any such statute or regulation. Instead, the Water Boards again simply argue that these requirements are consistent with the MEP standard and EPA supported their inclusion. WB Comments at 26-28.

The Commission has already considered and rejected the Water Board’s contention that Priority Development and HMP requirements such as the ones at issue in this Joint Test Claim are federal mandates. In the San Diego County stormwater test claim, the Commission considered

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permit provisions required by the same San Diego Water Board that required the updating of Standard Urban Stormwater Mitigation Plans (“SUSMPs”) to include LID requirements similar to the SSMP update requirements at issue here, and HMP requirements almost identical to those at issue here. *See* SD County SOD at 11-16 (HMP) and 16-18 (LID). The Water Boards made the same arguments in that test claim as they make here (SD County SOD at 42-44 (HMP) and 50 (LID)). After considering those arguments, the Commission found that

nothing in the federal regulation (40 C.F.R. §122.26) . . . 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.’ As in *Long Beach Unified School Dist. v. State of California*, 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 to impose these requirements. Thus, the Commission finds that [the LID provisions] of the permit is not a federal mandate.

SD County SOD at 51.

The Commission reached the same conclusion with respect to HMPs, finding that

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 ‘exceeds[s] the mandate in that federal law or regulation.’ As in *Long Beach Unified School Dist. v. State of California*, 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 to impose these requirements.

SD County SOD at 44-45 (citations omitted).

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

“Discharge of pollutants” is defined to be “the addition of any pollutant to navigable waters from any point source . . .” 33 U.S.C. § 1362(12).²⁷ “Pollutant” is defined to mean “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. §

²⁷ Rebuttal Documents, Tab 2.

1362(6).²⁸ The volume of water is not included in this definition. Moreover, under the CWA, the Water Boards may not regulate flow as a surrogate for CWA-regulated pollutants. *See Virginia Dept. of Transp. v. EPA*, Civil Action No. 1:12-CV-775 (U.S. District Court, E.D. Va.) (January 3, 2013) (slip op.)²⁹ (invalidating EPA TMDL which sought to regulate flow of water as a surrogate for pollutants such as sediment). Because volume of water is not subject to NPDES regulation, the 2010 Permit's Priority Development and HMP programs that addresses such volume are not derived from federal law.

The Water Boards nevertheless argue that that the San Diego Water Board found that these requirements are based exclusively on federal law, citing Permit Findings E.6 and D.1.a, and are necessary to meet the MEP standard. WB Comments at 26. As discussed above, however, Finding E.6 is boilerplate and not case specific and the Water Boards cite to no evidence that supports the finding with respect to the Priority Development and HMP requirements. The Water Boards cite no evidence that would support a reversal of the Commission's decision in the San Diego County SOD. Indeed, Finding E.6 does not mention Priority Development and HMP requirements.

Similarly, Permit Finding D.1.a is simply a general statement that the permit contained requirements necessary to meet the MEP standard. It does not address these two specific requirements or any evidence that would establish that these are the only means to implement MEP. The other findings cited by the Water Boards (WB Comments at 27) likewise are general statements about the efficacy of LID and hydromodification principles; they do not establish that federal law compelled the LID and HMP requirements at issue here. *Dept. of Finance*, 1 Cal.5th at 765 (federal mandate only if federal law compels the state to impose the requirement.)

Moreover, a general statement that the permit contains requirements to meet MEP is not equivalent to a finding that *all* permit requirements are necessary to MEP. As noted, the 2010 Permit is based on both federal and state authority and the permit's compliance standard is not adherence to the MEP standard but rather the attainment of water quality standards. *See* Section I.B, above. Thus, these findings are entitled to no deference. *Dept. of Finance*, 1 Cal. 5th at 768 (deference required only when a determination is made that these requirements are the only means by which the MEP standard could be implemented).

The same is true with regard to the Water Boards' citation to U.S. EPA's comments on the permit. EPA "encouraged" or supported these requirements, but did not say that they were mandatory. EPA Comments, September 7, 2010, at 3 (AR 5749). Indeed, no EPA-issued permit contains these same detailed requirements, which they would be if they were mandated by federal law. *See* Ashby Dec., ¶¶ 11-12.³⁰ The Water Boards' citation to EPA's comments on other permits

²⁸ Rebuttal Documents, Tab 2.

²⁹ Rebuttal Documents, Tab 1.

³⁰ As set forth in the Ashby Declaration, neither the Boston nor Worcester permits include the detailed requirements of 2010 Permit Section F.1.d. The Albuquerque, D.C., and Boise permits contain LID requirements, but not the extensive requirements that are present in the 2010 permit. The Albuquerque permit seeks to encourage use of LID, but does not require on site or off site mitigation projects. The D.C. permit contains LID requirements, but they are not as prescriptive as those in the 2010 Permit. Similarly, the Boise permit contains requirements for LID and green infrastructure strategy, but does not contain the two PDP definitions or the requirement to create a LID waiver program. With respect to the requirements

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(WB Comments at 28-29) is entitled to no weight. The comments are not specific to the characteristics of Claimants' watershed and the 2010 Permit, and thus do not establish that the CWA compelled these requirements in this permit. *Dept. of Finance*, 1 Cal.5th 768 n.15. The Washington Pollution Control Board Hearing decision cited by the Water Boards (WB Comments at 28-29) is likewise inapplicable. As the Water Boards themselves concede, that decision addressed federal and Washington state law. WB Comments at 28.

In the San Diego County stormwater test claim, the Commission did distinguish LID and HMP requirements as applied to municipal projects. Whereas the Commission found that permit's provisions requiring LID and HMP on private developments to be a state mandate, the Commission determined that requiring LID and HMP for municipal projects would not. The Commission reasoned that compliance with LID and HMP for municipal projects was voluntary because it arose only when the permittees built a project and there was no legal requirement to do so, citing *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727. (SD County SOD at 45, 51.)

As set forth in the Narrative Statement (at 33-35), the Commission's reasoning is not applicable to the 2010 Permit. The 2010 Permit required the preparation of an updated SSMP, without regard to whether Claimants were going to construct a municipal PDP. Moreover, as also set forth in the Narrative Statement, the rationale of *City of Merced v. State of California* (1984) 153 Cal.App.3^d 777, relied upon by the court in *Kern High School Dist.*, is not applicable and has been limited to its facts by the Supreme Court in *San Diego Unified School Dist., supra*, 33 Cal.4th at 887-88. See Narrative Statement at 33-35.

2. The Priority Development and Hydromodification Requirements Represented New Programs and/or Higher Levels of Service

The 2004 Permit did not contain requirements relating to Priority Development or hydromodification. It did not require an update of the SSMPs and did not impose those requirements on municipal projects that resulted in the disturbance of 1 acre or more or new development projects that created 10,000 square feet or more of impervious service. The 2004 Permit also did not require the development of a HMP and application of the HMP requirements on municipal projects.

The Water Boards do not dispute that the 2010 Permit extended LID and hydromodification requirements to these two new categories of projects, and do not dispute that the 2010 Permit requires the development and application of a HMP to municipal projects. Instead, the Water Boards contend that these requirements are "refinements" of the 2004 Permit's requirement that Claimants develop numeric criteria to ensure discharges from priority development projects

of 2010 Permit Section F.1.h, none of the Albuquerque, D.C., Boston or Worcester permits contain such provisions. The Boise permit contains requirements for LID and green infrastructure strategy, but does not apply it to the range of PDPs to which the 2010 Permit applies, including municipal projects, but instead requires only the development of a strategy and application to three pilot projects. No EPA-issued permit has provisions as extensive and prescriptive as the San Diego permit.

maintain or reduce pre-development downstream erosion and protect stream habitat. WB Comments at 29.

The 2004 Permit, however, did not apply its requirements to projects that fall within the 2010 Permit's 1 acre threshold or to projects that create 10,000 square feet or more of impervious surface (2010 Permit, Section F.1.d(1)(c) and (2)(a)). Thus, these requirements represent not simply a refinement of a prior permit requirement. They represent an *expansion* of prior permit requirements. These new requirements are new programs, or a "higher level of service," in that they require an increase in the actual level or quality of the governmental services being provided. *San Diego Unified School Dist.*, 33 Cal.4th at 877. These new priority development project and hydromodification plan requirements thus are a new program or higher level of service within the meaning of article XIII B, section 6.

3. No Other Mandate Exceptions Apply

No other mandate exceptions apply. Contrary to the Water Boards' assertion (WB Comments at 29), Claimants did not propose application of the Priority Development and HMP requirements to municipal projects that resulted in the disturbance of one acre or more or that created 10,000 square feet or more of impervious surface. Claimants' ROWD, cited by the Water Boards, only states that the permittees will revise the Riverside County Stormwater Quality Best Management Practice design handbook to better incorporate LID concepts and guidance, and that the permittees will use completed guidance or hydromodification to update their water quality management plan and BMP design handbook (AR at 3112-13).

The ROWD says nothing about expanding the definition of PDPs, development of a LID waiver program or development of an HMP, as required by the 2010 Permit. Indeed, a comparison of the ROWD to the 2010 Permit requirements shows how the San Diego Water Board usurped the Claimant's ability to design their own program, and instead substituted its own directives and requirements. As such, the San Diego Water Board imposed requirements that exceeded federal law. *Long Beach Unified*, 225 Cal.App.3^d at 173.

The Water Boards also contend that Claimants can assess fees to fund these requirements. WB Comments at 30. This contention is addressed in the Funding Rebuttal comments below. As set forth in Claimant's declarations, Claimants incurred increased costs in implementing these programs over \$60,000 in FY 2010-11 and over \$685,000 in FY 2011-12. These costs are not *de minimis*. See Govt. Code § 17564(a).

E. BMP Maintenance Tracking Requirements

The 2010 Permit required Claimants to develop and maintain a watershed-based database to track all approved post-construction BMPs and to inspect these BMPs to verify that they had been implemented and were conducting BMP maintenance within its jurisdiction (Permit, Section F.1).

1. The BMP Maintenance Tracking Requirements Were Not Federally Mandated

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No federal statute or regulation required the BMP maintenance tracking program. The Water Boards cite federal regulations requiring MS4 dischargers to develop a program to reduce pollutants from new development and redevelopment construction and certain industrial or land use sites. WB Comments at 30, *citing* 40 CFR § 122.26(d)(2)(iv)(A)-(D). None of these regulations, however, requires the extensive BMP maintenance tracking and inspection program at issue here, and the Water Boards cite to no such portion of the regulations that requires it.

Instead, the Water Boards again repeat the argument they make with respect to the other mandates in this Joint Test Claim, that this program is necessary to meet the MEP standard. WB Comments at 30-31. The Water Boards, however, only cite to a general permit finding regarding the nature of MEP (*id.* at 31), not to a finding specific to this watershed or this BMP maintenance tracking requirement. The finding does not assert that this program is the *only* way to meet the MEP standard and thus is not entitled to any deference. *Dept. of Finance*, 1 Cal.5th at 768.

With respect to requirements of EPA-issued permits, neither the Albuquerque, Boston nor Worcester permits contain requirements that permittees develop and maintain a watershed-based database to track all approved post-construction BMPs and to inspect those BMPs to verify that they have been implemented and are operating. The D.C. permit contains a requirement to inventory BMPs, but it is not as prescriptive as the requirements in the 2010 Permit and does not require 100% of high priority projects to be annually inspected or the same frequency of verification and inspection as required by the 2010 Permit. The Boise permit contains BMP maintenance tracking requirements, but are not as prescriptive as those in the 2010 Permit. *See Ashby Dec.*, ¶ 13.

Indeed, the requirement to inspect BMPs on private developments in the 2010 Permit is similar to the requirement to inspect commercial, industrial and construction sites that was at issue in *Dept. of Finance*. In that case, the Supreme Court noted that “neither the CWA’s ‘maximum extent practicable’ provision nor the EPA regulations on which the State relies expressly required the Operators to inspect these particular facilities or construction sites.” 1 Cal. 5th at 770. The Court also rejected the argument that the inspection requirements were federally mandated because the CWA required the Los Angeles Water Board to impose permit controls to the MEP and that EPA regulations contemplated that some kind of inspections would be required. The Supreme Court found that while “the EPA regulations contemplated some form of inspections, however, does not mean that federal law required the scope and detail of inspections required by the Permit conditions.” *Id.* at 771.

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

The BMP maintenance tracking program is a state mandate for another reason. As discussed in Section I.D.2 above, the Porter-Cologne Act regulates discharges of waste to waters of the state. Under Porter-Cologne, water boards are obliged to control such discharges from all dischargers, including any private property developments subject to the BMP maintenance tracking program. Water Code §§ 13260 and 13263. Under Porter-Cologne, it is the regional

boards' obligation to track and verify these private discharges and private BMPs. The San Diego Water Board could have performed this task itself. When the Board freely chose to shift this obligation onto the Claimants, it created a state mandate. *Hayes, supra*, 11 Cal.App.4th at 1594.

The Water Boards also contend that this requirement is consistent with U.S. EPA's MS4 Permit Improvement Guide. WB Comments at 31. That Guide, however, is not a statute or regulation and is not intended to create any legal obligation. As the Guide itself states,

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.**

EPA MS4 Permit Improvement Guide at 3 (emphasis added). The test of whether a requirement is federally mandated is if federal law compels the state to impose, or itself imposes the requirement. *Dept. of Finance*, 1 Cal.5th at 765. The guide itself states that it does not.

2. The BMP Maintenance Tracking Requirement Represented a New Program and/or Higher Level of Service

These requirements were not present in the 2004 Permit. The Water Boards do not contend otherwise. As such, they are a new program.

3. No Other Mandate Exceptions Apply

The Water Boards contend that Claimants proposed an approach for inspecting and verifying post construction BMPs in their ROWD. WB Comments at 32. That proposal, however, was not as extensive as the 2010 Permit requirements and was not to commence immediately, but only when resources became available (AR at 3113-14).

The Water Boards also contend that Claimants can assess fees to fund these requirements. This contention is addressed in the Funding Rebuttal comments below. As set forth in Claimant's declarations, Claimants incurred increased costs in implementing these programs in the amount of over \$50,000 in both FYs 2010-11 and FY 2011-12. These costs are not *de minimis*. See Govt. Code § 17564(a).

F. Construction Site Requirements

2010 Permit Section F.2.d(3) required Claimants to require Active/Passive Sediment Treatment ("AST") at construction sites, both private and municipal, determined to be an exceptional threat to water quality and, when inspecting construction sites. Section F.2.e(6e) required Claimants to review site monitoring data results for compliance purposes, including compliance with provisions the San Diego Water Board in the permit has ordered Claimants to impose on that site.

1. The Construction Site Requirements Were Not Federally Mandated

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As set forth in the Narrative Statement, nothing in the CWA or its implementing regulations required the installation of AST at construction sites or that the Claimants were required to review a construction site's monitoring data. Narrative Statement at 40. The San Diego Water Board freely chose to impose these requirements in the permit, imposing requirements that exceeded federal law. *Dept. of Finance*, 1 Cal.5th at 765; *Hayes*, 11 Cal.App.4th at 1594. See also *Long Beach Unified*, 225 Cal.App.3^d at 173 (state mandate created where state removes local agency's discretion and directs program to be implemented).

Moreover, under the Porter-Cologne Act, it is a regional board's responsibility to inspect and control the discharge of pollutants into the waters of the State, including from private construction sites. Water Code §§ 13263 and 13267(c). The San Diego Water Board chose to shift that obligation to Claimants, creating a state mandate when doing so. *Hayes*, 11 Cal.App.4th at 1593.

The Water Boards nevertheless contend that these construction requirements are necessary to implement the MEP standard, citing to findings made by the San Diego Water Board. WB Comments at 32-33.³¹ These findings, however, do not stipulate that AST measures are the only means to implement the MEP standard. As such, they are not entitled to deference. *Dept. of Finance*, 1 Cal.5th at 768. Instead, imposition of this requirement usurped Claimants' ability to design their own program. The San Diego Water Board directed that Claimants must require these construction sites to utilize Active/Passive Sediment Treatment. By mandating this requirement, the San Diego Water Board directed how Claimants must act and imposed a requirement that exceeded federal law. *Long Beach Unified*, 225 Cal.App.3^d at 173.

The Water Boards also contend that the monitoring data inspection requirement falls within the federal regulation that Claimants control discharges from industrial and construction sites. WB Comments at 33-34. The Water Boards made this same argument in *Dept. of Finance* with respect to the facility inspections at issue there. 1 Cal. 5th at 760 n.11. The Supreme Court rejected that argument, holding that nothing in the general regulations required the specific number or type of inspections. *Id.* at 770. That same rule applies here.

Finally, 40 CFR § 122.42(c), cited by the Water Boards, does not require that municipalities review third-party monitoring data. The regulation states that a municipality must submit an annual report that includes, *inter alia*, monitoring data that is accumulated throughout the year. The reporting, however, is of monitoring performed by the municipality *itself*, not monitoring performed by *third parties*. (The federal stormwater regulations require a municipality to have a monitoring program for representative data collection of its discharges. 40 CFR § 122.26(d)(2)(iii)(D).) The fact that this reporting requirement is applicable to Claimants' own monitoring and not that performed by third parties at construction sites is evidenced by the fact that the 2010 Permit does not require Claimants to include in their annual report the construction site monitoring data that they are directed to review. See, e.g., Fact Sheet at 175 ("Reporting

³¹ In fact, while the Fact Sheet discussion of Section F.2.d, states that "AST is . . . considered MEP for the discharges from these sites," the same discussion concluded that AST was required both "[t]o ensure the MEP standard and [that] *water quality standards* are met." Fact Sheet at 147 (emphasis supplied). Again, as with so many of the requirements of the 2010 Permit, the AST requirement was not a function of MEP compliance.

requirements in the Order focus on results and responses to the effectiveness assessments conducted by the Copermittees.”)

Finally, none of the EPA-issued stormwater permits contain the requirements set forth in the 2010 Permit regarding construction sites. *See* Ashby Dec., ¶ 14.

2. The Construction Site Requirements Represented a New Program and/r Higher Level of Service

The Water Boards concede that these requirements were not contained in the 2004 Permit. WB Comments at 34. Nevertheless, they contend that they were not a new or a higher level of service because the 2004 Permit required permittees to require construction sites located near or adjacent to “sensitive” waters to control pollutants. In the view of the Water Boards, the requirements in the 2010 Permit “build” on that earlier requirement, and because the 2004 Permit required inspections for compliance with local ordinances. *Id.*

The test of whether a mandate is a new program or higher level of service is whether the local agency had previously been required to do it, or whether it results in an increase in the actual level or quality of governmental services provided. *Lucia Mar, supra*, 44 Cal. 3^d at 836; *San Diego Unified School Dist.*, 33 Cal. 4th at 877. Here, Claimants did not have to require AST at construction sites (and did not have to include it in municipal projects) and did not have to review monitoring results until the San Diego Water Board ordered it in the 2010 Permit. These requirements certainly are an increase in the actual level or quality of governmental services provided. These requirements are a new program or higher level of service.³²

3. No Other Mandate Exceptions Apply

The Water Boards contend that the Claimants have fee authority, that municipal projects are voluntary, and that the costs to implement these requirements are *de minimis*. For the reasons set forth in the Funding Rebuttal comments set forth below, the Claimants do not have such fee authority. Nor are the costs incurred in complying with these requirements at municipal projects voluntary (*see* Narrative Statement at 33-35).

The costs of complying with these requirements are also not “*de minimis*.” As set forth in the Joint Test Claimant’s Section 6 Declarations, the Claimants incurred increased costs in implementing these programs of over \$3,000 in both FYs 2010-11 and 2011-12. These costs are not *de minimis*. *See* Govt. Code § 17564(a).

³² The Water Boards also contend that there is no shifting of inspection costs because the inspections are not for compliance with the State’s General Construction Stormwater Permit. WB Comments at 35. The inspections, however, are for determining compliance with permittees’ ordinances, permits, and “this Order.” (2010 Permit, Section F.2.e.) Because the inspections are to determine compliance with “this Order,” i.e., the 2010 Permit, the San Diego Water Board shifted to the Claimants the obligation to determine if private construction sites were complying with the requirements the San Diego Water Board has ordered to be imposed on them.

G. Unpaved Roads BMP Requirements

Sections F.1.i. and F.3.a.10 of the 2010 Permit required Claimants to develop and implement BMPs to address erosion and sediment and other impacts from the development and maintenance of unpaved roads. Claimants were also required to develop and implement BMPs for erosion and sediment control during maintenance of unpaved roads, maintain such roads to reduce erosion and sediment transport, re-grade the roads in specified manners or employ alternative equally effective BMPs, and examine the feasibility of replacing existing culverts or the design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology.

1. These Requirements Were Not Federally Mandated

The specific requirements relating to unpaved road BMPs (set forth in the Narrative Statement at 41-42) represent the exercise of discretion by the San Diego Water Board to impose a particular implementing requirement by virtue of a true choice by the Board. It thus represents a state, not federal, mandate under the Supreme Court's test in *Dept. of Finance*. 1 Cal. 5th at 765.

The Water Boards cite no federal regulatory requirement mandating such BMPs. They instead argue (WB Comments at 35) that "design and source control BMPs for unpaved roads are needed to minimize the discharge of sediment to the MS4s and receiving waters, implementing the federal mandate to control pollutants in storm water discharges to the MEP." The Boards cite 2010 Permit Finding D.1.f (which does not even mention the unpaved road requirements)³³ as authority to conclude that the BMP requires are "necessary to implement the federal requirement." *Id.*

The Boards further cite Finding D.1.c as evidence of a determination by the San Diego Water Board that the unpaved road BMP requirements were "necessary to meet MEP." WB Comments at 36. That finding, however, references not only the MEP standard but also the achievement of water quality standards:

This Order contains new or modified requirements that are necessary to improve Copermitees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP *and achieve water quality standards.*

2010 Permit at 7 (emphasis supplied).

Importantly, the Board's finding also does not state that the 2010 Permit requirements for unpaved roads were the "only" means by which the MEP standard could be met, the test laid down by the Supreme Court as to whether deference should be given to such a finding by a water board. 1 Cal. 5th at 765. Given the explicit reference to the achievement of water quality standards in Finding D.1.c, it is clear from the record that the San Diego Water Board went further than what the MEP standard required, and that deference cannot be given to such findings.

The Water Boards argue (WB Comments at 35, n.171) that the 2010 Permit could not have required the control of sediment from roads "that do not qualify as MS4s or do not discharge into MS4s," as was set forth in Claimants' Narrative Statement at 42, because this assertion is

³³ And was not cited by the San Diego Water Board as authority for the unpaved road BMPs requirement in the Fact Sheet. *See* Fact Sheet at 144.

“unsupported by the overarching purpose of and legal basis for issuing an MS4 permit to Claimants.”

The actual text of the 2010 Permit and the relevant Findings, however, belie this argument by including requirements relating not to discharges from or to MS4s but rather discharges into natural waterbodies (which are not MS4) or to Waters of the United States (which are not a CWA “point source,” such as MS4s).

In the examples below, relevant Permit sections reflecting that the requirements applied to natural waterbodies are italicized for emphasis. 2010 Permit Section F.1.i(4) required road and culvert designs “that do not impact *creek functions* and where applicable, . . . *maintain migratory fish passage*.” Section F.3.a.10(a) required development of BMPs for the maintenance of unpaved roads “particularly in or adjacent to *receiving waters*.” Section F.3.a.10(b) required development and implementation of BMPs “to minimize impacts on *streams and wetlands*” during unpaved road maintenance activities. Section F.3.a.10(c) required erosion and sediment transport protections during maintenance of unpaved roads “adjacent to *streams and riparian habitat*.” Finally, Section F.3.a.10(e) required the permittees to examine the feasibility of replacing culverts or designing new culverts or bridge crossings to “maintain *natural stream geomorphology*.”

Similarly, the Fact Sheet discussion of Finding D.1.c noted that “[r]oad construction, culvert installation, and other maintenance activities can disturb the soil and drainage patterns *to streams in undeveloped areas . . .*” Fact Sheet at 58. The Fact Sheet further noted that “[p]oorly designed roads” can “carry runoff and sediment into *natural streams . . .*” *Id.* at 59.

These permit provisions appear to flow from an assertion of jurisdiction made by the San Diego Water Board that exceeds the definition of “MS4” in the CWA. In Finding D.3.c, the Board extended the concept of the “MS4” to “natural . . . streams,” even though the federal regulatory definition of “MS4” is of 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 State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of . . . storm water . . . including . . . a . . . flood control district.” 40 CFR § 122.26(b)(8).

“Natural streams” are not “owned or operated” by any municipal body, and certainly do not fall within the anthropogenic water courses identified in the regulatory language (e.g., “man-made channels” or “storm drains.”). Extending the scope of the 2010 Permit to such streams may have allowed the Water Boards to argue that the permit regulated only discharges to or from the “MS4,” but that is an “MS4” which exceeds the bounds of the CWA’s definition.

Nothing in the text of the 2010 Permit or the Fact Sheet suggests any limitation on discharges from unpaved roads which the BMP requirements are supposed to address. Thus, those requirements in fact exceed the requirements of an MS4 permit issued under Section 402(p)(3)(B) of the Clean Water Act and cannot represent a federal mandate.

Even were it to be conceded that the scope of the 2010 Permit and its unpaved roads requirements extended only to what would be considered a CWA-defined “MS4,” those requirements still were not federally mandated. Nothing in the CWA or its regulations requires the specific mandate set forth in the unpaved roads construction, design and maintenance requirements. The San Diego Water Board here made the “true choice” to mandate such

requirements. *Dept. of Finance*, 1 Cal. 5th at 765. And, nowhere in the record is there any finding by the Water Board that these specific requirements were the only means by which the MEP requirement could be met, as noted above.³⁴

Finally, a review of EPA-issued stormwater permits disclosed none that contained unpaved road BMP requirements. *Ashby Dec.*, ¶ 15. As noted previously, the absence of such provisions in EPA-issued permits undermines the argument that the provisions were federally mandated. *Dept. of Finance*, 1 Cal. 5th at 772.

2. The Unpaved Roads BMP Requirements Represented a New Program And/Or Higher Level of Service

The Water Boards contend (WB Comments at 36-37 and n.179) that the unpaved road BMP requirements were not a new program because the 2004 Permit required BMPs for construction projects. The 2004 Permit, however, contained no specific requirements for unpaved road construction or maintenance nor in it did the San Diego Water Board identify unpaved roads as a pollutant source of concern.

In fact, the Finding D.1.c cited by the Water Boards states that the 2010 Permit “contains *new or modified requirements*” and that the unpaved road requirements were the result of the San Diego Water Board’s “identification of water quality problems through investigations and complaints *during the previous permit period.*” (emphasis supplied). Obviously, had these requirements been part of the previous 2004 Permit, the San Diego Water Board would not have been able to make such findings.

The unpaved road BMP requirements of the 2010 Permit were a new program and/or represented a higher level of service mandated on the Claimants.

3. No Other Mandate Exceptions Apply

The Water Boards again argue that the Claimants had fee authority to pay for the unpaved road BMP mandates. For the reasons set forth elsewhere in this Rebuttal, that assertion is incorrect. *See Funding Rebuttal comments, below.* Similarly, there is no support (and the Water Boards offer none) for the assertion that the costs of compliance are *de minimis*. WB Comments at 37. In fact, as set forth in the Narrative Statement at 43, the increased costs of compliance with the unpaved roads requirements were substantial, totaling nearly \$500,000 in FY 2010-11 and nearly \$600,000 in FY 2011-12. These costs are far from being *de minimis*. *See Govt. Code* § 17564(a).

H. Industrial/Commercial Inspection Requirement

Section F.3.b.4(a)(ii) of the 2010 Permit required that Claimants review self-monitoring data produced by commercial and industrial facilities as part of the inspection of such facilities.

1. The Inspection Requirements Were Not Federally Mandated

The Water Boards (WB Comments at 37-38) argue that this requirement is necessary to meet the MEP standard. The Water Boards cite 40 CFR § 122.26(d)(2)(i)(A), which requires

³⁴ The reference to the need to achieve water quality standards in the Water Boards-referenced Finding D.1.c, of course, belies any argument that the intent of the unpaved roads requirements (or other related requirements in the 2010 Permit) were intended only to meet the MEP standard.

permittees to control through “ordinance, permit, contact, order or similar means” stormwater discharges associated with industrial activity. This regulation does not even mention commercial facilities. This requirement, moreover, does not go to inspections of industrial facilities, which are specifically addressed by 40 CFR § 122.26(d)(2)(iv)(C). And, those industrial facilities required by the regulation to be inspected are only a small subset of all industrial facilities, plus those facilities determined by the *municipality*, not the permitting agency, to be contributing a substantial pollutant loading to the MS4. *See* discussion in Narrative Statement at 44.

The Water Boards cite 2010 Permit Finding D.3.b, which does not specifically mention inspections, as further authority for their MEP argument. WB Comments at 37-38. Nothing in Finding D.3.b or the discussion in the Fact Sheet of that finding makes the case that inspections of industrial and commercial facilities which involve review of their self-monitoring data was the *only* way by which the MEP standard can be met, the test set forth by the Supreme Court in *Dept. of Finance*.

The Water Boards also quote part of a finding (without citation) and then add text not found in the 2010 Permit or Fact Sheet to the effect that inspections are “*a necessary part of the process to achieve MEP.*” WB Comments at 38. This is not evidence that the Commission can rely upon, but rather the erroneous characterization of the law and facts by the Water Boards.

With respect to the provisions of EPA-issued stormwater permits, the requirement to review facility monitoring data when inspecting a range of industrial and commercial sites are found in no EPA-issued permit. Although EPA-issued permits require review of monitoring data when inspecting municipal landfills, hazardous waste treatment storage or disposal facilities, facilities subject to EPCRA Title III, or industrial sites that have NPDES permits that discharged to the MS4, none of the EPA-issued permits require inspections of the extensive list of commercial and industrial facilities required by the Permit, and thus none required review of monitoring data of the extensive list of facilities required by the San Diego permit. *See* Ashby Dec., ¶ 16.

2. The Inspection Requirements Represented a New Program and/or Higher Level of Service

The Water Boards argue that the state had not shifted its own responsibility for inspecting industrial and commercial sources, claiming that the Industrial General Permit (“IGP”) in effect when the 2010 Permit was adopted “did not require the regional water boards to review monitoring data if sites monitor their runoff.” WB Comments at 38. This assertion is simply incorrect.

First, the IGP in effect in 2010 (and through most of the 2010 Permit’s term), State Board Order No. 97-03-DWQ,³⁵ specifically required monitoring by industrial discharger permittees in Section B. Second, as the Commission itself has found, the regional boards, including the San Diego Water Board, were required to enforce that IGP: “The state has issued a statewide general activity industrial permit . . . that is enforced through the regional boards.” LA County SOD at 39. *See also* Section F of the Order, which required that “Regional Water Boards shall: (a) Implement the provisions of this General Permit, including, but not limited to, reviewing SWPPs, reviewing annual reports, *conducting compliance inspections*, and taking enforcement actions.” (emphasis supplied). As the enforcing agency, the San Diego Water Board was charged with the

³⁵ Relevant excerpts of which are attached in the Rebuttal Documents, Tab 2.

responsibility of ensuring that monitoring had been undertaken, since that was a specific requirement of the IGP.

Third, the Fact Sheet specifically noted that “BMP implementation plans *and monitoring data* are expected to *be available for any facility that is covered under the General Industrial Permit.*” Fact Sheet at 156 (emphasis supplied). To argue, without citation, that the permit “did not require the regional water boards to review monitoring data” ignores the San Diego Water Board’s own findings that such data would be available for IGP-covered facilities. Moreover, the San Diego Water Board had the authority under the Porter-Cologne Act, Water Code § 13267, to require any discharger (including any industrial or commercial facility) to provide information, including monitoring data, to the Board. By shifting the responsibility to review that monitoring data to the Claimants, the Water Board created a state mandate. *Hayes, supra*, 11 Cal. App. 4th at 1593-94.

While agreeing that the requirement to review monitoring data “was absent in the prior [2004] permit” the Water Boards argue the MEP requirement “is the same.” WB Comments at 38. This argument apparently repeats the argument, already rejected by the Commission, that additional requirements intended to meet the MEP standard are not new programs. *See* discussion in Section I.C.2 above. Finally, the Water Boards argue that because the permittees were required under the 2004 Permit check for various items during inspections, “reviewing available monitoring data is wholly consistent with the prior requirements” (WB Comments at 39.) As already has been pointed out, that is not the test for a new mandate. The requirement to review monitoring data was a new requirement (as admitted by the Water Boards) and thus constitutes a new program or higher level of service.

3. No Other Mandate Exceptions Apply

The Water Boards again argue (WB Comments at 39) that Claimants have not shown that they must use tax money or have fee authority for the costs of the monitoring data review. In fact, the Declarations supporting the Joint Test Claim establish the first issue and the second is addressed in the Funding Rebuttal comments, below. The Water Boards argue that the costs of the mandate are “*de minimis*,” but this too is rebutted by the evidence in the Section 6 Declarations, which indicate that Claimants incurred increased costs of over \$15,000 in each of FYs 2010-11 and 2011-12 in response to this mandate. *See* Narrative Statement at 45. The Water Boards have not met their burden of establishing the existence of any exceptions to the requirement for a subvention of funds for this mandate.

I. *Retrofitting Requirements for Existing Development*

Section F.3.d of the 2010 Permit required Claimants to identify areas of existing developments, including municipal developments, as candidates for retrofitting, evaluate and rank candidates according to pre-established criteria, prioritize work plans for implementation according to the evaluation, cooperate with landowners to encourage retrofit of private improvements, and track and inspect retrofitting projects. Permittees were required to invest significant staff time and other valuable resources into developing and implementing this new program.

1. The Retrofitting Requirements Were Not Federally Mandated

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The Water Boards concede that the federal stormwater regulations “do not explicitly require these provisions be included in the permit.” WB Comments at 39. That should be the end of the inquiry. Nonetheless, the Water Boards argue that the retrofitting requirements in the 2010 Permit are necessary to meet the federal MEP standard. WB Comments at 39-41. The record indicates otherwise.

First, in addition to the fact that the 2010 Permit is itself not an “MEP permit” (see discussion in Section I.B, above), the permit language cited by the San Diego Water Board as to the purpose of the retrofitting program itself refers not only to the reduction of discharges of stormwater pollutants to the MEP but also the prevention of “discharges from the MS4 from causing or contributing to a violation of water quality standards.” 2010 Permit, Section F.3.d. As previously discussed, the decision by the San Diego Water Board to exercise its discretion, its “true choice” to require such provisions is not federally mandated. *Dept. of Finance*, 1 Cal. 5th at 765.

Second, citation to the MS4 Permit Improvement Guide does not support the Water Boards’ argument because, as discussed above in Section II.F.2, the Guide has no regulatory weight and indeed imposes “no legal obligations” on any party. The Guide therefore is not evidence upon which the Water Boards can base an argument that the retrofitting requirements for existing development represents a federally required step to achieve the MEP standard.

Third, Finding D.3.h, cited by the Water Boards (WB Comments at 40-41), does not rise to the type of finding required by the Supreme Court to afford deference to the San Diego Water Board’s determination of what constitutes compliance with the MEP standard. The finding itself belies such an interpretation, as there is no language indicating that the Board specifically found that the retrofitting required by Section F.3.d was the *only* means by which the MEP standard could be achieved. The finding only indicates that, in the view of the San Diego Water Board, the type of retrofitting required by the 2010 Permit “meets MEP.” The finding *never* states, as do the Water Boards (WB Comments at 41), that the retrofitting provisions “are necessary to satisfy the MEP standard” or that they are “based entirely federal law.”³⁶

With respect to stormwater permits issued by the EPA, neither the Boston nor the Worcester permits requires the provisions set forth in 2010 Permit Section F.3.d. The Albuquerque permit encourages evaluation of retrofitting of municipal properties and flood control devices but does not extend to private development. The Boise permit is likewise limited to municipal existing stormwater control devices. The D.C. permit is likewise not as broad as the San Diego permit. *See Ashby Dec.*, ¶ 17.

³⁶ As discussed in Section I.D above, the San Diego Water Board made no 2010 Permit-specific finding that the permit is based entirely on federal law nor is there evidence in the record to support such a finding. In fact, in the Fact Sheet for the 2010 Permit, the San Diego Water Board cited not only the federal CWA as authority for the existing development retrofitting requirements (33 U.S.C. § 1342(p)(3)(B)(ii-iii)), but also California Water Code § 13377 which specifically allows the water boards to exceed the requirements of the CWA. Fact Sheet at 158.

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2. The Retrofitting Requirements Represented a New Program and/or Higher Level of Service

The Water Boards appear to argue (WB Comments at 42) that no new program or higher level of service was required by the retrofitting requirements (even though the Water Boards do not dispute that the requirements were not contained in the 2004 Permit or even required by the federal stormwater regulations) because the Claimants were under “the same federal standards” to which they “have been subject for decades.” Of course under that theory (which, as explained above, ignores the nature of the 2010 Permit and is not supported by the record before the Commission), there could never be any new program in a stormwater permit, since anything new required of the permittees by a water board was simply subject to the “same federal standards.”

This same argument was considered and rejected by the Commission in the SD County SOD, where the DOF had contended that the permit at issue there was not a new program or higher level of service “because additional activities, beyond those required [by the previous permit], are necessary for the claimants to continue to comply with the Clean Water Act and reduce pollutants to the Maximum Extent Practicable.” SD County SOD at 48-49.

The Commission rejected this argument, indicating that it analyzing the provisions of the permit at issue in the test claim against the previous 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 high level of service. The Commission does not read the federal Clean Water Act so broadly.” San Diego County SOD at 49.

The retrofitting requirements for existing development was a new program or a higher level of service.

3. No Other Mandate Exceptions Apply

The Water Boards, again without support, argue that the costs for the Claimants to implement the retrofitting requirements mandated by Section F.3.d of the 2010 Permit are “*de minimis*.” As a factual matter, this argument is wrong. As set forth in the Narrative Statement at 48, the Claimants incurred more than \$190,000 in increased costs during FY 2011-12 alone. These increased costs are not *de minimis*. See Govt. Code § 17564(a). The arguments regarding alleged fee authority are addressed in the Funding Rebuttal comments, below.

J. Watershed Water Quality Workplan Requirements

Section G of the 2010 Permit required Claimants to develop and implement a Watershed Water Quality Workplan to identify, prioritize, address and mitigate the “highest priority water quality issues/pollutants in the Upper Santa Margarita Watershed.” 2010 Permit at 74. As set forth in Claimants’ Narrative Statement at 48-50, the permit requires several activities and components as part of the development and implementation of this plan. And, as further set forth in the Narrative Statement at 50-51, the 2010 Permit requirements in this area were significantly different and more demanding than those in the 2004 Permit.

1. The Watershed Water Quality Workplan Requirements Were a New Program or Higher Level of Service

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As set forth above, the test of whether a mandate is a new program or higher level of service is whether the local agency had previously been required to do it, or whether it results in an increase in the actual level or quality of governmental services provided. *Lucia Mar*, 44 Cal.3^d at 836; *San Diego Unified School Dist.*, 33 Cal.4th at 877.

The Water Boards do not dispute that the 2010 Permit is much more specific and much more demanding than the 2004 Permit with respect to its basic thrust. Indeed the 2010 Permit's Fact Sheet itself states that "the implementation approach has changed." Fact Sheet at 166. Instead, the Water Boards argue that the 2004 Permit required a storm water management program and the 2010 permit's requirements are "a refocused implementation approach." WB Comments at 44.

The Water Boards first argue that the watershed workplan requirements were designed to consolidate watershed planning in a more efficient and effective manner, and therefore did not represent a new program or higher level of service. The Water Boards also contend that the specific activities were "in substantial part" previously required. WB Comments at 44.

As the Fact Sheet states, however, the specific requirements imposed on Claimants in the 2010 Permit did change. The 2004 Permit required "selection and implementation of watershed activities," but the San Diego Water Board found that program to be unsatisfactory. Fact Sheet at 166. The San Diego Water Board thus revised those requirements, requiring co-permittees to develop a workplan that would now assess receiving waterbody conditions, prioritize the highest water quality problems, implement effective BMPs and measure water quality improvement, and in doing so, state that the "implementation approach has changed." Fact Sheet at 166-67. Thus, it is not correct to generally state that the 2004 Permit contained the same requirements, when the Fact Sheet itself states that the San Diego Water Board was not satisfied with those permit requirements and imposed new ones (*Id.*).

If the San Diego Water Board did not intend Claimants to initiate new programs or a higher level of service under Section G, the Board would have just continued the requirements in the 2004 Permit. The Board did not do so. Instead, it found that the 2004 Permit requirements "were not able to demonstrate improvements to water quality." Fact Sheet at 166. The Regional Board therefore revised and supplemented the requirements in the 2004 Permit. The San Diego Water Board's dissatisfaction with the prior permit's stormwater management program and its revision and supplementation of that program in the 2010 Permit is evidence that the Board did intend a change from the prior permit, *i.e.*, did intend a new program or higher level of service.

Although this evidence, as well as a comparison of 2010 Permit Section G to the counterpart requirements of the 2004 Permit should be sufficient to show that Section G is a new program or higher level of service, particularly in light the of the Fact Sheet statement that the "implementation approach has changed," the Water Boards have parsed individual elements of the water quality work plan in their comments. WB Comments at 44-49. Claimants will therefore respond to each of the Water Boards' contentions with respect these individual elements.

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a. Characterizing Watershed Receiving Water Quality Including Analyzing Monitoring Data Collected under the 2010 Permit from Other Public and Private Organizations

Section G's first requirement (Section G.1.a) is the requirement to characterize receiving water quality in the watershed based on data from Claimants' monitoring program and applicable information available from other public and private organizations. The Water Boards contend that under the 2004 Permit, Claimants were also required to assess receiving water quality and thereafter annually assess water quality data from Claimants' monitoring program and other "reliable sources." WB Comments at 45.

The activities required under the 2004 Permit, however, were not part of the much more robust analysis and workplan efforts, including public participation, required by the 2010 Permit. The Watershed Water Quality Workplan, of which the characterization is a part, was a "refocused implementation approach," for the purpose of increasing the level and quality of governmental services provided (Fact Sheet at 166-67). It thus is part of the "higher level of service" mandated by Section G.

b. Prioritizing Water Quality Problems by Constituent and Location

Section G.1.b required Claimants to prioritize water quality problems by constituent and location. The 2004 Permit did not contain any such requirement (*compare* 2004 Permit, Directive K, pp. 30-31.) The Water Boards nevertheless contend that the 2004 Permit contained comparable requirements. WB Comments at 46.

The 2004 Permit, however, did not require Claimants to do an analysis by constituent and location. This requirement is new, part of the 2010 Permit's refocused implementation approach and mandated because the San Diego Water Board was not satisfied with the results being obtained under the 2004 Permit (Fact Sheet at 166). This requirement was directed towards increasing the level and quality of Claimants' program, *i.e.*, the services being rendered. It thus is part of the higher level of service mandated by Section G.

c. Identifying Likely Sources Causing Highest Water Quality Problems

Section G.1.c required Claimants to identify the likely sources, pollutant discharges and/or other factors causing the highest water quality problems within the watershed. The Water Boards contend that Claimants were already required to address and mitigate the highest priority water quality issues in the watershed and identify major water quality problems and sources. WB Comments at 46. The 2004 Permit, however, did not require the extensive analysis required by the 2010 Permit.

Under Section G.1.c, Claimants were required to include in their analysis an examination of information from construction, industrial, commercial, municipal and residential source identification programs, water quality monitoring data collected as part of the receiving water monitoring and reporting program required by the 2010 Permit, and additional focused water

quality monitoring performed to identify specific sources within the watershed. The 2004 Permit did not require this scope of analysis, and did not require additional focused water quality monitoring to identify specific sources. (*Compare* 2010 Permit Section G.1.c with 2004 Permit, Section K.2.c and d.) Section G.1.c mandated an increased level and quality of governmental services as part of the higher level of service required by Section G.

d. Development of a Watershed BMP Implementation Strategy

Section G.1.d required Claimants to develop a watershed BMP implementation strategy to attain receiving water quality objectives in the highest priority water quality locations. The implementation strategy was to include a schedule for implementation to abate specific receiving water quality problems and a list of criteria to be used to evaluate BMP effectiveness.

The 2004 Permit did not require this watershed BMP implementation strategy. *Compare* 2004 Permit Section K, at 30-31. Although the Water Boards contend that the 2004 Permit required identification and prioritization of major water quality problems, short and long term activities and certain specific BMPs such as an education program (WB Comments at 47), the 2004 Permit did not require development of a BMP implementation strategy “to attain receiving water quality objectives.” (2010 Permit, Section G.1.d).

Again, as the Fact Sheet stated, the purpose of these requirements was to change the implementation approach because the San Diego Water Board determined that the requirements of the 2004 Permit did not suffice to show improvements in water quality. As the Fact Sheet stated, the purpose of these new requirements was not to continue the prior permit’s requirements approach but to change it. Fact Sheet at 166. Like the other requirements in Section G, this requirement was also directed towards increasing the level and quality of Claimant’s program, *i.e.*, the services being rendered. Thus Section G. 1.d is also a part of the higher level of service mandated by Section G.

e. Establish a Schedule for Development and Implementation of the Watershed Work Plan Including Annual Public Meetings

Section G.1.f required Claimants to establish a schedule for development and implementation of the watershed work plan and hold annual public meetings to review that plan and receive public comment. There is no dispute that the 2004 Permit did not require annual public meetings. The Water Boards concede that the public meeting to review the plan and receive comments was a “new requirement.” WB Comments at 47. Annual public meetings is a new requirement and a higher level of service.

f. Implementation of the Watershed Work Plan

Section G.2 required Claimants to implement the watershed work plan within 90 days of submittal. The Water Boards contend that the 90 day requirement is similar to the 2004 Permit’s requirement to implement the 2004 Permit sufficiently early to begin implementation of a short term strategy. WB Comments at 48. The Water Boards miss the point. It is not the 90 days, but

the implementation of this entirely new watershed work plan, with all its new requirements, which is the new program or higher level of service.

- g. Co-Permittee Collaboration, Including Frequent Meetings and Pursuit of Interagency Agreements with Non-Permittee MS4 Operators

Section G.3 required Claimants to collaborate in the development and implementation of the watershed work plan and to have frequent, regularly scheduled meetings to do so. Section G.3 also required Claimants to pursue efforts to obtain interagency agreements or coordinate efforts with non-permittee MS4 operators.

The 2004 Permit did not contain these requirements. First, under the 2004 Permit, permittees were required to meet only annually. The 2010 Permit required Claimants to meet more than once a year. Second, the 2004 Permit did not require Claimants to obtain interagency agreements. The 2004 Permit only required the watershed SWMP to describe such agreements if they existed (2004 Permit, Section K.2.b.). The 2010 Permit required Claimants to “pursue efforts” to obtain such agreements.

These requirements were new. They certainly constituted an increase in the level and quality of the governmental services that are required to be provided.

- h. Public Participation

Section G.4 required Claimants to implement a watershed-specific public participation mechanism within each watershed. Included in this mechanism was a minimum 30-day public review and opportunity to comment on the watershed work plan prior to its submittal to the San Diego Water Board.

It is undisputed that the 2004 Permit contained no such requirement. The Water Boards only contend that the 2010 Permit did not require Claimants to consider the public comment, not that public participation was not a new requirement. WB Comments at 48.

- i. Annual Public Watershed Plan Review Meeting

Section G.5 required Claimants to annually review and update the watershed work plan. All updates were to be presented during a public annual watershed review meeting. Claimants were also required to review and modify their own programs to be consistent with the updated watershed workplan.

The Water Boards do not dispute that the 2004 Permit did not require public meetings for consideration of updates to the 2004 Permit’s watershed stormwater management plan. WB Comments at 49. Public meetings were new and were part of the higher level of service required by Section G as a whole.

2. The Watershed Water Quality Workplan Requirements Were Not Federally Mandated

As set forth in the Narrative Statement at 50, nothing in the CWA or its implementing regulations required a Watershed Quality Workplan. The Water Boards nevertheless contend that this requirement was necessary to meet the MEP standard. WB Comments at 42-43. Section G itself, however, states that the watershed plan is required to have a BMP implementation strategy that is to “attain receiving water quality objectives,” not to meet the MEP standard (2010 Permit, Section G.1.d). As discussed in Section I, it is well established that the CWA does not require municipal stormwater discharges to meet water quality standards or objectives, but instead to only to reduce pollutants in their discharge to the MEP. 33 U.S.C. § 1342(p)(3)(B)(iii); *Browner, supra*, 191 F.3^d at 1166. In that sense, as also discussed above, the compliance standard in the 2010 Permit (and the compliance standard for Section G of that permit) is not an “MEP” standard but rather a State-required standard to achieve water quality standards.

The Water Boards also cite to the 2010 Permit’s findings and discussion in the Fact Sheet, and suggest that the findings and discussion establish Section G as necessary to meet the MEP standard. WB Comments at 42-44. None of those findings or the Fact Sheet, however, states that the requirements of Section G constituted the only means by which the MEP standard could be achieved, and there is no evidence in the record to support such a finding. Thus, these findings and discussion are entitled to no deference. *Dept. of Finance*, 1 Cal. 5th at 768.

Nothing in the CWA or its implementing regulations requires a Watershed Quality Workplan as set forth in Section G and the Water Boards have identified no such legal requirement. Instead, the San Diego Water Board freely chose to impose these requirements in the 2010 Permit, imposing requirements that exceeded federal law. *Dept. of Finance*, 1 Cal.5th at 765; *Hayes*, 11 Cal.App.4th at 1594. *See also Long Beach Unified*, 225 Cal.App.3^d at 173 (state mandate created where state removes local agency’s discretion and directs program to be implemented).

With respect to EPA-issued stormwater permits, the Albuquerque, D.C., Boston, and Worcester permits do not contain the requirement to develop and implement a watershed water quality workplan. The Boise permit contains a requirement for watershed plans, but not the extensive requirements set forth in the 2010 Permit. The Boise permit is focused on identifying beneficial uses and implementing LID and infiltration principles. The 2010 Permit, on the other hand, is more extensive, requiring permittees to characterize the watershed, prioritize water quality problems, identify sources and develop strategies to monitor and improve water quality. These requirements are not included in the Boise permit work plan requirements. *See Ashby Dec.*, ¶ 18.

3. No Other Mandate Exceptions Apply

The Water Boards contend that Claimants have fee authority to pay for the water quality workplans and that the costs to implement these requirements are *de minimis*. WB Comments at 49. As discussed in the Funding Rebuttal comments below, Claimants do not have such fee authority.

Moreover, the costs of complying with these requirements, including the costs of public participation and annual public meetings, are also not *de minimis*. As set forth in Claimants' declarations, Claimants incurred increased costs in implementing these programs of more than \$11,000 in FY 2010-11 and more than \$21,000 in FY 2011-12. These increased costs are not *de minimis*. See Govt. Code § 17564(a).

K. JRMP Annual Report Requirements

Section K.3 of the 2010 Permit (including Table 5) and a checklist set forth in Attachment D to the permit required the provision of information not required by federal regulation on the JRMP Annual Reports required to be filed by the Claimants. In their comments, the Water Boards argue that these requirements are entitled to deference under *Dept. of Finance*, that the requirements are reflected in the D.C. Permit and that they do not represent a new program or higher level of service. WB Comments at 49-54. For the reasons set forth below, these arguments are not supported by the law or the facts.

1. The Requirements Are Not Necessary to Meet the MEP Standard

In their Narrative Statement (at 53), Claimants acknowledged that the federal stormwater regulations include annual reporting requirements in 40 CFR § 122.42(c). The reporting requirements at issue in the Joint Test Claim, however, encompass a scope and detail in the JRMP Annual Reports that goes beyond the federal requirements. As such, they are state mandated requirements. *Dept. of Finance*, 1 Cal. 5th at 771.

The Water Boards contend that the items required by Section K.3 and the checklist are included within the items required by Section 122.42(c). WB Comments at 50. However, as already set forth in the Narrative Statement at 53-54, the 2010 Permit requires far more detail as well as additional types of information that are not required by the stormwater regulations.

The Water Boards also assert that since "the San Diego Water Board found that the provisions in the 2010 Permit are exclusively based on federal law and found that the underlying substantive provisions to be reported upon were necessary to meet the MEP standard," and that the annual reporting requirements included in the permit "are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs," the "San Diego Water Board's findings are entitled to deference under *Department of Finance*." WB Comments at 50 (quoting 2010 Permit Finding D.1.g).

This assertion ignores several facts. First, the Water Boards again attempt to "bootstrap" a finding as to the alleged federal-only nature of the 2010 Permit to apply to the annual reporting requirements. In fact, the boilerplate finding referred to, but not cited by, the Water Boards, Finding E.6, is not entitled to deference for the reasons set forth in Section I.D.3. Second, Finding E.6 itself could not apply to the annual reporting requirements in the 2010 Permit because, as the Fact Sheet states, a second and independent grant of authority for those requirements is California Water Code § 13267, which provides that "the San Diego Water Board may require than [sic] any person who has discharged [. . .] shall furnish, upon penalty of perjury, technical or monitoring reports which the regional board requires." Fact Sheet at 174 (quoting Water Code § 13267). Third, Finding D.1.g makes no reference to the MEP standard but merely states that the reporting requirements are "necessary to meet federal requirements." This is not the case-specific finding

determining that the permit conditions “were the only means by which the [MEP] standard could be implemented.” *Dept. of Finance*, 1 Cal. 5th at 768 and n.15.

It is the Commission, not the San Diego Water Board, which has the duty to determine whether the additional scope and detail of the mandated requirements in the Section K.3 and the checklist represent a state, rather than federal, mandate.

With respect to EPA-issued stormwater permits, while such permits require the preparation of annual reports (which are required under the federal stormwater regulations, as noted above), none require the extensive reporting required by the 2010 Permit. *See Ashby Dec.*, ¶ 19. This fact undermines any argument that the JRMP annual reporting requirements were mandated by federal law.

2. The JRMP Annual Reporting Requirements Represented a New Program and/or Higher Level of Service

The Water Boards argue that the JRMP annual reporting requirements were not a new program or higher level of service, not through a comparison of reporting requirements in the 2004 Permit, but rather by simply reproducing the annual reporting requirements of the 2004 Permit. WB Comments at 51-54.

In their Narrative Statement at 54, the Claimants have already summarized the new JRMP annual reporting requirements in the 2010 Permit that were additional to the requirements in the 2004 Permit. To assist the Commission in their review of those requirements, the new requirements not set forth in the 2004 Permit include:

- *With respect to new development projects:* All revisions to the Standard Stormwater Mitigation Plans (“SSMPs”), including identification and summary of where the SSMP failed to meet the requirements of the 2010 Permit, updating procedures for identifying pollutants of concern in each PDP, updated treatment BMP ranking matrix, updated site design and treatment control BMP standards; the number of PDPs reviewed and approved during the reporting period, including brief descriptions of BMPs required at PDPs and verification that site design, source control and treatment BMPs were required on all applicable PDPs; the name and location of all PDPs granted a waiver from implementing LID BMPs; an updated watershed-based BMP maintenance tracking database of approved treatment control BMPs and treatment control BMP maintenance, including updates to the list of high-priority PDPs and verification that the requirements of the Permit were met during the reporting period; the name and brief description of all approved PDPs required to implement hydrologic control measures in compliance with 2010 Permit Section F.1.h, including a description of management measures planned to protect downstream beneficial uses and adverse physical changes to downstream channels; and, the number and a description of all enforcement activities applicable to the new development and redevelopment component of the Permit and a summary of the effectiveness of those activities.
- *With respect to construction activities:* Any updated ordinances or planned ordinance updates; a description of any changes to procedures used to identify inspection priorities and enforcing control measures that consider the nature of the construction activity, a topography and the characteristics of soils and receiving water quality; any

changes to designated minimum and enhanced BMPs; and, the number and date of inspections and the number and date and types of enforcement actions for each facility, a description of high-level enforcement actions and a requirement for maintenance of supporting paper or electronic files, including a record of inspection dates, the results of the inspection, any photographs and a summary of any enforcement actions taken.

- *With respect to municipal activities:* An updated source inventory; all changes to designated municipal BMPs; descriptions of any changes to procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies; a summary and assessment of BMP retrofits implemented at flood control structures, including list of retrofitted projects, list and descriptions of structures evaluated for retrofitting and a list of structure still needing to be evaluated and the schedule for evaluation; summary of municipal structural treatment control operations and maintenance activities, including types of facilities inspected and summary of findings; summary of the MS4 and MS4 facilities operations and maintenance, including the number and types of facilities maintained, amount of material removed and list of facilities planned for bi-annual inspections and the justification therefore; summary of municipal areas/programs inspections, including the date of inspections conducted at each facility, BMP violations identified by facility, the number, date and types of enforcement actions by facility and summary of inspection findings and follow-up activities for each facility; description of activities implemented to address sewage infiltration into the MS4; and, description of BMPs and their implementation for unpaved roads construction and maintenance.
- *With respect to commercial/industrial facilities:* An updated inventory of such sources; summary of the inspection program, including number and date of inspections conducted at each facility or mobile business, BMP violations identified during the inspection by facility, the number, date and types of enforcement by facility or mobile business, brief description of each high-level enforcement actions at commercial/industrial sites, including the effectiveness of the enforcement and followup activities for each facility; all changes to designated minimum and enhanced BMPs; and, a list of industrial sites by name, address and SIC code, that the permittee suspects may require coverage under the General Industrial Permit, but has not submitted a Notice of Intent.
- *With respect to residential areas:* All updated minimum BMPs required for residential areas and activities; a summary of enforcement actions taken with residential areas and activities; and, a description of efforts to manage runoff and stormwater pollution in common interest areas and mobile home parks.
- *With respect to the retrofitting of existing development:* An updated inventory and prioritization of existing developments identified as candidates for retrofitting; description of efforts to retrofit existing developments during the reporting year; description of efforts taken to encourage private landowners to retrofit existing development; list of all retrofit projects that have been implemented, including site location, description of the project, pollutants expected to be treated and the tributary

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acreage of runoff that will be treated; any proposed retrofit or regional mitigation projects and timelines for future implementation; and, any proposed changes to the permittee's overall retrofitting program.

- *With respect to illicit discharge detection and elimination (“IDDE”)*: Any changes to the legal authority to implement IDDE activities; any changes to established investigation procedures; any changes to public reporting mechanisms, including phone numbers and web pages; summaries to how each significant illicit discharge case was resolved; description of instances when field screening and analytical data exceeded action levels, including instances where no investigation was conducted; and, a description of followup and enforcement actions taken in response to investigations of illicit discharges and a description of the outcome of the investigation/enforcement actions.
- *With respect to workplans*: Any updated workplans, including priorities, strategy, implementation, schedule and effectiveness evaluation.
- *Checklist*: Additionally, Claimants were required for the first time in the 2010 Permit to submit a checklist that required the listing of the number of a variety of categories, including with regard to construction sites, the numbers of active and inactive sites, sites inspected, inspections, violations and enforcement actions taken; with regard to new development, numbers of development plan reviews, grading permits issued and projected exempted from hydromodification requirements; for post construction development, numbers of PDPs as well as SUSMP Required Post-Construction BMP inspections, BMP violations and BMP enforcement actions taken; for Illicit Discharges and Illicit Connections (“IC/ID”), the numbers of IC/ID inspections, IC/ID detections by staff, IC/ID detections from the public, IC/ID eliminations, IC/ID violations and IC/ID enforcement actions taken; for MS4 maintenance, the number of inspections conducted, amount of waste removed and total miles of MS4 inspected; and, for municipal/commercial/industrial facilities, numbers of facilities, inspections conducted, facilities inspected, violations and enforcement actions taken.

While certain items in the checklist were also required by the 2004 Permit, such as numbers of inspections and enforcement actions taken, no checklist was required for the items identified above in that permit.

All of the items set forth above represent new requirements contained in the 2010 Permit which were not required in the previous 2004 Permit. A number of the requirements identified for the annual reports reflected new programs in the 2010 Permit, such as regarding the retrofitting of existing development or BMPs concerning unpaved roads. *See* Sections II.G and II.I.

3. No Other Mandates Exceptions Apply

The Water Boards again contend that the Claimants had fee authority “for many, if not all of the related substantive provisions underlying the required elements,” that the reporting of municipal projects, such projects were undertaken voluntarily and that the costs are *de minimis*. WB Comments at 54.

The lack of fee authority is discussed in the Funding Rebuttal comments below. The issue of municipal projects as being “voluntary” is addressed in the Narrative Statement in Support of Joint Test Claim filed April 28, 2017 at 33-35, and will not be repeated here. Finally, the increased costs of the JRMP annual reporting mandates are not *de minimis*, as identified in the Narrative Statement at 55, as those costs exceeded \$130,000 in each of FYs 2010-11 and 2011-12. *See* Govt. Code § 17564(a).

L. Special Studies Requirements

The Monitoring and Reporting Program (“MRP”) for the 2010 Permit, Attachment E, required the Claimants to conduct several “special studies” regarding waters in the Santa Margarita River watershed. These studies went beyond the “core monitoring” requirements for MS4 permittees in the CWA regulations and represent the “true choice” of the San Diego Water Board to impose such requirements in the absence of any controlling federal requirement.

Five special studies are at issue: (1) a sediment toxicity study, (2) a trash and litter study, (3) a study on agricultural federal and tribal lands’ discharges into the Claimants’ MS4, (4) an MS4 and Receiving Water Maintenance Study and (5) a study on the impacts of the implementation of LID protections on downstream flows to Camp Pendleton and potential impacts on downstream beneficial uses. As to the last, which replaced a study into intermittent and ephemeral stream conversion to perennial streams, the Water Boards contend that it is not a state mandate “because it is not required by the permit itself.” WB Comments at 60, n.244.

This fifth study was, however, required by the San Diego Water Board. Attached as exhibits to these Rebuttal Comments is a letter to the San Diego Water Board from Jason Uhley of the District (on behalf of itself and the other permittees) dated May 29, 2012, describing the study and its costs and a letter from the Water Board approving performance of that study in lieu of the intermittent and ephemeral stream study and performance of monitoring in the MS4 and Receiving Waters Maintenance Study. That correspondence is discussed further below. As such, the performance of the LID impacts study was as much a mandate as the studies set forth in the 2010 Permit (for which the Claimants remained liable).

With respect to EPA-issued permits, while some required assessment of the effectiveness of certain structural controls or LID requirements, none required the special studies identified in the 2010 Permit. *See* Ashby Dec., ¶ 20.

1. Adherence to the “MEP Standard” Has No Applicability to the Requirement to Conduct Special Studies

The Water Boards argue (WB Comments at 55-57) that the special studies were “necessary” to meet the MEP standard. In making this argument, the Water Boards bootstrap findings unrelated to the MRP and ignore evidence in the record. With respect, the Water Boards make unsupported assertions of fact in an attempt to establish a federal mandate for the special studies.

First, the Water Boards cite Finding D.1.c, which refers to “runoff management programs” and moreover references both the reduction of “the contribution of storm water pollutants in runoff to the MEP” and the meeting of “water quality standards.” WB Comments at 55. As discussed above, the 2010 Permit is not an “MEP Permit” and this finding does not support an argument that

the requirements of the 2010 Permit at issue in this Joint Test Claim are necessary to meet the MEP standard (much less qualify as the kind of finding as to which the Supreme Court would afford deference). And, the finding does not even mention the special studies required by the MRP. As such, the statement that the San Diego Water Board’s “determination to require these special studies was an essential part of this effort (to achieve the MEP standard and to effectively prohibit non-stormwater discharges to the MS4)” is simply without factual basis, as is the Water Boards’ conclusion that there is an “overarching federal basis” for the MRP “(of which the special studies requirements are part).” WB Comments at 56.

In fact, nowhere in the 2010 Permit or the Fact Sheet is there any indication that the special studies were intended to meet any federally mandated requirements, including the MEP standard. There are, as Claimants acknowledged in the Narrative Statement, federal regulatory requirements for monitoring programs (Narrative Statement at 57-58), but these requirements nowhere required or even mentioned the expansive special studies required in the 2010 Permit. As the State Supreme Court held in *Dept. of Finance*, “[t]hat 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.” 1 Cal.5th at 771. There is even less support for the argument that the federal stormwater monitoring regulations required the “scope and detail” of the special studies.

Both the 2010 Permit and the Fact Sheet cite as authority for the MRP requirements several state statutes. In discussing the requirements of the MRP, including the special studies, the Fact Sheet cites Water Code § 13377 which, as discussed above, enables the water boards to exceed the requirements of federal law in issuing NPDES permits. Fact Sheet at 185. The Fact Sheet also cites as authority California Water Code § 13267, a statute which gives the water boards, under color of state, not federal, law the authority to “require than [sic] any person who has discharged [. . .] shall furnish, under penalty of perjury, technical or monitoring reports which the regional board requires.” Fact Sheet at 185 (quoting Water Code § 13267). In addition, the 2010 Permit itself, in Finding E.11, states that the “monitoring and reporting required under [the Permit] is required pursuant to authority under CWC section 13383.” This statute³⁷ provides, *inter alia*, that the State Board or a regional board “may establish monitoring . . . reporting, and recordkeeping requirements, as authorized by Section 13160, 13376, or 13377 . . . for any person who discharges, or proposes to discharge, to navigable waters.”

Significantly, the Fact Sheet (which contains the only discussion of the legal basis for the MRP), cites no federal regulatory provisions as authority for the special studies. This is to be contrasted to the citation of such provisions as support for wet weather MS4 discharge monitoring, non-storm water dry weather action level monitoring or source identification monitoring. *Compare* Fact Sheet at 193-95 *with* Fact Sheet at 196-98.

The special studies contained in the 2010 Permit’s MRP, plus the additional LID impacts study set forth in the San Diego Water Board’s September 14, 2012 letter to the permittees (discussed below), are not federally mandated. They are, as the Water Boards comments indicate, additional monitoring mandates intended to address “receiving water questions . . . not addressed by *core monitoring programs*.” (WB Comments at 55, *quoting* Responses to Comments at 150

³⁷ Rebuttal Documents, Tab 3.

(emphasis supplied)). The special studies are not part of the “core monitoring programs” as reflected by their absence in the previous 2004 Permit. That the San Diego Water Board might have authority under the state Porter-Cologne Act to order such studies to be conducted is not the issue before the Commission. It is whether such studies were required by federal law or regulation. They were not.

Each of the special studies represents a discretionary act, the exercise of a “free choice” by the San Diego Water Board to impose these mandates on the Claimants in the absence of any federal law or regulation requiring such studies. As such, they fall well within the Supreme Court’s definition of a state mandate in *Dept. of Finance*.

2. The Sediment Toxicity Study Was a State Mandate

The Water Boards conclude (WB Comments at 57) that the sediment toxicity study “was necessary to implement the federal MS4 requirements.” As the discussion above illustrates, there is no support for this conclusion. The San Diego Water Board has the discretion, subject to the requirements of state law, to require persons who discharge waste (including MS4 operators) to conduct studies of those discharges. Water Code § 13267; Water Code § 13383.

The Water Boards ignore the point made in the Narrative Statement, that an investigation of sediment toxicity (which is of statewide concern and was more identified with discharges from perennial streams and in estuaries, not the intermittent and ephemeral streams in the Santa Margarita River watershed) was a shifting of the responsibility of the San Diego Water Board to undertake such a study to the Claimants. Under *Dept. of Finance* and *Hayes*, such a shifting of a state obligation represents a state mandate.

3. The Trash and Litter Study Was a State Mandate

The Water Boards argue (WB Comments at 57) that “the trash and litter study was intended to inform the need for improved BMPs as part of the iterative process of achieving the federal MEP standard.” As with other assertions made by the Water Boards, this statement is not supported by the record. Moreover, the rationale cited by the Water Boards found in the Fact Sheet (WB Comments at 57-58) makes no reference at all to compliance with the MEP standard, much less makes a finding that conducting the trash and litter study was the *only* means by which the MEP standard could be achieved.

The D.C. permit includes provision for the control of trash, but that is not the same as a special study. As noted above, there is no requirement for a trash and litter study in the D.C. permit (Ashby Dec., ¶ 20.) In addition, there is no support for the assertion by the Water Boards that a trash control provision in the D.C. permit “supports the San Diego Water Board’s conclusion that this study was necessary to meet MEP.” WB Comments at 58. In fact, there is *no such conclusion* in the record.³⁸ The trash and litter study, like the other special studies mandated by the San Diego Water Board, is a state mandate.

³⁸ And, the quote from the D.C. permit makes no reference to MEP in any event. The issue is not that trash cannot be a pollutant discharged from MS4s. The issue is whether the San Diego Water Board was following a federal mandate in requiring a study of how trash and litter got into receiving waters, a study

4. The Agricultural, Federal and Tribal Input Study Was a State Mandate

The Water Boards themselves admit that with respect to this study, which required Claimants to investigate the quality of waters discharged by jurisdictions beyond the control of the Claimants, the San Diego Water Board “could have directed other entities to investigate” the discharges. WB Comments at 58. At the same time, the Water Boards claim that the San Diego Water Board “is not responsible for undertaking the investigation required in the special study and did not shift its responsibility to Claimants.” *Id.*

This special study required the permittees under the 2010 Permit to sample discharges from non-permittee sources that were not, by definition, within the control of the permittees. None of these sources, agricultural runoff, federal land runoff and tribal lands runoff, are within the jurisdictional control of the Claimants. Thus, the unsupported assertion (WB Comments at 58) that “such discharges into Copermittees’ MS4s are squarely their responsibility to evaluate in efforts to meet the MEP standard for storm water discharges and the independent federal law requirement that Copermittees’ [sic] effectively prohibit non-storm water discharges into the Ms4s” is irrelevant to the argument that the special study requirement is federally mandated. And, there was no finding by the San Diego Water Board to support the assertion made by the Water Boards. The only rationale for the study provided by the Board was a concern about the impacts of storm water discharged from these non-permittee areas, and how they might affect the overall water quality in two watersheds. Fact Sheet at 197.

The Water Boards also assert that the study “also originated from information voluntarily provided by Copermittees.” WB Comments at 59. It is not clear if the Water Boards are attempting to argue that the special study was voluntarily undertaken, but the record shows that it was not.³⁹ The Claimants identified in their ROWD a problem stemming from outside of their jurisdiction. Fact Sheet at 197. Instead of requiring the sources of that problem to investigate, the San Diego Water Board simply placed that burden on Claimants. For these and the other reasons discussed above, the study was a state mandate.

5. MS4 and Receiving Waters Maintenance Study Was a State Mandate

This study required that the Claimants investigate “receiving waters” that were also considered “part of the MS4” under the 2010 Permit’s unique expansion of what constitutes an MS4 (*see* Finding D.3.c). As previously discussed, this finding expands the definition of “MS4” beyond its federal bounds.

The Water Boards cite a footnote in a Ninth Circuit decision involving the Los Angeles County MS4 system for the proposition that an MS4 can also be a receiving water. (WB Comments at 60, citing *NRDC v. Los Angeles County Flood Control Dist.* (9th Cir. 2013) 725 F.3^d 1194, 1200 n.12). That footnote (which constitutes dicta since it was not necessary predicate for the Ninth Circuit’s ruling) goes no further than stating that it “appears” that certain reaches of the Los Angeles and San Gabriel rivers constituted both MS4 and receiving water. The Ninth Circuit

not limited to whether that trash was entering via the MS4, which is the focus of the 2010 Permit. *See* 2010 Permit, Attachment E, Section E.3.

³⁹ *See* District Comment Letter, Attachment 4.

unambiguously concluded, however that the monitoring stations at issue in that case were within the receiving water, i.e., the Los Angeles and San Gabriel Rivers. The court further cited U.S. EPA's statement in the preamble to the proposed stormwater regulations that "[i]n many situations, waters of the United States that receive discharges from municipal storm sewers can be *mistakenly considered* to be part of the storm sewer system." *Id.* at 1200 n.12 (quoting 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988) (emphasis supplied). That preamble further noted that "waters of the United States are not storm sewers for purposes of this rule." 53 Fed. Reg. at 49442.⁴⁰

The footnote cited by the Water Boards is hardly a ringing endorsement of the notion that a waterbody can be both an MS4 (which is defined as a "point source" which discharges into a receiving water through an "outfall." (*see* 40 CFR § 122.26(b)(9) ("*Outfall* means a *point source* . . . at the point where a [MS4] discharges to waters of the United States.")). The stormwater regulations, and indeed the structure of the NPDES permit program under Section 1342 of the CWA, contemplates that a point source must be separate from the navigable water into which it discharges.

In any event, whether or not the San Diego Water Board's finding concerning what constituted a "MS4" unlawfully conflated a "point source" with a "receiving water," the Water Boards cite no authority in the record for their assertion that the "purposes" of the study "are wholly consistent with the goal of ensuring that Copermittees' efforts are effective achieving the MED [sic] standard." WB Comments at 59. No linkage is made in the record of the 2010 Permit, including in the Fact Sheet, and the Water Boards do not cite to such a finding. The decision by the San Diego Water Board to require such a study was an exercise of the Board's discretion under state authority, i.e., those Water Code sections cited in the Permit and Fact sheet as additional authority for the MRP.

6. The LID Impacts Study Was a State Mandate

As indicated in the Narrative Statement at 60, the Claimants reached an agreement with the San Diego Water Board to substitute a special study on LID BMP impacts for performance of monitoring in the MS4 and Receiving Waters maintenance special study (the Claimants already incurred some \$12,670 in locating monitoring sites and developing a monitoring plan for that study, *see* Letter dated May 29, 2012 to David Gibson of the San Diego Water Board, Exhibit B, attached hereto as Exhibit A to the Declaration of Claudio M. Padres, P.E. (Attachment 2)) and a special study on intermittent and ephemeral streams (as to which no funds were expended and which has been dropped from this Joint Test Claim).

While this LID impacts study was not required by the 2010 Permit, it is clear that its performance was required by the San Diego Water Board. In a letter dated September 14, 2012 from San Diego Water Board Assistant Executive Officer James G. Smith (Exhibit B to Padres Dec.), Mr. Smith stated that he would not recommend that the Board enforce the special study requirements in Sections II.E.5 and E.6 of the 2010 Permit (which correspond to the MS4 and receiving waters and intermittent and ephemeral stream special studies). This non-enforcement agreement was subject to the requirement that the LID impacts study be performed, however.

⁴⁰ Excerpts of the Preamble to the proposed stormwater regulations are in Tab 2 of the Rebuttal Documents.

Thus, the LID impacts study was a mandate of the San Diego Water Board, of equal dignity to the mandates set forth in the 2010 Permit.

7. The Special Studies Were a New Program

The Water Boards contend that because the 2004 Permit contained a requirement that the permittees perform one special study on a subject unrelated to the subjects of the multiple special studies required by the 2010 Permit, the latter requirement did not represent a new program or higher level of service mandated on the Claimants. WB Comments at 60.

As noted above in Section I.C, similar arguments were addressed, and rejected, by the Commission. None of the special studies required by the 2010 Permit were required by the San Diego Water Board in the 2004 Permit. As such, they were “new programs.” *County of Los Angeles, surpa*, 110 Cal. App.4th at 1189.

8. No Other Mandates Exceptions Apply

The Water Boards argue that the special studies “were largely based on information voluntarily provided by Copermittees as water quality concerns.” WB Comments at 60. This is neither an exception to a mandate nor accurate. While the Claimants may have identified certain conditions in receiving waters as part of their ROWD or annual monitoring reports, this required reporting does not constitute a voluntary agreement to undertake the special studies which were *ordered* by the San Diego Water Board in response. With respect to funding issues, please see the Funding Rebuttal comments, below.⁴¹

M. *Requirements that 2010 Permit Programs Ensure No Violation of Water Quality Standards and Other Requirements*

Various provisions in Section F of the 2010 Permit contained language that required Claimants, in developing and implementing programs required in Section F, to meet various standards, including that of preventing discharges from the MS4 (or from certain projects) from “causing or contributing to a violation of water quality standards” or “preventing” illicit discharges or non-stormwater discharges. While the CWA’s implementing regulations require permittees, in some cases, to develop various programs designed to reduce pollutants in runoff, the 2010 Permit instead made specific reductions enforceable under the Permit, and subjected Claimants to sanctions, including civil penalties and injunctive relief, for the programs’ failure to achieve the goals. These requirements both go beyond the federally mandated MEP standard as well as specify a standard of compliance not found in federal stormwater regulations. As such, these requirements are state mandates imposed by the San Diego Water Board that went beyond the MEP requirement in the CWA, as the 2010 Permit did not limit the efforts of Claimants to achieving such goals to the MEP.

⁴¹ The Water Boards contend that “it is likely that cost savings can be achieved by coordination of efforts or use of information for dual purposes.” (WB Comments at 60.) No evidence of such savings is adduced, and the comment is without support. As set forth in the Narrative Statement, increased costs of more than \$27,000 in FY 2010-11 and more than \$103,000 in FY 2011-12 were incurred by Claimants. Narrative Statement at 61.

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1. The Requirements in Section F of the 2010 Permit Were Not Required by Federal Law and Constituted a New Program or Higher Level of Service

The provisions at issue in this Joint Test Claim are specific requirements applicable to various programmatic requirements in Section F of the 2010 Permit. The Water Boards, however (WB Comments at 61-67) argue at length that the issue before the Commission is instead provisions in Section A of the 2010 Permit relating to the so-called “receiving water limitations language.” Claimants, however, do not include the Section A receiving water limitations language in this Joint Test Claim. Thus, the extended discussion by the Water Boards about the derivation of that Section A language and its alleged presence in prior stormwater permits issued to Claimants is not relevant. That discussion does, however, confirm that the 2010 Permit is not an “MEP Permit,” and that the attainment of water quality standards, a state-mandated requirement, is the overall controlling Permit compliance standard.

The 2010 Permit contains an explicit requirement that in promulgating the development planning component, Standard Storm Water Mitigation Plans, the construction component, the program for municipal areas and activities, the commercial/industrial program, the residential program and retrofitting of existing development, that Claimants must meet the requirement to “prevent . . . discharges from the MS4 from causing or contributing to a violation of water quality standards.”⁴²

As Claimants explained in the Narrative Statement (at 63-66), the federal stormwater regulations applicable to these programs (there is no federal requirement to retrofit existing development, as discussed in Section II.I above) do not require the achievement of water quality standards as a compliance objective. By requiring this standard, the San Diego Water Board compelled Claimants to design those programs in a fashion not required by federal law or regulation.

The Water Boards claim that the receiving water limitations language (which they assert is the basis for the Section F requirements) is “required by federal law and is expected to be achieved through an iterative process over time.” WB Comments at 63. This claim is belied by the law and the facts. Under *Browner, supra*, MS4 dischargers are *not* required under federal law to take steps not to “cause or contribute” to the exceedance of water quality standards with respect to MS4 dischargers, but rather to reduce pollutants in those discharges to the MEP.⁴³ The 2010 Permit contains the “cause or contribute” language and does not, despite the Water Boards’ language regarding the “iterative process,” excuse the permittees for liability for continuing violation of those standards, as also discussed in Section I.B.2 above. The Water Boards acknowledge this lack of a “safe harbor” in their discussion of the receiving water limitations language, making the “iterative process over time” language irrelevant for purposes of CWA enforcement. WB Comments at 62-63.

⁴² See generally, Narrative Statement at 61-63.

⁴³ The “precedential language” initially developed by U.S. EPA in fact got it wrong by finding that MS4 discharges had to meet water quality standards. The legal reasoning in the EPA letters referred to in the WB Comments at 61 was rejected by the Ninth Circuit the next year in *Browner*. Nevertheless, the State Water Board, in Order No. 99-05 cited by the Water Boards, acted on its own authority to establish the “precedential” receiving water limitations language.

Again, citing the receiving water limitations language in Section A, the Water Boards claim that the Section F requirements at issue here are not new programs or represent a higher level of service. WB Comments at 64. That argument, however, ignores the fact that these requirements were *not* contained in the previous 2004 Permit. To the contrary, and in contradiction of the Water Boards' claim that the 2010 Permit did not "impose any stringent level of compliance than previously existed" (WB Comments at 64), the 2004 Permit set forth a very different level of compliance.

For example, the industrial/commercial program required the implementation of BMPs "to reduce the discharge of pollutants in runoff to the MEP." 2004 Permit, Section H.2.c. The BMP program programs for residential areas and municipal facilities, too were required to reduce pollutants "to the MEP." 2004 Permit, Sections H.1.c(1); H.3.c. The construction program in the 2004 Permit required the permittees to implement a program "to address construction sites to reduce pollutants in runoff to the MEP during all construction phases." 2004 Permit, Section G. As noted above in Section II.I, the 2004 Permit contained no provision requiring retrofitting of existing development. These provisions in the 2004 Permit were ignored by the Water Boards in their comments.

The "guarantee" provisions in Section F of the 2010 Permit were not required by federal law and constituted a new program or higher level of service as compared to the previous MS4 permit.⁴⁴

2. The Prohibition of Non-Stormwater Discharges in the Section F provisions Was Not Federally Mandated and Was a New Program or Higher Level of Service

The Water Boards contend (WB Comments at 65-66) that the requirement in the Section F provisions to prevent or eliminate illicit discharges into the MS4 were federally mandated and did not constitute a new program or higher level of service. These contentions, however, ignore the law and the facts. First, the CWA requires that MS4 permittees "effectively prohibit" the discharge of non-stormwater into the MS4. 33 U.S.C. § 1342(p)(3)(B)(ii). The regulatory language cited by the Water Boards refers to programs that are to be implemented over time, not the immediate "prevents illicit discharges into the MS4" language found in the Section F provisions. For example, regulations regarding the proposed stormwater management program require the description of a program "including a *schedule*, to detect and remove . . . illicit discharges." 40 CFR § 122.26(d)(2)(iv)(B) (emphasis supplied). In the preamble to the final stormwater regulations, quoted by the Water Boards (WB Comments at 66, n.272), the requirement is that "[u]ltimately, such non-storm water discharges through a municipal storm sewer must either be

⁴⁴ With respect to EPA-issued stormwater permits, the D.C. permit does not have the requirements in 2010 Permit Section F. The other permits state that the intent is to control discharge from the MS4 to the MEP, but contain language indicating that permittees should select programs to prevent or which are intended to prevent a violation of state water quality standards. The Albuquerque and Boise permits provide that discharges should not cause an exceedance of water quality standards. *See* Ashby Dec., ¶ 21. As discussed in Section I.B.1 above, the EPA Administrator has discretion, under *Browner*, to require MS4 permits to protect water quality standards. 191 F.3^d at 1166. Therefore, the presence of such language in these permits does not indicate that it is required by the CWA.

removed from the system” (quoting 55 Fed. Reg. 47990, 47995 (November 16, 1990) (emphasis supplied)).

And, the specific counterpart provisions in the 2004 Permit also did not contain language requiring the prevention or elimination of such non-stormwater discharges. *See* 2004 Permit, Section F (Development Planning); Section G (Construction); Section H (Existing Development, including H.1 (municipal facilities), H.2 (industrial/commercial facilities) and H.3 (residential)); or Section I (Education). It is those specific counterparts that the Commission must evaluate in determining whether the Section F requirements of the 2010 Permit were a new program or higher level of service than that required under the previous 2004 Permit. The record reflects that they were.

3. No Other Mandates Exceptions Apply

The Water Boards (WB Comments at 67) again argue (without evidence) that the costs of the Section F requirements are *de minimis* and that the Claimants have fee authority to fund this requirements. The first argument is rebutted by the evidence in the Section 6 Declarations (Paragraph 5(m)) and the Narrative Statement at 67, indicating that the increased costs of the mandates exceeded \$500,000 in each of FYs 2010-11 and 2011-12, and the second in the Funding Rebuttal Comments, below.

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

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

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

The Water Boards and the DOF have not met this burden. The Water Boards’ chief contention is that Claimants can assess a general fee to pay for the 13 programs at issue in this Joint Test Claim. WB Comments at 18-19. DOF’s chief contention, also raised by the Water Boards, is that the fact that Claimants must seek voter approval pursuant to Proposition 218, articles XIII C and D of the California Constitution, to assess a fee or tax does not mean that they do not have authority to do so within the meaning of Govt. Code § 17556(d). (DOF Comments at 1-2.)

Neither of these contentions meets the State’s burden of explaining why Claimants can assess charges, fees or assessments to fund the mandates in this Joint Test Claim. First, under article XIII C of the California Constitution, when providing services or conferring benefits, Claimants cannot assess a fees that covers more than the reasonable cost of providing the benefit,

privilege, service or product. Additionally, the manner in which those costs are allocated to a payor must bear a fair and reasonable relationship to the payor's burdens or benefits received from the governmental activity. In this regard, when assessing a fee, Claimants bear the burden of proving by a preponderance of the evidence that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. Cal. Const., article XIII C § 1(e). Otherwise the fee would be considered a tax subject to the requirements of article XIII C of the California Constitution. Cal. Const., article XIII C § 1(e). *See Jacks v. City of Santa Barbara* (2017) 3 Cal. 5th 248, 261.⁴⁵

The mandates at issue in this Joint Test Claim are not the types of programs for which the Claimants can assess a fee. The removal of irrigation run-off from non-prohibited non-stormwater discharges, the NALs and SALs programs, BMP maintenance tracking requirements, unpaved road program, retrofit program, watershed water quality work plan requirements, JRMP Annual Report requirements, special studies, and water quality standard programs, described in Section II of these Rebuttal Comments, all are programs intended to improve the overall water quality in the Santa Margarita River watershed, which benefits all persons within the jurisdiction. It is not possible to identify benefits that any individual resident, business or property owner within the jurisdiction would be receiving that is distinct from benefits that all other persons within the jurisdiction are receiving.

Likewise, the 2010 Permit's requirements that apply to Claimants' own activities as municipal governments address requirements imposed on Claimants themselves. Again, there is no individual resident, business or property owner upon whom a fee can be assessed to pay for these requirements. These requirements includes LID, hydromodification costs and construction costs incurred in conjunction with municipal projects. *See* Narrative Statement at 33-35. Nor are these costs voluntarily incurred.

Similarly, no fee can be assessed for inspection of industrial or construction sites, at least to the extent those sites hold general industrial or general construction stormwater permits for which the State Board already assesses a fee, which includes a fee to pay for inspections. This issue is relevant to the mandate in the 2010 Permit for inspection of industrial and commercial facilities (*see* discussion in Section II.H. above). Because the State is already assessing a fee for these inspections, pursuant to Water Code Code § 13260(d)(2)(B), the Claimants would have difficulty demonstrating that their fees would bear a fair and reasonable relationship to the payors' burdens or benefits; the State has already collected a fee for that activity. Likewise, there is no party on which to assess the cost of creating the inventory and databases of industrial and commercial sites.

Second, any assessment would be considered to be a "special tax," and, as such, could not be imposed without a vote of the electorate. Under the Constitution a tax is defined to be "any levy, charge, or exaction of any kind imposed by a local government . . ." Cal. Const., article XIII C § 1(e). A "special tax" is defined to be "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." *Id.*, article XIII C § 1(d).

⁴⁵ Rebuttal Documents, Tab 1.

REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS, 11-TC-03

Under the Constitution, “No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote.” Cal. Const., article XIII C § 2(d).

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

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

Cal. Const., Article XIII C § 1(e).

None of these exceptions applies here. As discussed above, any fee or assessment to pay for the removal of irrigation run-off from non-prohibited non-stormwater discharges, NALs and SALs programs, BMP maintenance tracking requirements, unpaved road program, retrofit program, watershed water quality work plan requirements, JRMP Annual Report requirements, special studies, and water quality standard programs, would be a fee or assessment to pay for the costs of a general program, not one directed towards a specific benefit, privilege, service or product. As for the other mandates, such as discharges from commercial, industrial or construction sites, the State is already regulating or has the authority to regulate those activities.

Article XIII D of the California Constitution also restricts the Claimants’ ability to assess property-related fees. Under article XIII D, section 3(a), no tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership, unless it is for “property-related services”⁴⁶ or certain other exceptions, except upon a two-thirds vote of the electorate. Under article XIII D, section 6(c), except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed unless approved by a majority vote of property owners of the property subject to the fee or charge or by two-thirds vote of the electorate residing the affected area. In *Howard Jarvis*

⁴⁶ “Property-related services” means “a public service having a direct relationship to property ownership.” Article XIII D, § 2(h).

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Taxpayers Association v. City of Salinas (2002) 98 Cal.App.4th 1351, 1354, the Court of Appeal held that a general stormwater fee is a property-related fee that is not excepted as a charge for water or sewer services, but instead is a property-related fee subject to the two-thirds electoral vote requirement. *Id.* at 1354-55, 1357-59.

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

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

The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes ‘costs mandated by the state’ if ‘The local agency . . . has the *authority* to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.’ . . . Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.

Additionally, it is possible that the local agency’s voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of taxing and spending limitations that articles XIII A and XIII B impose.”

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

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

The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. *Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d).* The voting requirement of Proposition does not impose a mere

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practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the “authority,” i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program.

SD County SOD at 107 (emphasis added).

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

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

The Commission reiterated this principle in *In Re Test Claim on Water Code Division 6, Part 2.5 [Sections 10608 through 10608.41] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4*, Test Claim Nos. 10-TC-12 and 12-TC-01 (December 5, 2014).⁴⁷ In these test claims, certain water suppliers sought reimbursement for new activities imposed on urban and agricultural water suppliers. With respect to the application of article XIII D, the Commission found that the water suppliers had fee authority, in that their fees were for water services within the meaning of article XIII D, section 6(e), and therefore the fee was subject only to a majority protest, not a vote of the electorate or property owners. *Id.* at 78. In doing so, the Commission noted that the San Diego County Stormwater Test Claim was distinguishable and that, with respect to in the mandates in that test claim, “absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d).” Test Claim Nos. 10-TC-12 and 12-TC-01, Decision at 77.

The Water Boards and DOF nevertheless contend that Claimants have the ability to submit fees to the voters for approval, and that under *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, this ability by itself meets the requirements of Govt. Code § 17556(d). (WB comments at 19; DOF comments at 1).

Clovis is not applicable. In *Clovis* the school district was authorized to collect health fees but voluntarily chose not to do so. 188 Cal. App. 4th at 810. In those circumstances, the Court of Appeal held that the Controller’s office properly offset the authorized fees, whether the school district collected them or not, because the district had the authority to assess those fees. *Id.* at 812.

⁴⁷ Rebuttal Documents, Tab 4.

REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS, 11-TC-03

Here, Claimants have not been authorized to collect fees or taxes; they currently have no such power as such authority resides directly with the electorate, pursuant to Prop 218, for any stormwater related pollution control charge. Therefore this is not a circumstance in which Claimants can assess fees but have voluntarily chosen not to do so. Indeed, if one accepted this argument, article XIII B, section 6 would be written out of the Constitution because the argument could always be made that a city or county could submit a tax or fee to the electorate. If that ability was all that was required to meet Government Code § 17556(d), a city or county could never obtain a subvention of funds. Such a result would be contrary to the people of California's intent in adopting article XIII B, section 6.⁴⁸

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

CONCLUSION

For the foregoing reasons, each of the 13 mandates at issue in this Joint Test Claim are state mandates for which Claimants are entitled to reimbursement. The Commission should 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: December 14, 2017

David W. Burhenn

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⁴⁸ The Water Boards reference the decision made by some jurisdictions to impose local stormwater fees. WB Comments at 18. The Water Boards do not provide evidence of the nature of such fees, i.e., whether they were in fact voted in by the residents in compliance with the requirements of the California Constitution. In any event, absent such evidence, the isolated excerpts attached to the comments, apparently obtained from municipal websites, does not rise to evidence that should be considered by the Commission.

**ATTACHMENTS IN SUPPORT OF REBUTTAL
COMMENTS OF JOINT TEST CLAIMANTS
CALIFORNIA REGIONAL WATER QUALITY CONTROL
BOARD, SAN DIEGO REGION
ORDER NO. R9-2010-0016, 11-TC-03**

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

ATTACHMENT 2: Declaration of Claudio M. Padres, P.E. and Exhibits A-B thereto

ATTACHMENT 3: Declaration of Karen Ashby and Exhibits 1-6 thereto

ATTACHMENT 1

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

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

1. I am a partner in the firm of Burhenn & Gest LLP and am the representative for the Joint Test Claimants in Test Claim 11-TC-03, California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016. As such, I have personal knowledge of the matters set forth in this Declaration and could, if called upon, testify competently thereto.

2. Exhibit A to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit issued by the California Regional Water Quality Control Board, Los Angeles Region (“LARWQCB”) to permittees in the County of Ventura on or about May 7, 2009. On December 8, 2017, I downloaded that excerpt from the website of the LARWQCB at the following address:

https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.

3. Exhibit B to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit issued by the California Regional Water Quality Control Board, Central Valley Region (“CVRWQCB”) to the City of Modesto on or about June 12, 2008. On December 8, 2017, I downloaded that excerpt from the website of the CVRWQCB at the following address:

https://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/stanislaus/r5-2008-0092.pdf

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

about October 14, 2009. On December 8, 2017, I downloaded that excerpt from the website of the SFBRWQCB at the following address:

https://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/R2-2009-0074_Revised.pdf

5. Exhibit D to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit Fact Sheet issued by the California Regional Water Quality Control Board, Santa Ana Region (“SARWQCB”) to permittees in Riverside County on or about January 29, 2010. On December 8, 2017, I downloaded that excerpt from the website of the SARWQCB at the following address:

https://www.waterboards.ca.gov/santaana/board_decisions/adopted_orders/orders/2010/10_033_RC_MS4_Permit_01_29_10.pdf

6. Exhibit E to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit and Fact Sheet issued by the California Regional Water Quality Control Board, San Diego Region (“SDRWQCB”) to permittees in Orange County on or about December 16, 2009. On December 8, 2017, I downloaded those excerpts from the website of the SDRWQCB at the following addresses:

https://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/oc_permit/updates_012710/FINAL_R9_2009_0002.pdf (permit)

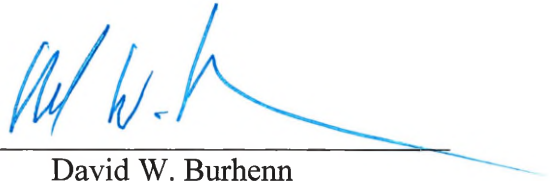
https://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/oc_permit/updates_012710/FINAL_R9_2009_0002_Fact%20Sheet.pdf (fact sheet)

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

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

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

Executed December 14, 2017 at Los Angeles, California.



David W. Burhenn

EXHIBIT A

STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

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

May 7, 2009



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

3. The U.S. EPA has entered into a Memorandum of Agreement (MOA) with the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service for enhancing coordination regarding the protection of endangered and threatened species under section 7 of the Endangered Species Act, and the CWA's water quality standards and NPDES programs. Among other actions, the MOA establishes a framework for coordination of actions by the U.S. EPA, the Services, and CWA delegated States on CWA permit issuance under § 402 of the CWA [66 Fed. Reg. 11202-11217].
 4. The CWA allows the U.S. EPA to authorize states with an approved environmental regulatory program to administer the NPDES program in lieu of the U.S. EPA. The State of California is a delegated State. The Porter-Cologne Water Quality Control Act (California Water Code) authorizes the State Water Resources Control Board (State Water Board), through the Regional Water Boards, to regulate and control the discharge of wastes that could affect the quality of waters of the State, including waters of the United States, and tributaries thereto.
 5. Under CWA § 303(d) of the CWA, States are required to identify a list of impaired water-bodies and develop and implement TMDLs for these waterbodies (33 USC § 1313(d)(1)). The most recent 303(d) list's U.S. EPA approval date was June 28, 2007. The U.S. EPA entered into a consent decree with the Natural Resources Defense Council (NRDC), Heal the Bay, and the Santa Monica Baykeeper on March 22, 1999, under which the Regional Water Board must adopt all TMDLs for the Los Angeles Region within 13 years from that date. This Order incorporates provisions incorporating approved WLAs for municipal storm water discharges and requires amending the SMP after subsequent pollutant loads have been allocated and approved.
 6. Collectively, the restrictions contained in the TMDL Provisions for Storm Water (Wet Weather) Discharges and Non-Storm Water (Dry Weather) Discharges of this Order on individual pollutants are no more stringent than required to implement the provisions of the TMDL, which have been adopted and approved in a manner that is consistent with the CWA. Where a TMDL has been approved, NPDES permits must contain effluent limits and conditions consistent with the assumptions and requirements of the available WLAs in TMDLs (40 CFR 122.44(d)(1)(vii)(B)).
-
7. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. This Order implements federally mandated requirements under CWA § 402, subdivision (p)(3)(B) (33 U.S.C. § 1342(p)(3)(B)). This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State

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

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

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

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

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

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

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

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

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

EXHIBIT B

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ORDER NO. R5-2008-0092

NPDES NO. CAS083526

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

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

1. The City of Modesto submitted a Report of Waste Discharge (ROWD) on 2 April 2007 and requested reissuance of Waste Discharge Requirements (WDR) under the National Pollutant Discharge Elimination System (NPDES) area-wide municipal separate storm sewer system (MS4) permit to discharge storm water runoff from storm drains and watercourses within the jurisdiction of the Discharger and to implement a Storm Water Management Plan (hereafter SWMP) for the City of Modesto.
2. Prior to issuance of this Order, the City of Modesto was covered under the NPDES area-wide MS4 permit, Order No. R5-2002-0182 (NPDES No. CA0083526) adopted on 1 October 2002.
3. The City of Modesto is located in Stanislaus County at the confluence of Dry Creek and the Tuolumne River (tributaries of the San Joaquin River). The City encompasses 36 square miles¹ with an average elevation of 91 feet above sea level. The average annual precipitation is approximately 12.2 inches.² The storm drain system has approximately 77 miles of storm drain lines and 20 pump stations within the City. Storm water discharges from the City drain to detention/retention basins (13 detention and 11 retention basins in the City), approximately 18 major outfalls to receiving waters (Tuolumne River or Dry Creek), Modesto Irrigation District (MID) laterals/drains, or rock wells (approximately 11,000). **Attachment A** shows a map of the City of Modesto and the service area covered under this permit.
4. Surface water discharges occur generally in the older areas of the City or those areas immediately adjacent to the Tuolumne River, Dry Creek or irrigation canals. Forty percent of storm water discharges to detention/retention basins, twenty percent to

¹ U.S. Census Bureau, 2000.

² Modesto Irrigation District, Water Years 2002-2007.

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

27. The Discharger's publicly-owned rock wells are Class 5 injection wells under the U.S. EPA's Underground Injection Control program. The U.S. EPA does not provide regulation of these wells beyond registration.
28. Due to the discharge of storm water to shallow groundwater through rock wells and the large number of these wells operated by the City of Modesto, this discharge represents a potential threat to groundwater quality. It is the intent of these requirements to quantify the magnitude of this threat, determine if historic discharge to groundwater has impacted groundwater and to minimize the discharge of pollutants to groundwater. Privately-owned rock wells (a.k.a. spin-out or backhole wells) within the Modesto urbanized area are not regulated as storm water discharges as part of this Order, because they are not part of the MS4 regulated by this Order. However, if the groundwater assessment determines that other rock wells (including individual rock wells, or rock well systems smaller than the Discharger's 11,000 wells) pose a threat to groundwater, such wells will be subject to requirements for the protection of shallow groundwater.

STATUTORY AND REGULATORY CONSIDERATIONS

29. The CWA authorizes the U.S. EPA to permit a state to serve as the NPDES permitting authority in lieu of the U.S. EPA. The State of California has in-lieu authority for an NPDES program. The Porter-Cologne Water Quality Control Act authorizes the State Water Resource Control Board (State Water Board), through the Regional Water Boards, to regulate and control the discharge of pollutants into waters of the State. The State Water Board entered into a Memorandum of Agreement with the U.S. EPA, on September 22, 1989, to administer the NPDES Program governing discharges to waters of the United States.
30. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under federal Clean Water Act section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (*Natural Resources Defense*

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

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

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

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

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

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

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

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31. The Water Quality Act of 1987 added Section 402(p) to the CWA (33 U.S.C. § 1251-1387). This section requires the U.S. EPA to establish regulations setting forth NPDES requirements for storm water discharges in two phases:
- a. The U.S. EPA Phase I storm water regulations were directed at MS4s serving a population of 100,000 or more, including interconnected systems and storm water discharges associated with industrial activities, including construction activities. The Phase I Final Rule was published on November 16, 1990 (55 *Fed. Reg.* 47990).
 - b. The U.S. EPA Phase II storm water regulations are directed at storm water discharges not covered in Phase I, including small MS4s (serving a population of less than 100,000), small construction projects (one to five acres), municipal facilities with delayed coverage under the Intermodal Surface Transportation Efficiency Act of 1991, and other discharges for which the U.S. EPA Administrator or the State determines that the storm water discharge contributes

EXHIBIT C

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

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



**FACT SHEET/RATIONALE
TECHNICAL REPORT**

for

ORDER NO. R2-2009-0074

NPDES Permit No. CAS612008

**Municipal Regional Stormwater NPDES Permit
and
Waste Discharge Requirements**

for

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

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

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

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

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

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

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

40 CFR 122.26(d)(2)(iv) – Federal NPDES regulation 40 CFR 122.26(d)(2)(iv) requires “a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. [...] Proposed programs may impose controls on a system wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. [...] Proposed management programs shall describe priorities for implementing controls.”

40 CFR 122.26(d)(2)(iv)(A -D) – Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A -D) require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial, and municipal land uses or activities. Control of illicit discharges is also required.

CWC 13377 – CWC section 13377 requires that “Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the CWA, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with anymore stringent effluent standards or limitation necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.”

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

State Mandates

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT D

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

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

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

AREA-WIDE URBAN RUNOFF MANAGEMENT PROGRAM

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

Table 1. Municipal Permittees (Dischargers)

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

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

Table 2. - Administrative Information

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

Order No. R8-2010-0033 (NPDES No. CAS 618033)
Area-wide Urban Runoff
RCFC&WCD, the County of Riverside, and the Incorporated Cities

APPENDIX 6

FACT SHEET

ORDER NO. R8-2010-0033

The CWA prohibits the discharge of any Pollutant to navigable waters from a Point Source unless an NPDES permit authorizes the discharge. Efforts to improve water quality under the NPDES program traditionally and primarily focused on reducing Pollutants in discharges of industrial process wastewater and municipal sewage. The 1987 amendments to the CWA required MS4s and industrial facilities, including construction sites, to obtain NPDES permits for storm water runoff from their facilities. On November 16, 1990, the USEPA promulgated the final NPDES Phase I storm water regulations. The storm water regulations are contained in 40 CFR Parts

~~122, 123 and 124.~~ This Order does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under federal Clean Water Act section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (*Natural Resources Defense Council, Inc. v. U.S.E.P.A.* (9th Cir. 1992) 966 F.2d 1292, 1308, fn.17). The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (*cf. Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.)

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

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

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

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

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

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

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

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

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

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

The Basin Plan is the basis for the Regional Board's regulatory programs. The Basin Plan was developed and is periodically reviewed and updated in accordance with relevant federal and state law and regulation, including the CWA and the California Water Code. As required, the Basin Plan designates the Beneficial Uses of the waters of the Region and specifies Water Quality Objectives intended to protect those uses. (Beneficial Uses and Water Quality Objectives, together with an anti-degradation policy, comprise federal "Water Quality Standard"). The Basin Plan also specifies an implementation plan, which includes certain discharge prohibitions. In general, the Basin Plan makes no distinctions between wet and dry weather conditions in designating Beneficial Uses and setting Water Quality Objectives, i.e., the Beneficial Uses, and correspondingly, the Water Quality Objectives are assumed to apply year-round. (Note: In some cases, Beneficial Uses for certain surface waters are designated as "I", or intermittent, in recognition of the fact that surface flows (and Beneficial Uses) may be present only during wet weather.) Most Beneficial Uses and Water Quality Objectives were established in the 1971, 1975, 1983, and 1995 Basin Plans. The 1995 Basin Plan was updated in February 2008⁵. Amendments to the Basin Plan included new nitrate-nitrogen and TDS objectives for specified

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

EXHIBIT E

**California Regional Water Quality Control Board
San Diego Region**

**Waste Discharge Requirements for
Discharges of Runoff from the
Municipal Separate Storm Sewer Systems
(MS4s)**

**Draining the Watershed of the County of Orange,
The Incorporated Cities of Orange County, and
The Orange County Flood Control District
Within the San Diego Region**

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

December 16, 2009

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 Copermitttee from developing a non-point source plan, for the urban category, under CZARA. The Regional Board addresses septic systems through the administration of other programs.
5. Section 303(d)(1)(A) of the CWA requires that "Each state must 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 current Section 303(d) List was approved by the State Board on October 25, 2006. On June 28, 2007 the 2006 303(d) list for California was given final approval by the United States Environmental Protection Agency (USEPA).
6. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under federal Clean Water Act section 402. (33 U.S.C. § 1342(p)(3)(B).) Second, the local agency Copermitttees' 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 Copermitttees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. Fourth, the Copermitttees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their storm water discharges. 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 XIII B, Section (6) of the California Constitution. Likewise, the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates. The federal Clean Water Act requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. sec. 1313(d).) Once the U.S. Environmental Protection Agency or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 C.F.R. sec. 122.44(d)(1)(vii)(B).)

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

FACT SHEET / TECHNICAL REPORT

FOR

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

WASTE DISCHARGE REQUIREMENTS

FOR

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

December 16, 2009

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

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

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

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

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

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

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

ATTACHMENT 2

DECLARATION OF CLAUDIO M. PADRES, P.E.
IN SUPPORT OF REBUTTAL COMMENTS


I, CLAUDIO M. PADRES, P.E., hereby declare and state as follows:

1. I am Chief of the Design and Construction Division of the Riverside County Flood Control and Water Conservation District (“District”). In 2012, I was an Senior Civil Engineer in the Watershed Protection Division of the District, with responsibility for, among other things, compliance of permittees subject to California Regional Water Quality Control Board, San Diego Region (“San Diego Water Board”) Order No. R9-2010-0016 (the “2010 Permit.”). As such, I have personal and first-hand knowledge of the matters set forth in this Declaration and could, if called upon, testify competently thereto.

2. Exhibit A to my Declaration is a true and correct copy of a letter dated May 29, 2012 sent by Jason Uhley, then Chief of the District’s Watershed Protection Division, to David Gibson, Executive Officer of the San Diego Water Board, regarding proposed adjustments to special studies required by the 2010 Permit. I obtained this copy of the letter from District files.

3. Exhibit B to my Declaration is a true and correct copy of a letter dated September 14, 2012 sent by James G. Smith, Assistant Executive Officer of the San Diego Water Board, regarding a modification of the special study requirements in Attachment E of the 2010 Permit. I obtained this copy of the letter from District files.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 13, 2017 at Riverside, California.



Claudio M. Padres, P.E.

EXHIBIT A

WARREN D. WILLIAMS
General Manager-Chief Engineer



1995 MARKET STREET
RIVERSIDE, CA 92501
951.955.1200
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www.rcflood.org

RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT

May 29, 2012

Mr. David Gibson, Executive Officer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Attn: David Barker

Dear Mr. Gibson:

Re: Order R9-2010-0016 – Revised Proposal
for Adjustments to Special Study
Requirements

On November 10, 2010, the San Diego Regional Water Quality Control Board (Regional Board) adopted Order R9-2010-0016 (Order) for the County of Riverside, the Riverside County Flood Control and Water Conservation District (District), and the Cities of Murrieta, Temecula and Wildomar (collectively 'Copermittees'). The District serves as Principal Permittee, and through an agreement among the Copermittees, conducts many elements of the Monitoring and Reporting Program described in the Order on their behalf.

The Order includes requirements that the Copermittees perform six Special Studies (Attachment E, Provision II.E.) identified by Regional Board staff to, among other things, assess impacts to beneficial uses that may be caused by discharges from the Copermittees' MS4. The Regional Board also received testimony before and at the November 10th adoption hearing from the Copermittees, Camp Pendleton Marine Corps Base and other stakeholders regarding concerns that the LID Retention Standard specified in the Order (Provision F.1.d.(4)(c)(i)) may cause adverse impacts to beneficial uses in the lower Santa Margarita River Watershed.

Pursuant to Board direction at the hearing, Regional Board staff has met with the Copermittees, Camp Pendleton and other interested stakeholders on several occasions to identify and investigate potential impacts of the LID Retention Standard on beneficial uses, including water supply in the lower Santa Margarita River Watershed. The stakeholders are recommending additional data collection, modeling and analysis to more accurately evaluate the potential impacts of implementation of the LID Retention Standard. A scope of work and estimated budget for performing the proposed study, hereinafter referred to as the "LID Retention Impacts Study", has been developed, and is attached hereto.

Mr. David Gibson
Re: Order R9-2010-0016 – Revised Proposal for
Adjustments to Special Study
Requirements

- 2 -

March 29, 2012

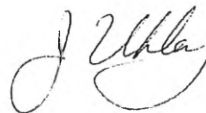
As is shown in the attached scope, the estimated total cost for performing this study is \$98,000. As requested by Regional Board staff, this cost is being shared equally between Camp Pendleton and the Copermittees; accordingly the Copermittees' share is estimated at \$50,000.

In addition, Regional Board staff has requested the LID Retention Impacts Study to be peer reviewed by an independent third-party. The Southern California Coastal Water Research Project (SCCWRP) has agreed to facilitate the peer review at an estimated additional cost of \$20,000, bringing the total cost to the Copermittees to at least \$70,000.

The Copermittees are proposing to fund the Copermittees' share of the proposed study in exchange for Regional Board relief from some of the other Special Study monitoring requirements. Please see the attachments to this letter which outline the proposal.

The Copermittees appreciate your prompt consideration of this proposal. If you or your staff should have any questions, please feel free to contact me at 951.955.1273 or Claudio Padres of my staff at 951.955.8602.

Very truly yours,



JASON UHLEY
Chief of Watershed Protection Division

Attachments:

- Proposal - Attachment A
- Scope of Work for the proposed 'LID Retention Impacts Study' - Attachment B
- Cost estimates for Special Studies II.E.5. and II.E.6. - Attachment C

CP:cw
P8/145258

Proposal

Consistent with direction from the Regional Board at the Order R9-2010-0016 adoption hearing, Regional Board staff has met with the Copermitees, Camp Pendleton and other interested stakeholders to identify and investigate potential impacts of the LID Retention Standard upon beneficial uses and water supply in the lower Santa Margarita River Watershed. The stakeholders recommend additional data collection, modeling and analysis to more accurately evaluate the potential impacts of the LID Retention Standard. A scope of work and estimated budget for performing the proposed study, hereinafter referred to as the "LID Retention Impacts Study", has been developed, and is attached hereto.

The total cost of the study is estimated at \$98,000, which would be paid for jointly by Marine Corps Base Camp Pendleton and the Copermitees, with the Copermitees' share being \$50,000. In addition, Regional Board staff has requested the LID Retention Impacts Study to be peer reviewed by an independent third-party. The Southern California Coastal Water Research Project (SCCWRP) has agreed to facilitate the peer review at an estimated additional cost of \$20,000, bringing the total cost to the Copermitees to at least \$70,000. To cover contingencies for additional and/or alternative analyses that may arise from the peer review, the Copermitees have also included in the contract being executed with Stetson Engineers additional on-call capacity beyond the \$70,000.

With the level of stakeholder and Regional Board staff interest in the LID Retention Impacts Study, and its relevance to the protection of beneficial uses, the Copermitees believe that funding of the proposed study and peer review should be a priority in the Santa Margarita Watershed. The Copermitees therefore request the following adjustments be made to the Order to allow the Copermitees to provide for funding of this study:

- Modify the following requirements of the Monitoring and Reporting Plan (Appendix E to the Order) as follows:
 - Substitute:
 - MS4 and Receiving Water Maintenance Study (II.E.5)
 - Intermittent & Ephemeral Stream Perennial Conversion (II.E.6)
 - With
 - "LID Retention Impacts Study" as a new special study within Section II.E.

The combined remaining cost for the two studies proposed for replacement is estimated at \$83,538 as shown in Attachment C. Any cost savings realized by the Copermitees due to the difference in cost between the LID Retention Impacts Study and the two studies proposed for replacement will be applied to cover contingency work that may arise due to the peer review.

Basis for Proposed Changes

As described in testimony to the Board at and before the November 10th adoption hearing, the extensive compliance requirements specified in the Order are already beyond the fiscal resources available to the Copermitees. The requested adjustments to the Order are necessary to allow the

redirection of Copermittee resources from other monitoring and special study efforts specified in the Order to fund the proposed "LID Retention Impacts Study".

Authorization to make Changes

There are several provisions in the Order that authorize the Executive Officer to make changes to the special study requirements. In particular the following are the relevant provisions:

- **Provision A, footnote 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."*
- **Provision K:** *"The Copermittees may propose alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance."*
- **Appendix E, footnote 10 on page 10:** *"For the purposes of Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2010-0016, review and approval by the San Diego Water Board of draft monitoring plans, proposals or protocols shall be conducted by the San Diego Water Board Executive Officer."*
- **Appendix E, Provisions II.E.2., II.E.5 and II.E.6 each state:** *"The Copermittees must implement the special study unless otherwise directed by the San Diego Water Board"*.
- **Fact Sheet page 198:** *"For the purposes of Receiving Waters and MS4 Discharge Monitoring and Reporting Program, required reviews and approvals by the San Diego Water Board of draft monitoring plans, proposals or protocols shall be conducted by the San Diego Water Board Executive Officer."*

Selection of Special Studies for Replacement

In assessing which special studies to propose for replacement, the District identified studies where the current estimated cost is comparable to, or for which the intrinsic value of the study was less than that of the proposed LID Retention Impacts Study. Additionally, the District consulted with Regional Board staff regarding special studies that staff considered as appropriate for this proposal. Based on this evaluation and discussions with Regional Board staff, the Copermittees recommend substituting the following special studies with the LID Retention Impacts Study:

II.E.5. MS4 and Receiving Water Maintenance Study: The effects of MS4 maintenance activities within Murrieta Creek have already been assessed by an independent study published by the Water Environment Federation (WEF) in 2007. A copy of this study was provided to Chiara Clemente of your staff on August 19, 2011. As maintenance practices have not substantively changed since the study was performed, the Copermittees do not believe that a repeat of this assessment is necessary at this time.

II.E.6. Intermittent & Ephemeral Stream Perennial Conversion: The Intermittent and Ephemeral Stream Perennial Conversion Study is similar to the proposed LID Retention Impacts Study in that both are assessing the impacts on beneficial uses caused by changes in runoff over the long term. However, these studies are designed to test slightly different hypotheses. II.E.6. presumes that urbanization has increased base flows and made naturally ephemeral streams into perennial streams. Decades of water rights litigation within the Santa Margarita River Watershed has demonstrated that the opposite has occurred - that the stream systems in the upper Santa Margarita Watershed are now *drier* than they historically have been due to a number of factors. Accordingly, the LID Retention Impacts Study is designed to answer a more pertinent question of whether the retention requirements in the Order will further impact flows in the Santa Margarita River.

ATTACHMENT B

DRAFT SCOPE OF WORK AND COST PROPOSAL

INVESTIGATION OF REGIONAL BOARD ORDER R9-2010-0016
MUNICIPAL SEPARATE STORM SEWER SYSTEMS PERMIT
RIVERSIDE COUNTY, CALIFORNIA

MAY 1, 2012

PREPARED FOR

RIVERSIDE COUNTY FLOOD CONTROL AND
WATER CONSERVATION DISTRICT,
RIVERSIDE COUNTY



PREPARED BY

STETSON ENGINEERS INC.
SAN RAFAEL, COVINA, AND BAKERSFIELD CALIFORNIA

ATTACHMENT B

PROPOSAL

This proposal is submitted by Stetson Engineers Inc. to Riverside County Flood Control and Water Conservation District (RCFCWCD). The purpose of the proposed study is to investigate the potential impact to flows, including their relationship to beneficial uses, in the Santa Margarita River Watershed that may result from San Diego Regional Water Quality Control Board (Board) Order R9-2010-0016 (Order). The Board Order addresses requirements for the Municipal Separate Storm Sewer Systems (MS4) for Southern Riverside County. Provision P of the Order specifically requires:

“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.”

The scope of work presented herein by Stetson Engineers, which incorporates input received from Camp Pendleton, RCFCWCD, Regional Board staff, and other interested parties during the study scoping process, outlines the tasks necessary to evaluate potential impacts to surface flow that may derive from the implementation of the Order.

Contractor Information:

Stetson Engineers Inc.
2171 E. Francisco Blvd. Suite K
San Rafael, California 94901
(415) 457-0701
(415) 457-1638 (FAX)
stever@stetstonengineers.com (e-mail)

Contract Person: Steve Reich

Tax Payer Identification No. (TIN) 94-2452155

AREA OF EXPERTISE

Stetson Engineers has worked on a wide range of water rights, water supply and quality, stormwater, and monitoring projects in the Santa Margarita River Watershed and is familiar with the water resources, hydrology, and infrastructure in southern Riverside County. Stetson will provide supervisors and support staff experienced in water resource engineering, including, civil engineering, water quality, hydrogeology, and water reuse.

ATTACHMENT B

STATEMENT OF WORK

The MS4 order issued under R9-2010-0016 specifies low impact development (LID) and other mitigation measures to improve water quality in creeks and rivers in southern Riverside County. These measures are intended to protect or improve water quality in the surface waters through increased retention requirements. Whether on-site or regionally developed, increased stormwater retention has the potential to reduce the quantity of water available for downstream beneficial use, including use on Camp Pendleton for water supply and other beneficial uses. There is particular concern that the proposed Order could significantly reduce small- to mid-size storm flow frequency at and below the SMR Gorge due to implementation of on-site retention requirements for stormwater that may retain more water onsite than would occur in nature. The purpose of this scope of work is to evaluate and address whether implementation of the Order will affect the surface flow of the Santa Margarita River at the confluence of Murrieta and Temecula Creeks. Specific attention will be focused on potential impacts to the beneficial use of surface flows, including, but not limited to: in-stream flow requirements for habitat, species and water rights.

The proposed scope of work is for a joint study by RCFCWCD and Camp Pendleton. The work includes collecting rainfall-runoff data from two MS4 facilities that exist in southwestern Riverside County. These representative data will then be used as input to a Storm Water Management Model (SWMM) to develop site specific in-situ rainfall-runoff curves. These relationships will then be used to calibrate infiltration parameters in the Murrieta-Temecula groundwater model that has been jointly developed by Rancho California Water District and Camp Pendleton. The regional groundwater model and the site-specific rainfall-runoff curves will then be used to assess potential impact to streamflow due to increased retention requirements under R9-2010-0016.

There are seven tasks associated with the study, plus an additional on-call task. The on-call task is for facilitating a third-party peer review, responding to and performing additional analysis based on the peer review, and other services as directed by the District. The following eight tasks outline specific requirements for this proposed scope of work. [Note: work has started on some tasks, as discussed below, under separate contract with Camp Pendleton.]

ATTACHMENT B

TASK 1 – COLLECT DATA AND REVIEW AS-BUILD DRAWINGS

Stetson Engineers will collect all available hydrologic, land use, and planning data for the Upper Basin area of the Santa Margarita River Watershed in southern Riverside County. Based on a review of data, specific MS4 facilities will be identified for further investigation. Digital elevation terrain models will be developed to analyze the surface water runoff tributary to MS4 facilities. As-built drawings will be reviewed to identify potential areas for site specific investigation. This task will include, but not be limited to: meeting with RCFCWCD personnel to investigate representative sites for sample collection; collecting available hydrologic data; processing elevation and topographic data, and; collecting and reviewing as-built engineering drawings of MS4 facilities.

A meeting, site visit, and identification of two sites for measuring runoff will be performed upon completion of this task.

TASK 2 SELECT SITES

Based on the available data collected in Task 2, Stetson and RCFCWCD will select two sites in Southwestern Riverside County to measure rainfall and runoff data during the 2011-12 winter period. The data will be used to develop rainfall-runoff relationships for areas of known land use and future calibration of the SWMM model. This task will include, but not be limited to: on-site surveying and instrument installation; coordination with RCFCWCD for identification of existing MS4 facilities; review and cataloging existing stormwater structures and characteristics; and analyzing land use and soils pertinent to use for basin wide application.

A meeting, inventory of available MS4 facilities, and land surveying to support runoff calculations will be performed upon completion of this task.

TASK 3 CALIBRATE SWMM

Following collection of actual rainfall and runoff data, Stetson will develop and calibrate a SWMM model at each of the two sites identified in the previous task. The purpose of developing a SWMM at each site is to identify the various hydrologic processes that control surface runoff and subsurface infiltration derived from time-dependent rainfall events. Specifically, the sites will be chosen so that different rainfall-runoff relationships may be derived based on different depths to groundwater, soils characteristics, and urban development.

The SWMM calibration task includes the following two model runs:

ATTACHMENT B

1) Undeveloped

1a) Historical

The purpose of this model run will be to develop a rainfall-runoff relationship that characterizes each site under undeveloped conditions that are consistent with elevated groundwater levels and natural soil cover.

1b) Historical with Existing Groundwater Level Drawdown

Similar to Historical Undeveloped Model run, this model run will simulate the rainfall-runoff relationship based on historical conditions except for the use of existing groundwater levels. The purpose of this model run will be to determine the rainfall-runoff relationship at each site under existing groundwater conditions as if no land use development existed.

2) Existing Conditions

Each SWMM will be calibrated to existing conditions that are characteristic of groundwater levels, urban development, population, and MS4 facilities that existed between 2008 and 2011.

A Draft Technical Memorandum describing the SWMM calibration will be presented to RCFCWCD and Camp Pendleton upon the completion of Task 4.

TASK 4 DEVELOP MANAGEMENT SCENARIOS AND RUN MODEL

Stetson and RCFCWCD/CPEN will establish various management scenarios to test the future build-out scenarios. There will be at least three management scenarios developed to characterize rainfall-runoff relationships under three different future condition assumptions. The purpose of these runs is to assess potential impacts of the MS4 Permit against baseline conditions previously identified. The proposed three scenarios include:

3) Full Build-Out

Each SWMM will be updated to reflect full buildout conditions based on the MS4 facilities that exist for Model Run 2 (Existing Conditions). City and county-wide general plans will be used to update the soils and land use properties that affect the rainfall-runoff relationship. Build-out – and associated stormwater runoff – under this model run will presume no onsite retention.

4) LID Scenario – No Retrofit

Building upon Model Run 3, each SWMM will be updated to simulate surface water runoff based on installation of LID BMPs on new development only.

ATTACHMENT B

The purpose of this simulation is to create rainfall-runoff relationships that are characteristic of build-out conditions with partial (only new development) implementation of LID BMPs identified in the Order.

5) Full LID Scenario

Building upon Model Run 3, each SWMM will be updated to simulate surface water runoff based on complete replacement/retrofit of all urban land use (existing and future) to reflect R9-2010-0016 requirements. The purpose of this simulation is to create rainfall-runoff relationships that are characteristic of build-out conditions with 100% implementation of LID BMPs identified in the Order.

The results from three SWMM management scenarios for Model Runs 3, 4, and 5 will be presented in a Draft Technical Memorandum upon completion of this task.

TASK 5 EXPAND SWMM RESULTS TO BASIN LEVEL

Stetson will develop a methodology to apply the rainfall-runoff relationship developed at the investigative sites for application to the basin-wide GSFLOW model. The rainfall-runoff relationships developed at each site for the three future scenarios will be applied to a basin-wide groundwater flow model. The GSFLOW groundwater model, which accounts for both surface and groundwater flow, will be used to expand the site specific data to a basin wide scale so potential impacts to surface flow at the Gorge may be assessed. The GSFLOW model is dependent upon rainfall-runoff relationships and will reflect changes in groundwater storage and surface flow based on time-dependent rainfall events.

The GSFLOW model has been developed by Rancho California Water District through a collaborative process under supervision of the SMR Watermaster. The purpose of the model is to assess the effects of urban and water related impacts to flow at the Gorge. The surface water portion of the groundwater model accounts for the rainfall-runoff relationship outside the two SWMM model control points to assure a mass balance exists between various future management scenarios. Specifically, the groundwater model will assure that the sum of basin-wide runoff and infiltration, based on total rainfall, remains equal between model runs.

While the groundwater model run reflecting undeveloped conditions (no dams or groundwater pumping) has been previously completed, this study will investigate future build out conditions identified in Task 4. Task 5 will develop data sets to be incorporated into the existing GSFLOW model to simulate flow at the Gorge. Three groundwater model scenarios are currently contemplated:

ATTACHMENT B

GW Run A – Full Build-Out

The first model run will calibrate the GSFLOW model to the newly developed rainfall-runoff relationships based on an assumption of full build-out without onsite retention.

GW Run B – LID with No Retrofit

The second model run will reflect fully functioning LID BMPs for new development in the future build-out scenario in accordance with the MS4 permit conditions.

GW Run C – LID with 100% Retrofit

The third model run will add an assumption of 100% retrofit of existing land uses to the previous scenario of adding LID BMPs to all new developments and redevelopments in accordance with the MS4 permit conditions.

This task will result in three datasets formatted for input to GSFLOW. The final recommendation for groundwater modeling will be based on the outcome and analysis of the SWMM modeling effort and the actual costs for the GSFLOW consultant to conduct each modeling scenario. If additional funds become available, alternative model runs to investigate undeveloped conditions under existing groundwater levels will be pursued with the groundwater model group.

TASK 6 GSFLOW COORDINATION

Stetson will work with the Cooperative Water Resource Management Agreement (CWRMA) Technical Advisory Committee (TAC) and the CWRMA groundwater model group to refine the model runs described above for using GSFLOW and MODFLOW. Following delivery of Task 5 datasets to the GSFLOW consultant, Task 6 will include meeting with the groundwater model group to coordinate data and result implementation into the existing GSFLOW model. Rancho California Water District's consultant, Geoscience Support Services Inc., will perform the GSFLOW model scenarios based on the datasets developed in Task 5. The results of these model run will be simulated streamflow records that may be used to assess whether R9-2010-0016 impacts flow at the Gorge. This task will include, but not be limited to: coordination with the CWRMA TAC; preparation of groundwater model input data; and analysis of results from the GSFLOW model run.

GSFLOW model results for each management scenario performed will be prepared upon the completion of this task. The model results will describe flow at the Gorge based

ATTACHMENT B

different rainfall-runoff relationships identified from each management scenario. These results will be described in the Task 7 technical memorandum.

TASK 7 TECHNICAL MEMORANDUM AND PROJECT MANAGEMENT

A draft and final Technical Memorandum will be provided that describes the methodologies used to develop the relationship, if any, between the requirements of the Order and flow at the Gorge under the different management scenarios described above. Changes to flow downstream of the Gorge due to impacts from implementation of the Order will be assessed qualitatively and discussed in terms of potential impacts on beneficial uses, including (if applicable) potential impacts on in-stream species requirements and water availability during different times of the year. A PowerPoint presentation and final report of the results will be created for presentation to RCFCWCD, CPEN, and the Regional Board along with recommendations for potential changes, if justified, to the Order that will minimize or otherwise avoid potentially adverse effects.

TASK 8 FACILITATION OF THIRD PARTY PEER REVIEW AND ASSOCIATED ANALYSIS

This on-call task includes facilitating a third-party peer review, responding to and performing additional analysis based on the peer review, and other services as directed by the District. Facilitation of the Peer Review process includes identifying potential expert reviewers; coordinating the selection process with the District, Camp Pendleton, and the Regional Board; administering the contract with the selected reviewers; and managing the work of the reviewers in a manner not to interfere with the Regional Board's supervision and interaction with the third party peer reviewers. Additional work, if directed, may include analyses required to address issues raised by the peer reviewers regarding study methods and findings, as well as other services as directed by the District.

PROJECT SCHEDULE AND DELIVERABLES

The following milestones define the project schedule. Work started in January 2012 under contract with Camp Pendleton. During March, Camp Pendleton temporarily halted work pending ongoing negotiations with the Regional Water Quality Control Board regarding acceptance of a study swap that would enable RCFCWCD to fund its participation in the study. When work is restarted, Stetson will coordinate new completion dates with RCFCWCD and Camp Pendleton.

- Completed - Task 1
- Completed – Task 2
- TBD – Task 3 completed (work temporarily halted while in progress)
- TBD - Task 4 completed and Draft Technical Memorandum delivered (work temporarily halted while in progress)

ATTACHMENT B

- 21 Days – Client Review Period. Presentation and Review of Draft Technical Memorandum
- TBD – Task 5 completed. Submit materials to GSFLOW Model group.
- TBD – Task 6 completed. GSFLOW model runs completed.
- TBD – Final Technical Memorandum delivered.
- TBD – Presentation to Regional Board
- TBD - Task 8. Facilitation of Peer Review and related services (if directed)

These deliverables will be provided each to RCFCWCD and Camp Pendleton:

(3) hard copies and (1) electronic Draft Technical Memorandum

(3) hard copies and (1) electronic Final Technical Memorandum

PowerPoint presentation and final meeting.

SUMMARY OF COSTS

Stetson's cost for performing the three tasks described in this scope of work is outlined below.

SUMMARY OF COSTS FOR SOUTHERN RIVERSIDE COUNTY MS4 PERMIT RCFCWCD AND MARINE CORPS BASE CAMP PENDLETON, CA

Task	Overall Cost
Task 1: Collect Data and Review As-Built Drawings	\$6,000
Task 2: Select and Survey Sites	\$17,000
Task 3: Calibrate SWMM Model	\$16,000
Task 4: Develop Management Scenarios and Run Model	\$9,000
Task 5: Expand SWMM Results to Basin Level	\$11,000
Task 6: Coordinate with GSFLOW Model	\$15,000
Task 7: TM and Project Management	\$24,000
Total Cost	\$98,000

The additional cost for the additional on-call Task 8 Facilitating a Third Party Peer Review and Associated Analysis, if directed, is up to \$50,000.00. This work would be performed on a time and materials basis. The subcontractor charge for administering the on-call third party peer reviewers is 5%.

COST ESTIMATE SUMMARY
Santa Margarita Region Consolidated Monitoring Plan
MS4 and Receiving Water Maintenance Special Study

	Task	Labor	Direct	Analytical	Total
1	Site Determination	\$4,240	\$428	\$0	\$4,668
	Monitoring Location Siting				
	Post-survey site determination				
2	Monitoring Plan Development	\$8,002	\$0	\$0	\$8,002
3	Pre-Maintenance Monitoring	\$12,414	\$279	\$999	\$13,692
	Conventionals & Nutrients			\$633	
	Indicator Bacteria			\$366	
4	Post-Maintenance Monitoring	\$12,414	\$279	\$999	\$13,692
	Conventionals & Nutrients			\$633	
	Indicator Bacteria			\$366	
5	Continuous Monitoring	\$18,760	\$2,679	\$0	\$21,439
	Total	\$55,830	\$3,665	\$3,996	\$48,823

NOTE As of the date of this proposal, Tasks 1 and 2 of the MS4 and Receiving Water Maintenance Special Study have already been completed in accordance with the deadlines identified in Order R9-2010-0016. The total shown above reflects cost estimates for the remaining work in Tasks 3 through 5.

COST ESTIMATE SUMMARY
Santa Margarita Region Consolidated Monitoring Plan
Intermittent and Ephemeral Stream Perennial Conversion Special Study

Task		Labor	Direct	Analytical	Total
1	Research	\$16,000	\$428	\$0	\$16,428
	Historical Research & Data Collection Field Surveys Site Analysis and Determination				
2	Monitoring Plan Development	\$8,044	\$0	\$0	\$8,044
3	Monitoring	\$6,184	\$75	\$3,984	\$10,243
	Conventionals & Nutrients			\$1,764	
	Metals			\$1,488	
	Indicator Bacteria			\$732	
	Total	\$30,228	\$503	\$3,984	\$34,715

EXHIBIT B



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

California Regional Water Quality Control Board, San Diego Region

September 14, 2012

Certified Mail – Return Receipt Requested
Article Number: 7011 0470 0002 8961 6480

Mr. Jason Uhley
Chief of Watershed Protection Division
Riverside County Flood Control
And Water Conservation District
1995 Market Street
Riverside, CA 92501

In reply refer to:
Place ID: 252906:dquach

Subject: Modification of Special Study Requirements in Attachment E of Order No. R9-2010-0016

Mr. Uhley:

By letter dated May 29, 2012, you requested modification to the Special Studies reporting requirements, contained in Attachment E, Section II.E. of Order No. 2010-0016 (Order), to allow submittal of a "Low Impact Development Retention Impacts Study" in lieu of the required "MS4 and Receiving Water Maintenance Study" (required under Attachment E, Section II.E.5 of the Order) and the "Intermittent and Ephemeral Stream Perennial Conversion Study" (required under Attachment E, Section II.E.6 of the Order). The Low Impact Development (LID) Retention Impacts Study is being conducted jointly by the Riverside County Flood Control (District) and the Cities of Murrieta, Temecula and Wildomar (collectively Copermitees) and Camp Pendleton to identify and investigate potential impacts to stream flows, including their relationship to beneficial uses in the lower Santa Margarita River Watershed, resulting from implementation of LID retention requirements of the Order. The San Diego Water Board is participating in the development of the LID Retention Impacts Study pursuant to Provision P of the Order.

I understand that if the requested study swap is approved, the Copermitees will use the funding originally earmarked for the "MS4 and Receiving Water Maintenance Study" and the "Intermittent and Ephemeral Stream Perennial Conversion Study" to fund the "LID Retention Impacts Study". Any cost savings realized by the Copermitees due to the difference in cost between the LID Retention Impacts Study and the two studies proposed for replacement will be applied to cover contingency work that may arise due to the peer review of the LID Retention Impacts Study.

Attachment B to your letter contains an expanded draft scope of work and estimated budget, dated May 1, 2012, for the LID Retention Impacts Study to more accurately evaluate the potential impacts of implementation of the LID retention requirements of the Order. The stated purpose of this draft scope of work is to evaluate and address whether implementation of the Order will affect the surface flow of the Santa Margarita River at the confluence of Murrieta and

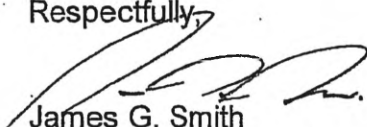
Temecula Creeks under various storm water management model scenarios. Specific attention will be focused on potential impacts to the beneficial uses of surface flows including but not limited to in-stream analyses for habitat, species, and water rights. The draft scope of work also includes provision for the Southern California Coastal Water Research Project (SCCWRP) to facilitate the scientific peer review of the LID Retention Impacts Study by independent experts as well as provision for the preparation of any analyses required to address issues raised by the peer reviewers regarding study methods and findings.

The draft scope of work does not include a schedule of specific milestone dates for the completion of the LID Retention Impacts Study. I understand that work on the study has been temporarily halted but will be resumed if the proposed study swap is approved. I anticipate that a schedule of specific milestone dates for the completion of the study will be coordinated with the San Diego Water Board when work is resumed.

Based on the foregoing, I have no objections to your proposed study swap in concept. I have been advised by Counsel that the proposed study swap would require modification of the Special Studies requirements of the Order by the San Diego Water Board at a publicly noticed hearing. Due to resource limitations this matter is unlikely to be scheduled for San Diego Water Board consideration in the near future. However, in the interim period until the matter can be scheduled for San Diego Water Board consideration, I will not recommend that the Board enforce the Special Studies requirements in Sections II.E.5 and E.6. of the Order pertaining to the "MS4 and Receiving Water Maintenance Study" or the "Intermittent and Ephemeral Stream Perennial Conversion Study". Please note that my decision to not recommend any enforcement action on these provisions of the Order during the interim period is not a restriction or shield against third party lawsuits under the citizen suit provisions of the Clean Water Act.

In the subject line of any response, please include the reference number 252906:dquach. For questions or comments, please contact Mr. Dat Quach by phone at (858) 467-2978, or by email at dquach@waterboards.ca.gov.

Respectfully,



James G. Smith
Assistant Executive Officer
JS: db:kd:dq

Tech Staff Info & Use	
Order No.	R9-2010-0016
Party (GT/CIWQS) ID	373608
File No.	
WDID	9 0000512S4
NPDES No.	CAS0108766
Reg. Measure ID	213857
Place ID	252906

ATTACHMENT 3

DECLARATION OF KAREN ASHBY

I, Karen Ashby, hereby declare:

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

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

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

4. I was requested to perform a survey of Phase I National Pollutant Discharge Elimination System (NPDES) municipal separate storm sewer systems (MS4) permits issued by the United States Environmental Protection Agency (EPA). I was further asked to review those permits to determine if they included any of the requirements that are the subject of the Test Claim filed with the Commission on State Mandates by the County of Riverside and certain cities located within the County.

5. EPA currently issues Phase I NPDES MS4 permits in four jurisdictions: Idaho, Massachusetts, New Mexico and Washington, D.C. I reviewed five currently effective Phase I

permits issued to municipalities in those jurisdictions, Albuquerque, Boise/Garden City Area (Boise), Washington, D.C. (D.C.), Boston, and Worcester.

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

7. I reviewed these five EPA-issued permits to determine if they included any of the provisions that are the subject of the test claim filed by Riverside County and certain cities concerning provisions in San Diego Regional Board Order No. R9-2010-0016 (the "Permit"). Attached as Exhibit 1 is a chart that summarizes my review. The Albuquerque, Boise, Washington D.C., Boston and Worcester permits are attached hereto as Exhibits 2, 3, 4, 5, and 6 respectively.

8. **Removal of Categories of Irrigation Runoff from Non-Prohibited Non-Stormwater Discharges.** Permit Section B.1 provides that permittees must effectively prohibit all types of non-stormwater discharges into their MS4 unless such discharges are otherwise authorized. Permit Section B.2 sets forth several categories of non-stormwater discharges which are excepted from this prohibition, but does not include three categories of irrigation runoff: landscape irrigation, irrigation water, and lawn watering. In contrast, all of the EPA-issued permits include landscape irrigation, irrigation water, and lawn watering within the categories of non-stormwater discharges that are excepted from the prohibition.

9. **Requirement to Respond to Non-Stormwater Action Levels or "NALs".** Permit Sections C and F.4.d and e require permittees to analyze non-stormwater discharges and compare those discharges against "non-stormwater dry weather action levels" ("NALs"). If exceedances of NALs are found, permittees are then required to take certain follow-up source investigations and other actions. No EPA-issued permit contains these requirements.

10. **Requirement to Respond to Stormwater Action Levels or "SALs".** Permit Section D requires permittees to analyze stormwater discharges and compare those discharges

against permit-designated “Stormwater Action Levels” (“SALs”). When a running average of twenty percent or greater of any discharge exceed the designated SALs, permittees are required to adopt additional control measures to reduce the levels of pollutants in the discharges. The permittee’s monitoring plan must also sample discharges from those major outfalls at which SALs have been exceeded. No EPA-issued permit contains these requirements.

11. **Priority Development Project Requirements.** Permit Section F.1.d requires permittees to update their standard stormwater mitigation plan (SSMP). Permit Section F.1.d (1)(c) and (2)(a) set forth two new priority development projects (which are subject to the SSMP requirements), all projects that result in the disturbance of one acre or more and all projects that create ten thousand square feet or more of impervious surfaces. Permit Section F.1.d(7) requires permittees to develop a low impact development (LID) Best Management Practices (“BMPs”) Waiver program.

The Boston and Worcester permits do not contain any such provisions. The Albuquerque, D.C., and Boise permits contain LID requirements, but not the extensive requirements that are present in the San Diego permit. The Albuquerque permit seeks to encourage use of LID, but does not require on site or off site mitigation projects. The D.C. permit contains LID requirements, but not as prescriptive as the San Diego permit. Similarly, the Boise permit contains requirements for LID and green infrastructure strategy, but does not contain the two priority development project definitions or the requirement to create a LID waiver program.

12. **Hydromodification Requirements.** Permit Section F.1.h requires the development of a hydromodification plan designed to mitigate the volume of the stormwater discharge from priority development projects. No EPA-issued permit has provisions as extensive and prescriptive as the San Diego permit. The Albuquerque and Boise permit encourage hydromodification concepts but do not require them. Neither the D.C., Boston nor Worcester permits contain such provisions.

13. **BMP Maintenance Tracking Requirements.** Permit Section F.1.f. requires permittees to develop and maintain a watershed-based database to track all approved post-construction BMPs and to inspect those BMPs to verify that they have been implemented and are operating. No such requirement is contained in the Albuquerque, Boston, or Worcester permits. The D.C. permit contains a requirement to inventory BMPs, but is not as prescriptive and does not require 100% of high priority projects to be annually inspected or the same frequency of verification and inspection that the Permit requires. The Boise permit contains BMP maintenance tracking requirements, but are not as prescriptive.

14. **Construction Site Requirements.** Permit Section F.2.d (3) requires permittees to require Active/Passive sediment treatment at construction sites, both private and municipal, determined to be an exceptional threat to water quality. Permit Section F.2.e (6)(e) requires permittees to review site monitoring data results for compliance purposes. No EPA-issued permit contains these requirements.

15. **Unpaved Roads BMP Requirements.** Permit Sections F.1.i and F.3.a.10 require permittees to develop and implement erosion and sediment control BMPs that apply to unpaved roads. No EPA-issued permits contains these requirements.

16. **Industrial/Commercial Inspection Requirements.** Permit Section F.3.b.4 requires permittees to review facility monitoring data when inspecting the range of industrial and commercial sites required to be inspected under the permit. The Boise and D.C. permits have inspection requirements but not as prescriptive as the Permit. Although EPA-issued permits require review of monitoring data when inspecting municipal landfills, hazardous waste treatment storage or disposal facilities, facilities subject to EPCRA Title III, or industrial sites that have NPDES permits that discharged to the MS4, none of the EPA-issued permits require review of monitoring data of the extensive list of facilities required by the San Diego permit.

17. **Requirement to Develop Program to Retrofit Existing Development.** Permit Section F.3.d requires permittees to identify areas of existing developments, including municipal developments, as candidates for retrofitting, evaluate those candidates and to prioritize and

encourage retrofitting projects to reduce discharges from the sites. Neither the Boston nor Worcester permits contain such provisions. The Albuquerque permit encourages evaluation of retrofitting of municipal properties and flood control devices but does not extend to private development. The Boise permit is likewise limited to municipal existing stormwater control devices. The D.C. permit is likewise not as broad as the San Diego permit.

18. **Watershed Water Quality Work Plan Requirements.** Permit Section G requires permittees to develop and implement a watershed water quality work plan. The Albuquerque, D.C., Boston, and Worcester permits do not contain this requirement. The Boise permit contains a requirement for watershed plans, but not extensive requirements as those required by the Permit. The Boise Permit is focused on identifying beneficial uses and implementing LID and infiltration principles. The Permit, on the other hand, is more extensive, requiring permittees to characterize the watershed, prioritize water quality problems, identify sources and develop strategies to monitor and improve water quality. These requirements are not included in the Boise permit work plan requirements.

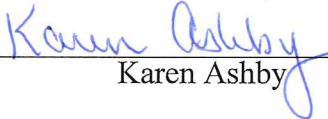
19. **JRMP Annual Report Requirements.** Permit Section K.3 and attachment D require an extensive JRMP Annual Report covering implementation of jurisdictional activities as well as other requirements. EPA-issued permits require the preparation of annual reports. They do not, however, require the extensive reporting required by the Permit.

20. **Special Studies Requirements.** Attachment E to the Permit includes requirements that permittees conduct several special studies, including a sediment toxicity study; trash and litter investigation; agricultural, federal and tribal runoff; and MS4 and receiving water maintenance study. Although EPA-issued permits may require assessment of the effectiveness of certain structural controls or LID requirements, neither the Boise, D.C., Boston or Worcester permits require a sediment toxicity study; trash and litter investigation; agricultural, federal and tribal runoff; or a MS4 and receiving water maintenance study. The Albuquerque permit requires monitoring of Dissolved Oxygen and temperature and monitoring/assessing of floatable material in discharges but also does not require the studies required by the Permit.

21. **Requirement that 2010 Permit Programs Attempt to Ensure no Violation of Water Quality Standards.** Several provisions of Permit Section F require permittees to develop programs that attempt to ensure that discharges do not cause a violation of water quality standards. The D.C. permit does not contain this requirement. The other EPA-issued permits state that the intent is to control discharges from the MS4 to the maximum extent practicable, but do contain language indicating that permittees should select programs to prevent or intended to prevent a violation of state water quality standards. The Albuquerque and Boise permits provide that discharges should not cause an exceedance of water quality standards.

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

Executed this 12th day of December, 2017 at Davis, California.



Karen Ashby

Exhibit 1

Summary of USEPA Phase I Permit Requirements

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI.A	Removal of Categories of Irrigation Runoff from Non-Prohibited Non-Stormwater Discharges Section B.2	No	Page 7 of Part I Page 40 of Part I	"Landscape irrigation", "irrigation water", and "lawn watering" among the exempted non-stormwater discharges identified within the permit.
VI. B	Requirement to Respond to Non-Stormwater Action Levels or "NALs" - Section C and portions of F.4 - New requirements related to "Non-Stormwater Dry Weather Action Levels" which included programmatic investigation, monitoring, and reporting requirements as well as action items stemming from a NAL exceedance.	No	-	No requirements to respond to Non-Stormwater Action Levels.
VI. C	Requirement to Respond to Stormwater Action Levels or "SALs" - Section D - Monitoring major MS4 outfalls into receiving waters for the presence of pollutants that exceeded SALs (if such pollutants were detected, to address the exceedances).	No	-	No requirements to respond to Stormwater Action Levels.
VI. D	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.d - New program to ensure that new development and significant redevelopment comply with strict low impact development ("LID")	Similar provisions, but not as stringent	Pages 26, 29, and 45-46 of Part I	- Requirements to identify/eliminate barriers to LID or Hydrologic Conditions of Concern - Encourage use of LID and green infrastructure concepts into plans, however it does not require on-site or off-site mitigation projects.
	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.h - New program to ensure that new development and significant redevelopment comply with strict hydromodification prevention requirements (including development and implementation of a Hydromodification Management Plan ("HMP")).	No	-	Encouragement of hydromodification concepts

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. E	BMP Maintenance Tracking Requirements - Provisions in Section F.1.f - Developing and maintaining a watershed-based database to track all projects that have a final approved SSMP and structural BMPs.	No	-	No requirement to develop and maintain a watershed-based database to track projects constructed as well as the related structural post-construction BMPs.
VI. F	Construction Site Requirements - Provisions of Section F.2 - Claimants to require Active/Passive Sediment Treatment ("AST") at construction sites determined to be "an exceptional threat to water quality".	No	-	No requirement for Active/Passive Sediment Treatment at construction sites.
	Construction Site Requirements - Provisions of Section F.2 - Claimants to review site monitoring data results during inspections of construction sites if the site monitored its runoff.	No	-	No requirement for reviewing construction site runoff monitoring data.
VI. G	Unpaved Roads BMP Requirements - Sections F.1.i. and F.3.a.10 - Developing and implementing BMPs to address erosion and sediment and other impacts from the development and maintenance of unpaved roads.	No	-	No specific requirements to develop and implement BMPs for the development and maintenance of unpaved roads.
VI. H	Industrial/Commercial Inspection Requirement - Section F.3.b.4(a)(ii) - Review facility monitoring data as part of an inspection program of commercial/industrial facilities if the facility monitored its runoff.	No	Pages 37-38 of Part I and Page 4-5 of Part III	Requirement to develop/implement a program to monitor industrial/commercial facilities. However, this requirement is limited to municipal landfills; other treatment, storage, or disposal facilities for municipal waste (e.g. transfer stations, incinerators, etc.); hazardous waste treatment, storage, disposal and recovery facilities; facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee(s) determines are contributing a substantial pollutant loading to the MS4.

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. I	<p>Requirement to Develop Program to Retrofit Existing Development</p> <ul style="list-style-type: none"> - Section F.3.d - Developing and implementing a new program to retrofit existing development. - Identifying areas of existing developments, including municipal developments, as candidates for retrofitting, evaluate and rank candidates according to pre-established criteria, prioritize work plans for implementation according to the evaluation, cooperate with landowners to encourage retrofit of private improvements, and track and inspect retrofitting projects. 	Similar provisions only required for MS4-owned property	Pages 31 and 36 of Part I	Retrofitting inventory, evaluation, prioritization required for MS4 properties and infrastructure and flood control devices, however it does not include existing development (or private properties) as a category.
VI. J	<p>Watershed Water Quality Workplan Requirements</p> <ul style="list-style-type: none"> - Section G - Developing and implementing 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." 	No	-	Permittees may participate in locally-based watershed planning efforts. No requirement to develop and implement a Watershed Workplan. Requirements focused on plans, strategies, and goals for pollutant specific issues.
VI. K	<p>Requirements Relating to JRMP Annual Report</p> <ul style="list-style-type: none"> - Section K.3 and a checklist in Attachment D - Requirements relating to the preparation of an extensive Jurisdictional Runoff Management Program (JRMP) Annual Report covering implementation of jurisdictional activities, as well as extensive other requirements. 	Smiliar provisions, not as prescriptive	Pages 7 and 8 of Part III	Includes basic and pollutant specific annual reporting requirements, however it does not include details regarding the specific values that need to be reported for the major stormwater program elements.

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. L	Special Studies Requirements - Attachment E - Mandated "special studies" regarding waters within the Santa Margarita Region.	Similar provision, but not as stringent	Page 21-22 of Part I Page 4 of Part III	Requirement for DO and temperature monitoring and floatable monitoring. However, no requirements for special studies related to sediment toxicity; agricultural, federal, or tribal inputs; or MS4 and receiving water maintenance.
VI. M	Requirements that 2010 Permit Programs Attempt to Ensure No Violations of Water Quality Standards and Other Requirements Developing and implementing programs required in Section F of the Permit, to meet various standards, including that of <u>preventing discharges from the MS4</u> (or from certain projects) from "causing or contributing to a violation of water quality standards" or "preventing" illicit discharges or non-stormwater discharges	Similar	Page 12 and 23 of Part I Page 2 of Part VII	Intent of the Permit is to control discharges from the MS4 to the MEP. However, the discharges can not cause or contribute to exceedances of water quality standards.

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI.A	Removal of Categories of Irrigation Runoff from Non-Prohibited Non-Stormwater Discharges Section B.2	No	Pages 4-5 of 66	"Landscape irrigation", "irrigation water", and "lawn watering" among the exempted non-stormwater discharges identified within the permit.
VI. B	Requirement to Respond to Non-Stormwater Action Levels or "NALs" - Section C and portions of F.4 - New requirements related to "Non-Stormwater Dry Weather Action Levels" which included programmatic investigation, monitoring, and reporting requirements as well as action items stemming from a NAL exceedance.	No	-	No requirements to respond to Non-Stormwater Action Levels.
VI. C	Requirement to Respond to Stormwater Action Levels or "SALs" - Section D - Monitoring major MS4 outfalls into receiving waters for the presence of pollutants that exceeded SALs (if such pollutants were detected, to address the exceedances).	No	-	No requirements to respond to Stormwater Action Levels.
VI. D	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.d - New program to ensure that new development and significant redevelopment comply with strict low impact development ("LID")	Similar provisions, not as prescriptive	Pages 7-8, 16, 30-31, and 44-45 of 66.	Requirements for LID and Green Infrastructure Strategy and Pilot Projects
	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.h - New program to ensure that new development and significant redevelopment comply with strict hydromodification prevention requirements (including development and implementation of a Hydromodification Management Plan ("HMP")).	No	-	Encouragement of hydromodification concepts, but not required

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. E	<p>BMP Maintenance Tracking Requirements</p> <ul style="list-style-type: none"> - Provisions in Section F.1.f - Developing and maintaining a watershed-based database to track all projects that have a final approved SSMP and structural BMPs. 	Similar provisions, but not as stringent	Page 18 of 66	Requirements for developing a database (not watershed-based) to track new and existing permanent storm water controls
VI. F	<p>Construction Site Requirements</p> <ul style="list-style-type: none"> - Provisions of Section F.2 - Claimants to require Active/Passive Sediment Treatment ("AST") at construction sites determined to be "an exceptional threat to water quality". 	No	-	No requirement for Active/Passive Sediment Treatment at construction sites.
	<p>Construction Site Requirements</p> <ul style="list-style-type: none"> - Provisions of Section F.2 - Claimants to review site monitoring data results during inspections of construction sites if the site monitored its runoff. 	No	-	No requirement for reviewing construction site runoff monitoring data.
VI. G	<p>Unpaved Roads BMP Requirements</p> <ul style="list-style-type: none"> - Sections F.1.i. and F.3.a.10 - Developing and implementing BMPs to address erosion and sediment and other impacts from the development and maintenance of unpaved roads. 	No	-	No specific requirements to develop and implement BMPs for the development and maintenance of unpaved roads.
VI. H	<p>Industrial/Commercial Inspection Requirement</p> <ul style="list-style-type: none"> - Section F.3.b.4(a)(ii) - Review facility monitoring data as part of an inspection program of commercial/industrial facilities if the facility monitored its runoff. 	Similar provisions, not as prescriptive	Pages 20-21 of 66	Requirement to develop/implement a program to monitor industrial/commercial facilities.

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. I	<p>Requirement to Develop Program to Retrofit Existing Development</p> <ul style="list-style-type: none"> - Section F.3.d - Developing and implementing a new program to retrofit existing development. - Identifying areas of existing developments, including municipal developments, as candidates for retrofitting, evaluate and rank candidates according to pre-established criteria, prioritize work plans for implementation according to the evaluation, cooperate with landowners to encourage retrofit of private improvements, and track and inspect retrofitting projects. 	Similar provisions for MS4-owned property, but not as stringent	Page 25 of 66	Retrofitting for storm water control devices, not existing development as a category.
VI. J	<p>Watershed Water Quality Workplan Requirements</p> <ul style="list-style-type: none"> - Section G - Developing and implementing 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." 	Similar provisions, not as stringent	Pages 7-8 of 66	Requirements to develop and implement two subwatershed plans.
VI. K	<p>Requirements Relating to JRMP Annual Report</p> <ul style="list-style-type: none"> - Section K.3 and a checklist in Attachment D - Requirements relating to the preparation of an extensive Jurisdictional Runoff Management Program (JRMP) Annual Report covering implementation of jurisdictional activities, as well as extensive other requirements. 	Similar provisions, not as prescriptive	Pages 45-47 of 66	Includes basic annual reporting requirements, however it does not include details regarding the specific values that need to be reported for the major stormwater program elements.

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. L	Special Studies Requirements - Attachment E - Mandated "special studies" regarding waters within the Santa Margarita Region.	No	-	Requirement to conduct an effectiveness assessment of structural controls as well as green infrastructure/LID projects. However, no requirements for special studies related to sediment toxicity; trash and litter; agricultural, federal, or tribal inputs; or MS4 and receiving water maintenance.
VI. M	Requirements that 2010 Permit Programs Attempt to Ensure No Violations of Water Quality Standards and Other Requirements Developing and implementing programs required in Section F of the Permit, to meet various standards, including that of <u>preventing discharges from the MS4</u> (or from certain projects) from "causing or contributing to a violation of water quality standards" or "preventing" illicit discharges or non-stormwater discharges	Similar	Pages 5-6 and 61 of 66	Intent of the Permit is to control discharges from the MS4 to the MEP. However, discharges can not cause or contribute to excursions above the water quality standards.

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI.A	Removal of Categories of Irrigation Runoff from Non-Prohibited Non-Stormwater Discharges Section B.2	No	Page 4	"Landscape irrigation", "irrigation water", and "lawn watering" among the exempted non-stormwater discharges identified within the permit.
VI. B	Requirement to Respond to Non-Stormwater Action Levels or "NALs" - Section C and portions of F.4 - New requirements related to "Non-Stormwater Dry Weather Action Levels" which included programmatic investigation, monitoring, and reporting requirements as well as action items stemming from a NAL exceedance.	No	-	No requirements to respond to Non-Stormwater Action Levels.
VI. C	Requirement to Respond to Stormwater Action Levels or "SALs" - Section D - Monitoring major MS4 outfalls into receiving waters for the presence of pollutants that exceeded SALs (if such pollutants were detected, to address the exceedances).	No	-	No requirements to respond to Stormwater Action Levels.
VI. D	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.d - New program to ensure that new development and significant redevelopment comply with strict low impact development ("LID")	Similar provisions, but not as prescriptive	Pages 11-14 and 15	- LID/Green infrastructure-based requirements - Green landscaping incentives program - Green roofs for District owned properties
	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.h - New program to ensure that new development and significant redevelopment comply with strict hydromodification prevention requirements (including development and implementation of a Hydromodification Management Plan ("HMP")).	No	-	No specific hydromodification requirements

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. E	BMP Maintenance Tracking Requirements - Provisions in Section F.1.f - Developing and maintaining a watershed-based database to track all projects that have a final approved SSMP and structural BMPs.	Similar provisions, but not as stringent	Page 14	Similar requirement to develop an inventory and ensure that O&M occurs for stormwater capture practices, however the requirements are not as prescriptive and are not watershed-based.
VI. F	Construction Site Requirements - Provisions of Section F.2 - Claimants to require Active/Passive Sediment Treatment ("AST") at construction sites determined to be "an exceptional threat to water quality".	No	-	No requirement for Active/Passive Sediment Treatment at construction sites.
	Construction Site Requirements - Provisions of Section F.2 - Claimants to review site monitoring data results during inspections of construction sites if the site monitored its runoff.	No	-	No requirement for reviewing construction site runoff monitoring data.
VI. G	Unpaved Roads BMP Requirements - Sections F.1.i. and F.3.a.10 - Developing and implementing BMPs to address erosion and sediment and other impacts from the development and maintenance of unpaved roads.	No	-	No specific requirements to develop and implement BMPs for the development and maintenance of unpaved roads.
VI. H	Industrial/Commercial Inspection Requirement - Section F.3.b.4(a)(ii) - Review facility monitoring data as part of an inspection program of commercial/industrial facilities if the facility monitored its runoff.	Similar provisions, not as prescriptive	Pages 22-23	Requirement to develop/implement a program to monitor industrial/commercial facilities and to review monitoring data.

City - State District of Columbia	Permit Type MS4-Phase I	Permit Number DC0000221, Modification #1	Year Issued 2011 (modified in 2012)	Internet Link DC MS4
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Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. I	<p>Requirement to Develop Program to Retrofit Existing Development</p> <ul style="list-style-type: none"> - Section F.3.d - Developing and implementing a new program to retrofit existing development. - Identifying areas of existing developments, including municipal developments, as candidates for retrofitting, evaluate and rank candidates according to pre-established criteria, prioritize work plans for implementation according to the evaluation, cooperate with landowners to encourage retrofit of private improvements, and track and inspect retrofitting projects. 	Similar provisions	Pages 12 and 26	<p>Retrofit program required for Existing Discharges. Retrofitting shall be considered for flood control devices owned/operated by the Permittee.</p>
VI. J	<p>Watershed Water Quality Workplan Requirements</p> <ul style="list-style-type: none"> - Section G - Developing and implementing 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." 	No	-	<p>Some watershed focus within the Permit, but no specific requirement to develop and implement a Watershed Workplan. Requirements focused on plans and strategies for TMDL-related issues. Permit issued to single discharger.</p>
VI. K	<p>Requirements Relating to JRMP Annual Report</p> <ul style="list-style-type: none"> - Section K.3 and a checklist in Attachment D - Requirements relating to the preparation of an extensive Jurisdictional Runoff Management Program (JRMP) Annual Report covering implementation of jurisdictional activities, as well as extensive other requirements. 	Similar provisions, not as prescriptive	Pages 38 and 39	<p>Includes basic annual reporting requirements, however it does not include details regarding the specific values that need to be reported for the major stormwater program elements.</p>

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. L	Special Studies Requirements - Attachment E - Mandated "special studies" regarding waters within the Santa Margarita Region.	No	-	No special studies requirements
VI. M	Requirements that 2010 Permit Programs Attempt to Ensure No Violations of Water Quality Standards and Other Requirements Developing and implementing programs required in Section F of the Permit, to meet various standards, including that of <u>preventing discharges from the MS4</u> (or from certain projects) from "causing or contributing to a violation of water quality standards" or "preventing" illicit discharges or non-stormwater discharges	No	-	Intent of the Permit is to control discharges from the MS4 to the MEP.

City - State Boston, MA	Permit Type MS4-Phase I	Permit Number MAS010001	Year Issued 1999* [Still valid]	Internet Link Boston MS4
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* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI.A	Removal of Categories of Irrigation Runoff from Non-Prohibited Non-Stormwater Discharges Section B.2	No	Pages 6-7 of 20	"Landscape irrigation", "irrigation water", and "lawn watering" among the exempted non-stormwater discharges identified within the permit.
VI. B	Requirement to Respond to Non-Stormwater Action Levels or "NALs" - Section C and portions of F.4 - New requirements related to "Non-Stormwater Dry Weather Action Levels" which included programmatic investigation, monitoring, and reporting requirements as well as action items stemming from a NAL exceedance.	No	-	No requirements to respond to Non-Stormwater Action Levels.
VI. C	Requirement to Respond to Stormwater Action Levels or "SALs" - Section D - Monitoring major MS4 outfalls into receiving waters for the presence of pollutants that exceeded SALs (if such pollutants were detected, to address the exceedances).	No	-	No requirements to respond to Stormwater Action Levels.
VI. D	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.d - New program to ensure that new development and significant redevelopment comply with strict low impact development ("LID")	No	-	No requirements to comply with LID requirements.
VI. D	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.h - New program to ensure that new development and significant redevelopment comply with strict hydromodification prevention requirements (including development and implementation of a Hydromodification Management Plan ("HMP")).	No	-	No requirements to comply with hydromodification prevention requirements.

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

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. E	BMP Maintenance Tracking Requirements - Provisions in Section F.1.f - Developing and maintaining a watershed-based database to track all projects that have a final approved SSMP and structural BMPs.	No	-	No requirement to develop and maintain a watershed-based database to track projects constructed as well as the related structural post-construction BMPs.
VI. F	Construction Site Requirements - Provisions of Section F.2 - Claimants to require Active/Passive Sediment Treatment ("AST") at construction sites determined to be "an exceptional threat to water quality".	No	-	No requirement for Active/Passive Sediment Treatment at construction sites.
	Construction Site Requirements - Provisions of Section F.2 - Claimants to review site monitoring data results during inspections of construction sites if the site monitored its runoff.	No	-	No requirement for reviewing construction site runoff monitoring data.
VI. G	Unpaved Roads BMP Requirements - Sections F.1.i. and F.3.a.10 - Developing and implementing BMPs to address erosion and sediment and other impacts from the development and maintenance of unpaved roads.	No	-	No specific requirements to develop and implement BMPs for the development and maintenance of unpaved roads.
VI. H	Industrial/Commercial Inspection Requirement - Section F.3.b.4(a)(ii) - Review facility monitoring data as part of an inspection program of commercial/industrial facilities if the facility monitored its runoff.	No	Page 8 of 20	Requirement to develop/implement a program to monitor industrial/commercial facilities. However, this requirement is limited to municipal landfills; hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee determines is contributing a substantial pollutant loading to the MS.

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

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. I	<p>Requirement to Develop Program to Retrofit Existing Development</p> <ul style="list-style-type: none"> - Section F.3.d - Developing and implementing a new program to retrofit existing development. - Identifying areas of existing developments, including municipal developments, as candidates for retrofitting, evaluate and rank candidates according to pre-established criteria, prioritize work plans for implementation according to the evaluation, cooperate with landowners to encourage retrofit of private improvements, and track and inspect retrofitting projects. 	No	-	<p>No requirement to develop a retrofitting program for areas of existing development.</p> <p>However, retrofitting shall be considered for flood control devices owned/operated by the Permittee.</p>
VI. J	<p>Watershed Water Quality Workplan Requirements</p> <ul style="list-style-type: none"> - Section G - Developing and implementing 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." 	No	-	<p>No requirement to develop and implement a Watershed Workplan.</p>
VI. K	<p>Requirements Relating to JRMP Annual Report</p> <ul style="list-style-type: none"> - Section K.3 and a checklist in Attachment D - Requirements relating to the preparation of an extensive Jurisdictional Runoff Management Program (JRMP) Annual Report covering implementation of jurisdictional activities, as well as extensive other requirements. 	Similar provisions, not as stringent	Pages 11 and 18 of 20	<p>Includes basic annual reporting requirements, however it does not include details regarding the specific values that need to be reported for the major stormwater program elements.</p>

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

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

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. L	Special Studies Requirements - Attachment E - Mandated "special studies" regarding waters within the Santa Margarita Region.	No	-	Requirement for an effectiveness assessment study. However, no requirements for special studies related to sediment toxicity; trash and litter; agricultural, federal, or tribal inputs; or MS4 and receiving water maintenance.
VI. M	Requirements that 2010 Permit Programs Attempt to Ensure No Violations of Water Quality Standards and Other Requirements Developing and implementing programs required in Section F of the Permit, to meet various standards, including that of <u>preventing discharges from the MS4</u> (or from certain projects) from "causing or contributing to a violation of water quality standards" or "preventing" illicit discharges or non-stormwater discharges	Similar	Pages 3 and 5 of 20 Fact Sheet - Pages 2-3, 9-10	Intent of the Permit is to control discharges from the MS4 to the MEP. However, the discharges can not cause a violation of State water quality standards.

City - State Worcester, MA	Permit Type MS4-Phase I	Permit Number MAS010002	Year Issued 1998* [Still valid]	Internet Link Worcester MS4
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* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI.A	Removal of Categories of Irrigation Runoff from Non-Prohibited Non-Stormwater Discharges Section B.2	No	Page 8 of 21	"Landscape irrigation", "irrigation water", and "lawn watering" among the exempted non-stormwater discharges identified within the permit.
VI. B	Requirement to Respond to Non-Stormwater Action Levels or "NALs" - Section C and portions of F.4 - New requirements related to "Non-Stormwater Dry Weather Action Levels" which included programmatic investigation, monitoring, and reporting requirements as well as action items stemming from a NAL exceedance.	No	-	No requirements to respond to Non-Stormwater Action Levels.
VI. C	Requirement to Respond to Stormwater Action Levels or "SALs" - Section D - Monitoring major MS4 outfalls into receiving waters for the presence of pollutants that exceeded SALs (if such pollutants were detected, to address the exceedances).	No	-	No requirements to respond to Stormwater Action Levels.
VI. D	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.d - New program to ensure that new development and significant redevelopment comply with strict low impact development ("LID")	No	-	No requirements to comply with LID requirements.
	Priority Development Project and Hydromodification Requirements - Portions of Section F.1.h - New program to ensure that new development and significant redevelopment comply with strict hydromodification prevention requirements (including development and implementation of a Hydromodification Management Plan ("HMP")).	No	-	No requirements to comply with hydromodification prevention requirements.

City - State Worcester, MA	Permit Type MS4-Phase I	Permit Number MAS010002	Year Issued 1998* [Still valid]	Internet Link Worcester MS4
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* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. E	<p>BMP Maintenance Tracking Requirements</p> <ul style="list-style-type: none"> - Provisions in Section F.1.f - Developing and maintaining a watershed-based database to track all projects that have a final approved SSMP and structural BMPs. 	No	-	No requirement to develop and maintain a watershed-based database to track projects constructed as well as the related structural post-construction BMPs.
VI. F	<p>Construction Site Requirements</p> <ul style="list-style-type: none"> - Provisions of Section F.2 - Claimants to require Active/Passive Sediment Treatment ("AST") at construction sites determined to be "an exceptional threat to water quality". 	No	-	No requirement for Active/Passive Sediment Treatment at construction sites.
	<p>Construction Site Requirements</p> <ul style="list-style-type: none"> - Provisions of Section F.2 - Claimants to review site monitoring data results during inspections of construction sites if the site monitored its runoff. 	No	-	No requirement for reviewing construction site runoff monitoring data.
VI. G	<p>Unpaved Roads BMP Requirements</p> <ul style="list-style-type: none"> - Sections F.1.i. and F.3.a.10 - Developing and implementing BMPs to address erosion and sediment and other impacts from the development and maintenance of unpaved roads. 	No	-	No specific requirements to develop and implement BMPs for the development and maintenance of unpaved roads.
VI. H	<p>Industrial/Commercial Inspection Requirement</p> <ul style="list-style-type: none"> - Section F.3.b.4(a)(ii) - Review facility monitoring data as part of an inspection program of commercial/industrial facilities if the facility monitored its runoff. 	No	Pages 9-10 of 21	Requirement to develop/implement a program to monitor industrial/commercial facilities. However, this requirement is limited to municipal landfills; hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, section 313; and any other industrial or commercial discharge the permittee determines is contributing a substantial pollutant loading to the MS4.

City - State Worcester, MA	Permit Type MS4-Phase I	Permit Number MAS010002	Year Issued 1998* [Still valid]	Internet Link Worcester MS4
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* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. I	<p>Requirement to Develop Program to Retrofit Existing Development</p> <ul style="list-style-type: none"> - Section F.3.d - Developing and implementing a new program to retrofit existing development. - Identifying areas of existing developments, including municipal developments, as candidates for retrofitting, evaluate and rank candidates according to pre-established criteria, prioritize work plans for implementation according to the evaluation, cooperate with landowners to encourage retrofit of private improvements, and track and inspect retrofitting projects. 	No	-	<p>No requirement to develop a retrofitting program for areas of existing development.</p> <p>However, retrofitting shall be considered for flood control devices owned/operated by the Permittee.</p>
VI. J	<p>Watershed Water Quality Workplan Requirements</p> <ul style="list-style-type: none"> - Section G - Developing and implementing 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." 	No	-	<p>No requirement to develop and implement a Watershed Workplan.</p>
VI. K	<p>Requirements Relating to JRMP Annual Report</p> <ul style="list-style-type: none"> - Section K.3 and a checklist in Attachment D - Requirements relating to the preparation of an extensive Jurisdictional Runoff Management Program (JRMP) Annual Report covering implementation of jurisdictional activities, as well as extensive other requirements. 	Similar provisions, not as stringent	Pages 13 and 19 of 21	<p>Includes basic annual reporting requirements, however it does not include details regarding the specific values that need to be reported for the major stormwater program elements.</p>

City - State Worcester, MA	Permit Type MS4-Phase I	Permit Number MAS010002	Year Issued 1998* [Still valid]	Internet Link Worcester MS4
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* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement	Riverside Permit Mandated Activity	Does this Permit have the Same Requirement as the Requirement in the Permit Issued to the Riverside Claimants?	Page Number	Description
VI. L	Special Studies Requirements - Attachment E - Mandated "special studies" regarding waters within the Santa Margarita Region.	No	-	No special studies requirements
VI. M	Requirements that 2010 Permit Programs Attempt to Ensure No Violations of Water Quality Standards and Other Requirements Developing and implementing programs required in Section F of the Permit, to meet various standards, including that of <u>preventing discharges from the MS4</u> (or from certain projects) from "causing or contributing to a violation of water quality standards" or "preventing" illicit discharges or non-stormwater discharges	Similar	Pages 3 and 5-6 of 21	Intent of the Permit is to control discharges from the MS4 to the MEP. However, discharges can not cause a violation of State water quality standards.

Exhibit 2

Albuquerque, NM – Middle Rio Grande Watershed Based MS4
Permit (NPDES General Permit No. NMR04A000)

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Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

NPDES General Permit No. NMR04A000

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

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

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


This is a renewal NPDES permit issued for these portions of the small municipal separate storm sewer systems covered under the NPDES permit No NMR040000 and NMR040001 and the large municipal separate storm sewer systems covered under the NPDES permit No NMS000101.

This permit is issued on and shall become effective on the date of publication in the Federal Register. DEC 22 2014


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

Signed by

Prepared by



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



Nelly Smith
Environmental Engineer
NPDES Permits and TMDLs Branch

MIDDLE RIO GRANDE WATERSHED BASED MUNICIPAL SEPARATE STORM SEWER
SYSTEM PERMIT

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PART I. INDIVIDUAL PERMIT CONDITIONS

A. DISCHARGES AUTHORIZED UNDER THIS PERMIT

1. **Permit Area.** This permit is available for MS4 operators within the Middle Rio Grande Sub-Watersheds described in Appendix A. This permit may authorize stormwater discharges to waters of the United States from MS4s within the Middle Rio Grande Watershed provided the MS4:
 - a. Is located fully or partially within the corporate boundary of the City of Albuquerque;
 - b. Is located fully or partially within the Albuquerque urbanized area as determined by the 2000 and 2010 Decennial Census. Maps of Census 2010 urbanized areas are available at: <http://water.epa.gov/polwaste/npdes/stormwater/Urbanized-Area-Maps-for-NPDES-MS4-Phase-II-Stormwater-Permits.cfm>;
 - c. Is designated as a regulated MS4 pursuant to 40 CFR 122.32; or
 - d. This permit may also authorize an operator of a MS4 covered by this permit for discharges from areas of a regulated small MS4 located outside an Urbanized Areas or areas designated by the Director provided the permittee complies with all permit conditions in all areas covered under the permit.
2. **Potentially Eligible MS4s.** MS4s located within the following jurisdictions and other areas, including any designated by the Director, are potentially eligible for authorization under this permit:
 - City of Albuquerque
 - AMAFCA (Albuquerque Metropolitan Arroyo Flood Control Authority)
 - UNM (University of New Mexico)
 - NMDOT (New Mexico Department of Transportation District 3)
 - Bernalillo County
 - Sandoval County
 - Village of Corrales
 - City of Rio Rancho
 - Los Ranchos de Albuquerque
 - KAFB (Kirtland Air Force Base)
 - Town of Bernalillo
 - EXPO (State Fairgrounds/Expo NM)
 - SSCAFCA (Southern Sandoval County Arroyo Flood Control Authority)
 - ESCAFCA (Eastern Sandoval County Arroyo Flood Control Authority)
 - Sandia Laboratories, Department of Energy (DOE)
 - Pueblo of Sandia
 - Pueblo of Isleta
 - Pueblo of Santa Ana
3. **Eligibility.** To be eligible for this permit, the operator of the MS4 must provide:
 - a. **Public Participation:** Prior submitting the Notice of Intent (NOI), the operator of the MS4 must follow the local notice and comment to procedures at Part I.D.5.h.(i).
 - b. **National Historic Preservation Act (NHPA) Eligibility Provisions**

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

- (i) Criterion A: storm water discharges, allowable non-storm water discharges, and discharge-related activities do not affect a property that is listed or is eligible for listing on the National Register of Historic Places as maintained by the Secretary of the Interior; or
- (ii) Criterion B: the applicant has obtained and is in compliance with a written agreement with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) (or equivalent tribal authority) that outlines all measures the MS4 operator will undertake to mitigate or prevent adverse effect to the historic property.

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

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

4. **Authorized Non-Stormwater Discharges.** The following non-stormwater discharges need not be prohibited unless determined by the permittees, U.S. Environmental Protection Agency (EPA), or New Mexico Environment Department (NMED) to be significant contributors of pollutants to the municipal separate storm sewer system (MS4). Any such discharge that is identified as significant contributor pollutants to the MS4, or as causing or contributing to a water quality standards violation, must be addressed as an illicit discharge under the illicit discharge and improper disposal practices established pursuant to Part I.D.5.e of this permit. For all of the discharges listed below, not treated as illicit discharges, the permittee must document the reason these discharges are not expected to be significant contributors of pollutants to the MS4. This documentation may be based on either the nature of the discharge or any pollution prevention/treatment requirements placed on such discharges by the permittee.
 - potable water sources, including routine water line flushing;
 - lawn, landscape, and other irrigation waters provided all pesticides, herbicides and fertilizers have been applied in accordance with approved manufacturing labeling and any applicable permits for discharges associated with pesticide, herbicide and fertilizer application;
 - diverted stream flows;
 - rising ground waters;
 - uncontaminated groundwater infiltration (as defined at 40 CFR §35.2005 (20));
 - uncontaminated pumped groundwater;
 - foundation and footing drains;
 - air conditioning or compressor condensate;
 - springs;
 - water from crawl space pumps;
 - individual residential car washing;
 - flows from riparian habitats and wetlands;
 - dechlorinated swimming pool discharges;
 - street wash waters that do not contain detergents and where no un-remediated spills or leaks of toxic or hazardous materials have occurred;
 - discharges or flows from fire fighting activities (does not include discharges from fire fighting training activities); and,
 - other similar occasional incidental non-stormwater discharges (e.g. non-commercial or charity car washes, etc.)
5. **Limitations of Coverage.** This permit does not authorize:
 - a. **Non-Storm Water:** Discharges that are mixed with sources of non-storm water unless such non-storm water discharges are:
 - (i) In compliance with a separate NPDES permit; or
 - (ii) Exempt from permitting under the NPDES program; or

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

- b. Industrial Storm Water: Storm water discharges associated with industrial activity as defined in 40 CFR §122.26(b)(14)(i)-(ix) and (xi).
- c. Construction Storm Water: Storm water discharges associated with construction activity as defined in 40 CFR §122.26(b)(14)(x) or 40 CFR §122.26(b)(15).
- d. Currently Permitted Discharges: Storm water discharges currently covered under another NPDES permit.
- e. Discharges Compromising Water Quality: Discharges that EPA, prior to authorization under this permit, determines will cause, have the reasonable potential to cause, or contribute to an excursion above any applicable water quality standard. Where such a determination is made prior to authorization, EPA may notify you that an individual permit application is necessary in accordance with Part IV.M. However, EPA may authorize your coverage under this permit after you have included appropriate controls and implementation procedures in your SWMP designed to bring your discharge into compliance with water quality standards.
- f. Discharges Inconsistent with a TMDL: You are not eligible for coverage under this permit for discharges of pollutants of concern to waters for which there is an applicable total maximum daily load (TMDL) established or approved by EPA unless you incorporate into your SWMP measures or controls that are consistent with the assumptions and requirements of such TMDL. To be eligible for coverage under this general permit, you must incorporate documentation into your SWMP supporting a determination of permit eligibility with regard to waters that have an EPA-established or approved TMDL. If a wasteload allocation has been established that would apply to your discharge, you must comply with the requirements established in Part I.C.2.b.(i). Where an EPA-approved or established TMDL has not specified a wasteload allocation applicable to municipal storm water discharges, but has not specifically excluded these discharges, adherence to a SWMP that meets the requirements in Part I.C.2.b.(ii) of this general permit will be presumed to be consistent with the requirements of the TMDL. If the EPA-approved or established TMDL specifically precludes such discharges, the operator is not eligible for coverage under this general permit.

6. Authorization Under This General Permit

- a. Obtaining Permit Coverage.
 - (i) An MS4 operator seeking authorization to discharge under this general permit must submit electronically a complete notice of intent (NOI) to the e-mail address provided in Part I.B.3 (see suggested EPA R6 MS4 NOI format located in EPA website at <http://epa.gov/region6/water/npdes/sw/ms4/index.htm>), in accordance with the deadlines in Part I.B.1 of this permit. The NOI must include the information and attachments required by Parts I.B.2, Part I.A.3, Part I.D.5.h.(i), and I.A.5.f of this permit. By submitting a signed NOI, the applicant certifies that all eligibility criteria for permit coverage have been met. If EPA notifies a discharger (either directly, by public notice, or by making information available on the Internet) of other NOI options that become available at a later date, such as electronic submission of forms or information, the MS4 operator may take advantage of those options to satisfy the NOI submittal requirements.
 - (ii) If an operator changes or a new operator is added after an NOI has been submitted, the operator must submit a new or revised NOI to EPA.
 - (iii) An MS4 operator who submits a complete NOI and meets the eligibility requirements in Part I of this permit is authorized to discharge storm water from the MS4 under the terms and conditions of this general permit only upon written notification by the Director. After review of the NOI and any public comments on the NOI, EPA may condition permit coverage on correcting any deficiencies or on including a schedule to respond to any public comments. (See also Parts I.A.3 and Part I.D.5.h.(i).)

- (iv) If EPA notifies the MS4 operator of deficiencies or inadequacies in any portion of the NOI (including the SWMP), the MS4 operator must correct the deficient or inadequate portions and submit a written statement to EPA certifying that appropriate changes have been made. The certification must be submitted within the time-frame specified by EPA and must specify how the NOI has been amended to address the identified concerns.
 - (v) The NOI must be signed and certified in accordance with Parts IV.H.1 and 4. Signature for the NOI, which effectively takes the place of an individual permit application, may not be delegated to a lower level under Part IV.H.2
- b. Terminating Coverage.
- (i) A permittee may terminate coverage under this general permit by submitting a notice of termination (NOT). Authorization to discharge terminates at midnight on the day the NOT is post-marked for delivery to EPA.
 - (ii) A permittee must submit an NOT to EPA within 30 days after the permittee:
 - (a) Ceases discharging storm water from the MS4,
 - (b) Ceases operations at the MS4, or
 - (c) Transfers ownership of or responsibility for the facility to another operator.
 - (iii) The NOT will consist of a letter to EPA and must include the following information:
 - (a) Name, mailing address, and location of the MS4 for which the notification is submitted;
 - (b) The name, address and telephone number of the operator addressed by the NOT;
 - (c) The NPDES permit number for the MS4;
 - (d) An indication of whether another operator has assumed responsibility for the MS4, the discharger has ceased operations at the MS4, or the storm water discharges have been eliminated; and
 - (e) The following certification:

I certify under penalty of law that all storm water discharges from the identified MS4 that are authorized by an NPDES general permit have been eliminated, or that I am no longer the operator of the MS4, or that I have ceased operations at the MS4. I understand that by submitting this Notice of Termination I am no longer authorized to discharge storm water under this general permit, and that discharging pollutants in storm water to waters of the United States is unlawful under the Clean Water Act where the discharge is not authorized by an NPDES permit. I also understand that the submission of this Notice of Termination does not release an operator from liability for any violations of this permit or the Clean Water Act.
 - (f) NOTs, signed in accordance with Part IV.H.1 of this permit, must be sent to the e-mail address in Part I.B.3. Electronic submittal of the NOT required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

B. NOTICE OF INTENT REQUIREMENTS

1. Deadlines for Notification.

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

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

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

Table 1 Deadlines to Submit NOI

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

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

- b. New Operators. For new operators of all or a part of an already permitted MS4 (due to change on operator or expansion of the MS4) who will take over implementation of the existing SWMP covering those areas, the NOI must be submitted 30 days prior to taking over operational control of the MS4. Existing permittees who are expanding coverage of their MS4 area (e.g., city annexes part of unincorporated county MS4) are not required to submit a new NOI, but must comply with Part I.D.6.d.
- c. Submitting a Late NOI. MS4s not able to meet the NOI deadline in Table I and Part I.B.1.b due to delays in determining eligibility should notify EPA of the circumstance and progress to date at the address in Part I.B.3 and then proceed with a late NOI. MS4 operators are not prohibited from submitting an NOI after the dates provided in Table 1 and Part I.B.1.b. If a late NOI is submitted, the authorization is only for discharges that occur after permit coverage is effective. The permitting authority reserves the right to take appropriate enforcement actions for any unpermitted discharges.
- d. End of Administrative Continued Coverage under Previous Permit. Administrative continuance is triggered by a timely reapplication. Discharges submitting an NOI for coverage under this permit are considered to have met

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

2. **Contents of Notice of Intent.** An MS4 operator eligible for coverage under this general permit must submit an NOI to discharge under this general permit. The NOI will consist of a letter to EPA containing the following information (see suggested EPA R6 MS4 NOI Format located in EPA website at <http://www.epa.gov/region6/water/npdes/sw/ms4/index.htm>) and must be signed in accordance with Part IV.H of this permit:
 - a. The legal name of the MS4 operator and the name of the urbanized area and core municipality (or Indian reservation/pueblo) in which the operator's MS4 is located;
 - b. The full facility mailing address and telephone number;
 - c. The name and phone number of the person or persons responsible for overall coordination of the SWMP;
 - d. An attached location map showing the boundaries of the MS4 under the applicant's jurisdiction. The map must include streets or other demarcations so that the exact boundaries can be located;
 - e. The area of land served by the applicant's MS4 (in square miles);
 - f. The latitude and longitude of the approximate center of the MS4;
 - g. The name(s) of the waters of the United States that receive discharges from the system.
 - h. If the applicant is participating in a cooperative program element or is relying on another entity to satisfy one or more permit obligations (see Part I.D.3), identify the entity(ies) and the element(s) the entity(ies) will be implementing;
 - i. Information on each of the storm water minimum control measures in Part I.D.5 of this permit and how the SWMP will reduce pollutants in discharges to the Maximum Extent Practicable. For each minimum control measure, include the following:
 - (i) Description of the best management practices (BMPs) that will be implemented;
 - (ii) Measurable goals for each BMP; and
 - (iii) Time frames (i.e., month and year) for implementing each BMP;
 - j. Based on the requirements of Part I.A.3.b describe how the eligibility criteria for historic properties have been met;
 - k. Indicate whether or not the MS4 discharges to a receiving water for which EPA has approved or developed a TMDL. If so, describe how the eligibility requirements of Part I.A.5.f and Part I.C.2 have been met.

Note: If an individual permittee or a group of permittees seeks an alternative sub-measurable goal for TMDL controls under Part I.C.2.b.(i).(c).B, the permittee or a group of permittees must submit a preliminary proposal with the NOI. This proposal shall include, but is not limited to, the elements included in Appendix B under Section B.2.
 - l. Signature and certification by an appropriate official (see Part IV.H). The NOI must include the certification statement from Part IV.H.4.

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

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

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

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

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

C. SPECIAL CONDITIONS

1. **Compliance with Water Quality Standards.** Pursuant to Clean Water Act §402(p)(3)(B)(iii) and 40 CFR §122.44(d)(1), this permit includes provisions to ensure that discharges from the permittee's MS4 do not cause or contribute to exceedances of applicable surface water quality standards, in addition to requirements to control discharges to the maximum extent practicable (MEP) set forth in Part I.D. Permittees shall address stormwater management through development of the SWMP that shall include the following elements and specific requirements included in Part VI.
 - a. Permittee's discharges shall not cause or contribute to an exceedance of surface water quality standards (including numeric and narrative water quality criteria) applicable to the receiving waters. In determining whether the SWMP is effective in meeting this requirement or if enhancements to the plan are needed, the permittee shall consider available monitoring data, visual assessment, and site inspection reports.
 - b. Applicable surface water quality standards for discharges from the permittees' MS4 are those that are approved by EPA and any other subsequent modifications approved by EPA upon the effective date of this permit found at New Mexico Administrative Code §20.6.4. Discharges from various portions of the MS4 also flow downstream into waters with Pueblo of Isleta and Pueblo of Sandia Water Quality Standards;
 - c. The permittee shall notify EPA and the Pueblo of Isleta in writing as soon as practical but not later than thirty (30) calendar days following each Pueblo of Isleta water quality standard exceedance at an in-stream sampling location. In the event that EPA determines that a discharge from the MS4 causes or contributes to an exceedance of applicable surface water quality standards and notifies the permittee of such an exceedance, the permittee shall, within sixty (60) days of notification, submit to EPA, NMED, Pueblo of Isleta (upon request) and Pueblo of Sandia (upon request), a report that describes controls that are currently being implemented and additional controls that will be implemented to prevent pollutants sufficient to ensure that the discharge will no longer cause or contribute to an exceedance of applicable surface water quality standards. The permittee shall implement such additional controls upon notification by EPA and shall incorporate such measures into their SWMP as described in Part I.D of this permit. NMED or the affected Tribe may provide information

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

- d. Phase I Dissolved Oxygen Program (Applicable only to the COA and AMAFCA as a continuation of program in 2012 NMS000101 individual permit): Within one year from effective date of the permit, the permittees shall revise the May 1, 2012 Strategy to continue taking measures to address concerns regarding discharges to the Rio Grande by implementing controls to eliminate conditions that cause or contribute to exceedances of applicable dissolved oxygen water quality standards in waters of the United States. The permittees shall:
- (i) Continue identifying structural elements, natural or man-made topographical and geographical formations, MS4 operations activities, or oxygen demanding pollutants contributing to reduced dissolved oxygen in the receiving waters of the Rio Grande. Both dry and wet weather discharges shall be addressed. Assessment may be made using available data or collecting additional data;
 - (ii) Continue implementing controls, and updating/revising as necessary, to eliminate structural elements or the discharge of pollutants at levels that cause or contribute to exceedances of applicable water quality standards for dissolved oxygen in waters of the United States;
 - (iii) To verify the remedial action in the North Diversion Channel Embayment, the COA and AMAFCA shall continue sampling for DO and temperature until the data indicate the discharge does not exceed applicable dissolved oxygen water quality standards in waters of the United States; and
 - (iv) Submit a revised strategy to FWS for consultation and EPA for approval from a year of effective date of the permit and progress reports with the subsequent Annual Reports. Progress reports to include:
 - (a) Summary of data.
 - (b) Activities undertaken to identify MS4 discharge contribution to exceedances of applicable dissolved oxygen water quality standards in waters of the United States. Including summary of findings of the assessment required in Part I.C.1.d.(i).
 - (c) Conclusions drawn, including support for any determinations.
 - (d) Activities undertaken to eliminate MS4 discharge contribution to exceedances of applicable dissolved oxygen water quality standards in waters of the United States.
 - (e) Account of stakeholder involvement.
- e. PCBs (Applicable only to the COA and AMAFCA as a continuation of program in 2012 NMS000101 individual permit and Bernalillo County): The permittee shall address concerns regarding PCBs in channel drainage areas specified in Part I.C.1.e.(vi) by developing or continue updating/revising and implementing a strategy to identify and eliminate controllable sources of PCBs that cause or contribute to exceedances of applicable water quality standards in waters of the United States. Bernalillo County shall submit the proposed PCB strategy to EPA within two (2) years from the effective date of the permit and submit a progress report with the third and with subsequent Annual Reports. COA and AMAFCA shall submit a progress report with the first and with the subsequent Annual Reports. The progress reports shall include:
- (i) Summary of data.
 - (ii) Findings regarding controllable sources of PCBs in the channel drainages area specified in Part I.C.1.e.(vi) that cause or contribute to exceedances of applicable water quality standards in waters of the United States via the discharge of municipal stormwater.
 - (iii) Conclusions drawn, including supporting information for any determinations.

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

(v) Account of stakeholder involvement in the process.

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

COA and AMAFCA Channel Drainage Areas:

- San Jose Drain
- North Diversion Channel

Bernalillo County Channel Drainage Areas:

- Adobe Acres Drain
- Alameda Outfall Channel
- Paseo del Norte Outfall Channel
- Sanchez Farm Drainage Area

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

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

- f. Temperature (Applicable only to the COA and AMAFCA as a continuation of program in 2012 NMS000101 individual permit): The permittees must continue assessing the potential effect of stormwater discharges in the Rio Grande by collecting and evaluating additional data. If the data indicates there is a potential of stormwater discharges contributing to exceedances of applicable temperature water quality standards in waters of the United States, within thirty (30) days such as findings, the permittees must develop and implement a strategy to eliminate conditions that cause or contribute to these exceedances. The strategy must include:
- (i) Identify structural controls, post construction design standards, or pollutants contributing to raised temperatures in the receiving waters of the Rio Grande. Both dry and wet weather discharges shall be addressed. Assessment may be made using available data or collecting additional data;
 - (ii) Develop and implement controls to eliminate structural controls, post construction design standards, or the discharge of pollutants at levels that cause or contribute to exceedances of applicable water quality standards for temperature in waters of the United States; and
 - (iii) Provide a progress report with the first and with subsequent Annual Reports. The progress reports shall include:
 - (a) Summary of data.
 - (b) Activities undertaken to identify MS4 discharge contribution to exceedances of applicable temperature water quality standards in waters of the United States.
 - (c) Conclusions drawn, including supporting information for any determinations.
 - (d) Activities undertaken to reduce MS4 discharge contribution to exceedances of applicable temperature water quality standards in waters of the United States.
 - (e) Accounting of stakeholder involvement.

2. **Discharges to Impaired Waters with and without approved TMDLs.** Impaired waters are those that have been identified pursuant to Section 303(d) of the Clean Water Act as not meeting applicable surface water quality standards. This may include both waters with EPA-approved Total Maximum Daily Loads (TMDLs) and those for which a TMDL has not yet been approved. For the purposes of this permit, the conditions for discharges to impaired waters also extend to controlling pollutants in MS4 discharges to tributaries to the listed impaired waters in the Middle Rio Grande watershed boundary identified in Appendix A.
 - a. Discharges of pollutant(s) of concern to impaired water bodies for which there is an EPA approved total maximum daily load (TMDL) are not eligible for this general permit unless they are consistent with the approved TMDL. A water body is considered impaired for the purposes of this permit if it has been identified, pursuant to the latest EPA approved CWA §303(d) list, as not meeting New Mexico Surface Water Quality Standards.
 - b. The permittee shall control the discharges of pollutant(s) of concern to impaired waters and waters with approved TMDLs as provided in sections (i) and (ii) below, and shall assess the success in controlling those pollutants.
 - (i) **Discharges to Water Quality Impaired Water Bodies with an Approved TMDL**

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

 - (a) Targeted Controls: The SWMP submitted with the first annual report must include a detailed description of all targeted controls to be implemented, such as identifying areas of focused effort or implementing additional Best Management Practices (BMPs) that will be implemented to reduce the pollutant(s) of concern in the impaired waters.
 - (b) Measurable Goals: For each targeted control, the SWMP must include a measurable goal and an implementation schedule describing BMPs to be implemented during each year of the permit term. Where the impairment is for bacteria, the permittee must, at minimum comply with the activities and schedules described in Table 1.a of Part I.C.2.(iii).
 - (c) Identification of Measurable Goal: The SWMP must identify a measurable goal for the pollutant(s) of concern. The value of the measurable goal must be based on one of the following options:
 - A. If the permittee is subject to a TMDL that identifies an aggregate Waste Load Allocation (WLA) for all or a class of permitted MS4 stormwater sources, then the SWMP may identify such WLA as the measurable goal. Where an aggregate WLA measurable goal is used, all affected MS4 operators are jointly responsible for progress in meeting the measurable goal and shall (jointly or individually) develop a monitoring/assessment plan. This program element may be coordinated with the monitoring required in Part III.A.
 - B. Alternatively, if multiple permittees are discharging into the same impaired water body with an approved TMDL (which has an aggregate WLA for all permitted stormwater MS4s), the MS4s may combine or share efforts, in consultation with/and the approval of NMED, to determine an alternative sub-measurable goal derived from the WLA for the pollutant(s) of concern (e.g., bacteria) for their respective MS4. The SWMP must clearly define this alternative approach and must describe how the sub-measurable goals would cumulatively support the aggregate WLA. Where an aggregate WLA measurable goal has been broken into sub-measurable goals for individual MS4s, each permittee is only responsible for progress in meeting its WLA sub-measurable goal.

- C. If the permittee is subject to an individual WLA specifically assigned to that permittee, the measurable goal must be the assigned WLA. Where WLAs have been individually assigned, or where the permittee is the only regulated MS4 within the urbanized area that is discharging into the impaired watershed with an approved TMDL, the permittee is only responsible for progress in meeting its WLA measurable goal.
- (d) Annual Report: The annual report must include an analysis of how the selected BMPs have been effective in contributing to achieving the measurable goal and shall include graphic representation of pollutant trends, along with computations of annual percent reductions achieved from the baseline loads and comparisons with the target loads.
- (e) Impairment for Bacteria: If the pollutant of concern is bacteria, the permittee shall include focused BMPs addressing the five areas below, as applicable, in the SWMP and implement as appropriate. If a TMDL Implementation Plan (a plan created by the State or a Tribe) is available, the permittee may refer to the TMDL Implementation Plan for appropriate BMPs. The SWMP and annual report must include justification for not implementing a particular BMP included in the TMDL Implementation Plan. The permittee may not exclude BMPs associated with the minimum control measures required under 40 CFR §122.34 from their list of proposed BMPs. The BMPs shall, as appropriate, address the following:
- A. Sanitary Sewer Systems
 - Make improvements to sanitary sewers;
 - Address lift station inadequacies;
 - Identify and implement operation and maintenance procedures;
 - Improve reporting of violations; and
 - Strengthen controls designed to prevent over flows
 - B. On-site Sewage Facilities (for entities with appropriate jurisdiction)
 - Identify and address failing systems; and
 - Address inadequate maintenance of On-Site Sewage Facilities (OSSFs).
 - C. Illicit Discharges and Dumping
 - Place additional effort to reduce waste sources of bacteria; for example, from septic systems, grease traps, and grit traps.
 - D. Animal Sources
 - Expand existing management programs to identify and target animal sources such as zoos, pet waste, and horse stables.
 - E. Residential Education: Increase focus to educate residents on:
 - Bacteria discharging from a residential site either during runoff events or directly;
 - Fats, oils, and grease clogging sanitary sewer lines and resulting overflows;
 - Decorative ponds; and
 - Pet waste.
- (f) Monitoring or Assessment of Progress: The permittee shall monitor or assess progress in achieving measurable goals and determining the effectiveness of BMPs, and shall include documentation of this monitoring or assessment in the SWMP and annual reports. In addition, the SWMP must include methods to be used. This program element may be coordinated with the monitoring required in Part III.A. The permittee may use the following methods either individually or in conjunction to evaluate progress towards the measurable goal and improvements in water quality as follows:
- A. Evaluating Program Implementation Measures: The permittee may evaluate and report progress towards the measurable goal by describing the activities and BMPs implemented, by identifying the appropriateness of the identified BMPs, and by evaluating the success of implementing the measurable goals. The permittee may assess progress by using program implementation indicators

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

- B. **Assessing Improvements in Water Quality:** The permittee may assess improvements in water quality by using available data for segment and assessment units of water bodies from other reliable sources, or by proposing and justifying a different approach such as collecting additional instream or outfall monitoring data, etc. Data may be acquired from NMED, local river authorities, partnerships, and/or other local efforts as appropriate. Progress towards achieving the measurable goal shall be reported in the annual report. Annual reports shall report the measurable goal and the year(s) during the permit term that the MS4 conducted additional sampling or other assessment activities.
- (g) **Observing no Progress towards the Measurable Goal:** If, by the end of the third year from the effective date of the permit, the permittee observes no progress toward the measurable goal either from program implementation or water quality assessments, the permittee shall identify alternative focused BMPs that address new or increased efforts towards the measurable goal. As appropriate, the MS4 may develop a new approach to identify the most significant sources of the pollutant(s) of concern and shall develop alternative focused BMPs (this may also include information that identifies issues beyond the MS4's control). These revised BMPs must be included in the SWMP and subsequent annual reports.

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

- (ii) Discharges Directly to Water Quality Impaired Water Bodies without an Approved TMDL:
The permittee shall also determine whether the permitted discharge is directly to one or more water quality impaired water bodies where a TMDL has not yet been approved by NMED and EPA. If the permittee discharges directly into an impaired water body without an approved TMDL, the permittee shall perform the following activities:
- (a) **Discharging a Pollutant of Concern:** The permittee shall:
- A. Determine whether the MS4 may be a source of the pollutant(s) of concern by referring to the CWA §303(d) list and then determining if discharges from the MS4 would be likely to contain the pollutant(s) of concern at levels of concern. The evaluation of CWA §303(d) list parameters should be carried out based on an analysis of existing data (e.g., Illicit Discharge and Improper Disposal Program) conducted within the permittee's jurisdiction.
 - B. Ensure that the SWMP includes focused BMPs, along with corresponding measurable goals, that the permittee will implement, to reduce, the discharge of pollutant(s) of concern that contribute to the impairment of the water body. (note: Only applicable if the permittee determines that the MS4 may discharge the pollutant(s) of concern to an impaired water body without a TMDL. The SWMP submitted with the first annual report must include a detailed description of proposed controls to be implemented along with corresponding measurable goals.
 - C. Amend the SWMP to include any additional BMPs to address the pollutant(s) of concern.
- (b) **Impairment for Bacteria:** Where the impairment is for bacteria, the permittee shall identify potential significant sources and develop and implement targeted BMPs to control bacteria from those sources (see Part I.C.2.b.(i).(e).A through E.. The permittee must, at minimum comply with the activities and

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

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

- (c) Impairment for Nutrients: Where the impairment is for nutrients (e.g., nitrogen or phosphorus), the permittee shall identify potential significant sources and develop and implement targeted BMPs to control nutrients from potential sources. The permittee must, at minimum comply with the activities and schedules described in Table 1.b of Part I.C.2, (iii). The annual report must include information on compliance with this section, including results of any sampling conducted by the permittee.
- (d) Impairment for Dissolved Oxygen: See Endangered Species Act (ESA) Requirements in Part I.C.3. These program elements may be coordinated with the monitoring required in Part III.A.
- (iii) Program Development and Implementation Schedules: Where the impairment is for nutrient constituent (e.g., nitrogen or phosphorus) or bacteria, the permittee must at minimum comply with the activities and schedules in Table 1.a and Table 1.b.

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

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

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

(*) During development of cooperative programs, the permittee must continue to implement existing programs

(**) or MS4s designated by the Director

(***) Permittees previously covered under permit NMS000101 or NMR040000

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

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

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

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

(*) During development of cooperative programs, the permittee must continue to implement existing programs

(**) or MS4s designated by the Director

(***) Permittees previously covered under permit NMS000101 or NMR040000

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

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

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

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

- (i) The permittees must identify (or continue identifying if previously covered under permit NMS000101) structural controls, natural or man-made topographical and geographical formations, MS4 operations, or oxygen demanding pollutants contributing to reduced dissolved oxygen in the receiving waters of the Rio Grande. The permittees shall implement controls, and update/revise as necessary, to eliminate discharge of pollutants at levels that cause or contribute to exceedances of applicable water quality standards for dissolved oxygen in waters of the Rio Grande. The permittees shall submit a summary of findings and a summary of activities undertaken under Part I.C.3.a.(i) with each Annual Report. The SWMP submitted with the first and fourth annual reports must include a detailed description of controls implemented (or/and proposed control to be implemented) along with corresponding measurable goals. (Applicable to all permittees).
- (ii) As required in Part I.C.1.d, the COA and AMAFCA shall revise the May 1, 2012 Strategy for dissolved oxygen to address dissolved oxygen at the North Diversion Channel Embayment and/or other MS4 locations. The permittees shall submit the revised strategy to FWS and EPA for approval within a year of permit issuance and progress reports with the subsequent Annual Reports (see also Part I.C.1.d.(iv)). The permittees shall ensure that actions to reduce pollutants or remedial activities selected for the North Diversion Channel Embayment and its watershed are implemented such that there is a reduction in

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

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

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

Notes:

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

(a) The revised strategy shall include:

- A. A Monitoring Plan describing all procedures necessary to continue conducting continuous monitoring of dissolved oxygen (DO) and temperature in the North Diversion Channel Embayment and at one (1) location in the Rio Grande downstream of the mouth of the North Diversion Channel within the action area (e.g., Central Bridge). The monitoring plan to be developed will describe the methodology used to assure its quality, and will identify the means necessary to address any gaps that occur during monitoring, in a timely manner (that is, within 24 to 48 hours).
- B. A Quality Assurance and Quality Control (QA/QC) Plan describing all standard operating procedures, quality assurance and quality control plans, maintenance, and implementation schedules that will assure timely and accurate collection and reporting of water temperature, dissolved oxygen, oxygen saturation, and flow. The QA/QC plan should include all procedures for estimating oxygen data when any oxygen monitoring equipment fail. Until a monitoring plan with quality assurance and quality control is submitted by EPA, any data, including any provisional or incomplete data from the most recent measurement period (e.g. if inoperative monitoring equipment for one day, use data from previous day) shall be used as substitutes for all values in the calculations for determinations of incidental takes. Given the nature of the data collected as surrogate for incidental take, all data, even provisional data (e.g., oxygen/water temperature data, associated metadata such as flows, date, times), shall be provided to the Service in a spreadsheet or database format within two weeks after formal request.

(b) Reporting: The COA and AMAFCA shall provide

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

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

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

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

- b. **Sediment Pollutant Load Reduction Strategy (Applicable to all permittees):** The permittee must develop, implement, and evaluate a sediment pollutant load reduction strategy to assess and reduce pollutant loads associated with sediment (e.g., metals, etc. adsorbed to or traveling with sediment, as opposed to clean sediment) into the receiving waters of the Rio Grande. The strategy must include the following elements:
- (i) **Sediment Assessment:** The permittee must identify and investigate areas within its jurisdiction that may be contributing excessive levels (e.g., levels that may contribute to exceedance of applicable Water Quality Standards) of pollutants in sediments to the receiving waters of the Rio Grande as a result of stormwater discharges. The permittee must identify structural elements, natural or man-made topographical and geographical formations, MS4 operations activities, and areas indicated as potential sources of sediments pollutants in the receiving waters of the Rio Grande. At the time of assessment, the permittee shall record any observed erosion of soil or sediment along ephemeral channels, arroyos, or stream banks, noting the scouring or sedimentation in streams. The assessment should be made using available data from federal, state, or local studies supplemented as necessary with collection of additional data. The permittee must describe, in the first annual report, all standard operating procedures, quality assurance plans to assure that accurate data are collected, summarized, evaluated and reported.
 - (ii) **Estimate Baseline Loading:** Based on the results of the sediment pollutants assessment required in Part I.C.3.b.(i) above the permittee must provide estimates of baseline total sediment loading and relative potential for contamination of those sediments by urban activities for drainage areas, sub-watersheds, Impervious Areas (IAs), and/or Directly Connected Impervious Area (DCIAs) draining directly to a surface waterbody or other feature used to convey waters of the United States. Sediment loads may be provided for targeted areas in the entire Middle Rio Grande Watershed (see Appendix A) using an individual or cooperative approach. Any data available and/or preliminary numeric modeling results may be used in estimating loads.
 - (iii) **Targeted Controls:** Include a detailed description of all proposed targeted controls and BMPs that will be implemented to reduce sediment pollutant loads calculated in Part I.C.3.b.(ii) above during the next ten (10) years of permit issuance. For each targeted control, the permittee must include interim measurable goals (e.g., interim sediment pollutant load reductions) and an implementation and maintenance schedule, including interim milestones, for each control measure, and as appropriate, the months and years in which the MS4 will undertake the required actions. Any data available and/or preliminary numeric modeling results may be used in establishing the targeted controls, BMPs, and interim measurable goals. The permittee must prioritize pollutant load reduction efforts and target areas (e.g. drainage areas, sub-watersheds, IAs, DCIAs) that generate the highest annual average pollutant loads.
 - (iv) **Monitoring and Interim Reporting:** The permittee shall monitor or assess progress in achieving interim measurable goals and determining the effectiveness of BMPs, and shall include documentation of this

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

- (v) Progress Evaluation and Reporting: The permittee must assess the overall success of the Sediment Pollutant Load Reduction Strategy and document both direct and indirect measurements of program effectiveness in a Progress Report to be submitted with the fifth Annual Report. Data must be analyzed, interpreted, and reported so that results can be applied to such purposes as documenting effectiveness of the BMPs and compliance with the ESA requirements specified in Part I.C.3.b. The Progress Report must include:
- (a) A list of species likely to be within the action area;
 - (b) Type and number of structural BMPs installed;
 - (c) Evaluation of pollutant source reduction efforts;
 - (d) Any recommendation based on program evaluation;
 - (e) Description of how the interim sediment load reduction goals established in Part I.C.3.b.(iii) were achieved; and
 - (f) Future planning activities needed to achieve increase of sediment load reduction required in Part I.C.3.d.(iii).
- (vi) Critical Habitat (Applicable to all permittees): Verify that the installation of stormwater BMPs will not occur in or adversely affect currently listed endangered or threatened species critical habitat by reviewing the activities and locations of stormwater BMP installation within the location of critical habitat of currently listed endangered or threatened species at the U.S. Fish and Wildlife service website <http://criticalhabitat.fws.gov/crithab/>.

D. STORMWATER MANAGEMENT PROGRAM (SWMP)

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

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

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

- a. Control the contribution of pollutants to the MS4 by stormwater discharges associated with industrial activity and the quality of stormwater discharged from sites of industrial activity (applicable only to MS4s located within the corporate boundary of the COA);
- b. Control the discharge of stormwater and pollutants associated with land disturbance and development activities, both during the construction phase and after site stabilization has been achieved (post-construction), consistent with Part I.D.5.a and Part I.D.5.b;
- c. Prohibit illicit discharges and sanitary sewer overflows to the MS4 and require removal of such discharges consistent with Part I.D.5.e;
- d. Control the discharge of spills and prohibit the dumping or disposal of materials other than stormwater (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;
- e. Control, through interagency or inter-jurisdictional agreements among permittees, the contribution of pollutants from one (1) portion of the MS4 to another;
- f. Require compliance with conditions in ordinances, permits, contracts and/or orders; and
- g. Carry out all inspection, surveillance and monitoring procedures necessary to maintain compliance with permit conditions.

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

- a. The SWMP, in addition to any interagency or inter-jurisdictional agreement(s) among permittees, (e.g., the Joint Powers Agreement to be entered into by the permittees), shall clearly identify the roles and responsibilities of each permittee.
- b. Implementation of the SWMP may be achieved through participation with other permittees, public agencies, or private entities in cooperative efforts to satisfy the requirements of Part I.D in lieu of creating duplicate program elements for each individual permittee.
 - (i) Implementation of one or more of the control measures may be shared with another entity, or the entity may fully take over the measure. A permittee may rely on another entity only if:
 - (a) the other entity, in fact, implements the control measure;
 - (b) the control measure, or component of that measure, is at least as stringent as the corresponding permit requirement; or,
 - (c) the other entity agrees to implement the control measure on the permittee's behalf. Written acceptance of this obligation is expected. The permittee must maintain this obligation as part of the SWMP description. If the other entity agrees to report on the minimum measure, the permittee must supply the other entity with the reporting requirements in Part III.D of this permit. The permittee remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure component.
- c. Each permittee shall provide adequate finance, staff, equipment, and support capabilities to fully implement its SWMP and all requirements of this permit.

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

5. **Control Measures.**

a. **Construction Site Stormwater Runoff Control.**

- (i) The permittee shall develop, revise, implement, and enforce a program to reduce pollutants in any stormwater runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of stormwater discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. **Permittees previously covered under permit NMS000101 or NMR040000 must continue existing programs, updating as necessary, to comply with the requirements of this permit.** (Note: Highway Departments and Flood Control Authorities may only apply the construction site stormwater management program to the permittees's own construction projects)
- (ii) The program must include the development, implementation, and enforcement of, at a minimum:
 - (a) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal or local law;
 - (b) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices (both structural and non-structural);
 - (c) Requirements for construction site operators to control waste such as, but not limited to, discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality (see EPA guidance at <http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=117>);
 - (d) Procedures for site plan review which incorporate consideration of potential water quality impacts. The site plan review must be conducted prior to commencement of construction activities, and include a review of the site design, the planned operations at the construction site, the planned control measures during the construction phase (including the technical criteria for selection of the control measures), and the planned controls to be used to manage runoff created after the development;
 - (e) Procedures for receipt and consideration of information submitted by the public;
 - (f) Procedures for site inspection (during construction) and enforcement of control measures, including provisions to ensure proper construction, operation, maintenance, and repair. The procedures must clearly define who is responsible for site inspections; who has the authority to implement enforcement procedures; and the steps utilized to identify priority sites for inspection and enforcement based on the nature of the construction activity, topography, and the characteristics of soils and the quality of the receiving water. If a construction site operator fails to comply with procedures or policies established by the permittee, the permittee may request EPA enforcement assistance. The site inspection and enforcement procedures must describe sanctions and enforcement mechanism(s) for violations of permit requirements and penalties with detail regarding corrective action follow-up procedures, including enforcement escalation procedures for recalcitrant or repeat offenders. Possible sanctions include non-monetary penalties (such as stop work orders and/or permit denials for non-compliance), as well as monetary penalties such as fines and bonding requirements;
 - (g) Procedures to educate and train permittee personnel involved in the planning, review, permitting, and/or approval of construction site plans, inspections and enforcement. Education and training shall also be provided for developers, construction site operators, contractors and supporting personnel, including requiring a stormwater pollution prevention plan for construction sites within the permittee's jurisdiction;
 - (h) Procedures for keeping records of and tracking all regulated construction activities within the MS4, i.e. site reviews, inspections, inspection reports, warning letters and other enforcement documents. A

summary of the number and frequency of site reviews, inspections (including inspector's checklist for oversight of sediment and erosion controls and proper disposal of construction wastes) and enforcement activities that are conducted annually and cumulatively during the permit term shall be included in each annual report; and

- (iii) Annually conduct site inspections of 100 percent of all construction projects cumulatively disturbing one (1) or more acres within the MS4 jurisdiction. Site inspections are to be followed by any necessary compliance or enforcement action. Follow-up inspections are to be conducted to ensure corrective maintenance has occurred; and, all projects must be inspected at completion for confirmation of final stabilization.
- (iv) The permittee must coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area to ensure that the construction stormwater runoff controls eliminate erosion and maintain sediment on site. Planning documents include, but are not limited to: comprehensive or master plans, subdivision ordinances, general land use plan, zoning code, transportation master plan, specific area plans, such as sector plan, site area plans, corridor plans, or unified development ordinances.
- (v) The site plan review required in Part I.D.5.a.(ii)(d) must include an evaluation of opportunities for use of GI/LID/Sustainable practices and when the opportunity exists, encourage project proponents to incorporate such practices into the site design to mimic the pre-development hydrology of the previously undeveloped site. For purposes of this permit, pre-development hydrology shall be met according to Part I.D.5.b of this permit. (consistent with any limitations on that capture). Include a reporting requirement of the number of plans that had opportunities to implement these practices and how many incorporated these practices.
- (vi) The permittee must include in the SWMP a description of the mechanism(s) that will be utilized to comply with each of the elements required in Part I.D.5.a.(i) throughout Part I.D.5.a.(v), including description of each individual BMP (both structural or non-structural) or source control measures and its corresponding measurable goal.
- (vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report. The permittee must include in each annual report:
 - (a) A summary of the frequency of site reviews, inspections and enforcement activities that are conducted annually and cumulatively during the permit term.
 - (b) The number of plans that had the opportunity to implement GI/LID/Sustainable practices and how many incorporated the practices.

Program Flexibility Elements

- (viii) The permittee may use storm water educational materials locally developed or provided by the EPA (refer to <http://water.epa.gov/polwaste/npdes/swbmp/index.cfm>, <http://www.epa.gov/smartgrowth/parking.htm>, <http://www.epa.gov/smartgrowth/stormwater.htm>), the NMED, environmental, public interest or trade organizations, and/or other MS4s.
- (ix) The permittee may develop or update existing construction handbooks (e.g., the COA NPDES Stormwater Management Guidelines for Construction and Industrial Activities Handbook) to be consistent with promulgated construction and development effluent limitation guidelines.
- (x) The construction site inspections required in Part I.D.5.a.(iii) may be carried out in conjunction with the permittee's building code inspections using a screening prioritization process.

Table 2. Construction Site Stormwater Runoff Control - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Development of an ordinance or other regulatory mechanism as required in Part I.D.5.a.(ii)(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of the permit
Develop requirements and procedures as required in Part I.D.5.a.(ii)(b) through in Part I.D.5.a.(ii)(h)	Ten (10) months from effective date of permit	Thirteen (13) months from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Annually conduct site inspections of 100 percent of all construction projects cumulatively disturbing one (1) or more acres as required in Part I.D.5.a.(iii)	Ten (10) months from effective date of permit	Start Thirteen (13) months from effective date of permit and annually thereafter	Start Sixteen (16) months from effective date of permit and annually thereafter	Start eighteen (18) months from effective date of permit and thereafter	Start two (2) years from effective date of permit and thereafter
Coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area as required in Part I.D.5.a.(iv)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Evaluation of GI/LID/Sustainable practices in site plan reviews as required in Part I.D.5.a.(v)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.a.(vi) and in Part I.D.5.a.(vii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include program elements in Part I.D.5.a.(viii) through Part I.D.5.a.(x)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs. (**) or MS4s designated by the Director

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

b. Post-Construction Stormwater Management in New Development and Redevelopment

(i) The permittee must develop, revise, implement, and enforce a program to address stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the MS4. The program must ensure that controls are in place that would prevent or minimize water quality impacts. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs, updating as necessary, to comply with the requirements of this permit.** (Note: Highway Departments and Flood Control Authorities may only apply the post-construction stormwater management program to the permittee's own construction projects)

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

(a) Strategies which include a combination of structural and/or non-structural best management practices (BMPs) to control pollutants in stormwater runoff.

(b) An ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law. The ordinance or policy must:

Incorporate a stormwater quality design standard that manages on-site the 90th percentile storm event discharge volume associated with new development sites and 80th percentile storm event discharge volume associated with redevelopment sites, through stormwater controls that infiltrate, evapotranspire the discharge volume, except in instances where full compliance cannot be achieved, as provided in Part I.D.5.b.(v). The stormwater from rooftop discharge may be harvested and used on-site for non-commercial use. Any controls utilizing impoundments that are also used for flood control that are located in areas where the New Mexico Office of the State Engineer requirements at NMAC 19.26.2.15 (see also Section 72-5-32 NMSA) apply must drain within 96 hours unless the state engineer has issued a waiver to the owner of the impoundment.

Options to implement the site design standard include, but not limited to: management of the discharge volume achieved by canopy interception, soil amendments, rainfall harvesting, rain tanks and cisterns, engineered infiltration, extended filtration, dry swales, bioretention, roof top disconnections, permeable pavement, porous concrete, permeable pavers, reforestation, grass channels, green roofs and other appropriate techniques, and any combination of these practices, including implementation of other stormwater controls used to reduce pollutants in stormwater (e.g., a water quality facility).

Estimation of the 90th or 80th percentile storm event discharge volume is included in EPA Technical Report entitled "*Estimating Predevelopment Hydrology in the Middle Rio Grande Watershed, New Mexico, EPA Publication Number 832-R-14-007*". Permittees can also estimate:

Option A: a site specific 90th or 80th percentile storm event discharge volume using methodology specified in the referenced EPA Technical Report.

Option B: a site specific pre-development hydrology and associated storm event discharge volume using methodology specified in the referenced EPA technical Report.

(c) The permittee must ensure the appropriate implementation of the structural BMPs by considering some or all of the following: pre-construction review of BMP designs; inspections during construction to verify BMPs are built as designed; post-construction inspection and maintenance of BMPs; and penalty provisions for the noncompliance with preconstruction BMP design; failure to construct BMPs

in accordance with the agreed upon pre-construction design; and ineffective post-construction operation and maintenance of BMPs;

- (d) The permittee must ensure that the post-construction program requirements are constantly reviewed and revised as appropriate to incorporate improvements in control techniques;
 - (e) Procedure to develop and implement an educational program for project developers regarding designs to control water quality effects from stormwater, and a training program for plan review staff regarding stormwater standards, site design techniques and controls, including training regarding GI/LID/Sustainability practices. Training may be developed independently or obtained from outside resources, i.e. federal, state, or local experts;
 - (f) Procedures for site inspection and enforcement to ensure proper long-term operation, maintenance, and repair of stormwater management practices that are put into place as part of construction projects/activities. Procedure(s) shall include the requirement that as-built plans be submitted within ninety (90) days of completion of construction projects/activities that include controls designed to manage the stormwater associated with the completed site (post-construction stormwater management). Procedure(s) may include the use of dedicated funds or escrow accounts for development projects or the adoption by the permittee of all privately owned control measures. This may also include the development of maintenance contracts between the owner of the control measure and the permittee. The maintenance contract shall include verification of maintenance practices by the owner, allows the MS4 owner/operator to inspect the maintenance practices, and perform maintenance if inspections indicate neglect by the owner;
 - (g) Procedures to control the discharge of pollutants related to commercial application and distribution of pesticides, herbicides, and fertilizers where permittee(s) hold jurisdiction over lands not directly owned by that entity (e.g., incorporated city). The procedures must ensure that herbicides and pesticides applicators doing business within the permittee's jurisdiction have been properly trained and certified, are encouraged to use the least toxic products, and control use and application rates according to the applicable requirements; and
 - (h) Procedure or system to review and update, as necessary, the existing program to ensure that stormwater controls or management practices for new development and redevelopment projects/activities continue to meet the requirements and objectives of the permit.
- (iii) The permittee must coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private new development and redevelopment projects/activities within the permit area to ensure the hydrology associated with new development and redevelopment sites mimic to the extent practicable the pre-development hydrology of the previously undeveloped site, except in instances where the pre-development hydrology requirement conflicts with applicable water rights appropriation requirements. For purposes of this permit, pre-development hydrology shall be met by capturing the 90th percentile storm event runoff (consistent with any limitations on that capture) which under undeveloped natural conditions would be expected to infiltrate or evapotranspire on-site and result in little, if any, off-site runoff. (Note: This permit does not prevent permittees from requiring additional controls for flood control purposes.) Planning documents include, but are not limited to: comprehensive or master plans, subdivision ordinances, general land use plan, zoning code, transportation master plan, specific area plans, such as sector plan, site area plans, corridor plans, or unified development ordinances.
- (iv) The permittee must assess all existing codes, ordinances, planning documents and other applicable regulations, for impediments to the use of GI/LID/Sustainable practices. The assessment shall include a list of the identified impediments, necessary regulation changes, and recommendations and proposed schedules to incorporate policies and standards to relevant documents and procedures to maximize infiltration, recharge, water harvesting, habitat improvement, and hydrological management of stormwater runoff as allowed under the applicable water rights appropriation requirements. The permittee must develop a report of the assessment findings, which is to be used to provide information to the permittee, of the regulation changes necessary to remove impediments and allow implementation of these practices.

- (v) Alternative Compliance for Infeasibility due to Site Constrains:
- (a) Infeasibility to manage the design standard volume specified in Part I(D)(5)(b)(ii)(b), or a portion of the design standard volume, onsite may result from site constraints including the following:
 - A. too small a lot outside of the building footprint to create the necessary infiltrative capacity even with amended soils;
 - B. soil instability as documented by a thorough geotechnical analysis;
 - C. a site use that is inconsistent with capture and reuse of storm water;
 - D. other physical conditions; or,
 - E. to comply with applicable requirements for on-site flood control structures leaves insufficient area to meet the standard.
 - (b) A determination that it is infeasible to manage the design standard volume specified in Part I.D.5.b.(ii)(b), or a portion of the design standard volume, on site may not be based solely on the difficulty or cost of implementing onsite control measures, but must include multiple criteria that rule out an adequate combination of the practices set forth in Part I.D,5.b.(v).
 - (c) This permit does not prevent imposition of more stringent requirements related to flood control. Where both the permittee's site design standard ordinance or policy and local flood control requirements on site cannot be met due to site conditions, the standard may be met through a combination of on-site and off-site controls.
 - (d) Where applicable New Mexico water law limits the ability to fully manage the design standard volume on site, measures to minimize increased discharge consistent with requirements under New Mexico water law must still be implemented.
 - (e) In instances where an alternative to compliance with the standard on site is chosen, technical justification as to the infeasibility of on-site management of the entire design standard volume, or a portion of the design standard volume, is required to be documented by submitting to the permittee a site-specific hydrologic and/or design analysis conducted and endorsed by a registered professional engineer, geologist, architect, and/or landscape architect.
 - (f) When a Permittee determines a project applicant has demonstrated infeasibility due to site constraints specified in Part I.D.5.b.(v) to manage the design standard volume specified in Part I.D.5.b.(ii).(b) or a portion of the design standard volume on-site, the Permittee shall require one of the following mitigation options:
 - A. *Off-site mitigation.* The off-site mitigation option only applies to redevelopment sites and cannot be applied to new development. Management of the standard volume, or a portion of the volume, may be implemented at another location within the MS4 area, approved by the permittee. The permittee shall identify priority areas within the MS4 in which mitigation projects can be completed. The permittee shall determine who will be responsible for long-term maintenance on off-site mitigation projects.
 - B. *Ground Water Replenishment Project:* Implementation of a project that has been determined to provide an opportunity to replenish regional ground water supplies at an offsite location.
 - C. *Payment in lieu.* Payment in lieu may be made to the permittee, who will apply the funds to a public stormwater project. MS4s shall maintain a publicly accessible database of approved projects for which these payments may be used.

D. Other. In a situation where alternative options A through C above are not feasible and the permittee wants to establish another alternative option for projects, the permittee may submit to the EPA for approval, the alternative option that meets the standard.

- (vi) The permittee must estimate the number of acres of impervious area (IA) and directly connected impervious area (DCIA). For the purpose of this part, IA includes conventional pavements, sidewalks, driveways, roadways, parking lots, and rooftops. DCIA is the portion of IA with a direct hydraulic connection to the permittee's MS4 or a waterbody via continuous paved surfaces, gutters, pipes, and other impervious features. DCIA typically does not include isolated impervious areas with an indirect hydraulic connection to the MS4 (e.g., swale or detention basin) or that otherwise drain to a pervious area.
- (vii) **The permittee must develop an inventory and priority ranking of MS4-owned property and infrastructure (including public right-of-way) that may have the potential to be retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges to and from its MS4.** In determining the potential for retrofitting, the permittee shall consider factors such as the complexity and cost of implementation, public safety, access for maintenance purposes, subsurface geology, depth to water table, proximity to aquifers and subsurface infrastructure including sanitary sewers and septic systems, and opportunities for public use and education under the applicable water right requirements and restrictions. In determining its priority ranking, the permittee shall consider factors such as schedules for planned capital improvements to storm and sanitary sewer infrastructure and paving projects; current storm sewer level of service and control of discharges to impaired waters, streams, and critical receiving water (drinking water supply sources);
- (viii) The permittee must incorporate watershed protection elements into relevant policy and/or planning documents as they come up for regular review. If a relevant planning document is not scheduled for review during the term of this permit, the permittee must identify the elements that cannot be implemented until that document is revised, and provide to EPA and NMED a schedule for incorporation and implementation not to exceed five years from the effective date of this permit. As applicable to each permittee's MS4 jurisdiction, policy and/or planning documents must include the following:
 - (a) A description of master planning and project planning procedures to control the discharge of pollutants to and from the MS4.
 - (b) Minimize the amount of impervious surfaces (roads, parking lots, roofs, etc.) within each watershed, by controlling the unnecessary creation, extension and widening of impervious parking lots, roads and associated development. The permittee may evaluate the need to add impervious surface on a case-by-case basis and seek to identify alternatives that will meet the need without creating the impervious surface.
 - (c) Identify environmentally and ecologically sensitive areas that provide water quality benefits and serve critical watershed functions within the MS4 and ensure requirements to preserve, protect, create and/or restore these areas are developed and implemented during the plan and design phases of projects in these identified areas. These areas may include, but are not limited to critical watersheds, floodplains, and areas with endangered species concerns and historic properties. Stakeholders shall be consulted as appropriate.
 - (d) Implement stormwater management practices that minimize water quality impacts to streams, including disconnecting direct discharges to surface waters from impervious surfaces such as parking lots.
 - (e) Implement stormwater management practices that protect and enhance groundwater recharge as allowed under the applicable water rights laws.
 - (f) **Seek to avoid or prevent hydromodification of streams and other water bodies caused by development, including roads, highways, and bridges.**

- (g) Develop and implement policies to protect native soils, prevent topsoil stripping, and prevent compaction of soils.
- (h) The program must be specifically tailored to address local community needs (e.g. protection to drinking water sources, reduction of water quality impacts) and must be designed to attempt to maintain pre-development runoff conditions.
- (ix) The permittee must update the SWMP as necessary to include a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.b.(i) throughout Part I.D.5.b.(viii) as well as the citations and descriptions of design standards for structural and non-structural controls to control pollutants in stormwater runoff, including discussion of the methodology used during design for estimating impacts to water quality and selecting structural and non-structural controls. Description of measurable goals for each BMP (structural or non-structural) or each stormwater control must be included in the SWMP.
- (x) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report. The following information must be included in each annual report:
 - (a) Include a summary and analysis of all maintenance, inspections and enforcement, and the number and frequency of inspections performed annually.
 - (b) A cumulative listing of the annual modifications made to the Post-Construction Stormwater Management Program during the permit term, and a cumulative listing of annual revisions to administrative procedures made or ordinances enacted during the permit term.
 - (c) According to the schedule presented in the Program Development and Implementation Schedule in Table 3, the permittee must
 - A. Report the number of MS4-owned properties and infrastructure that have been retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges. The permittee may also include in its annual report non-MS4 owned property that has been retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges.
 - B. As required in Part I.D.5.b.(vi), report the tabulated results for IA and DCIA and its estimation methodology. In each subsequent annual report, the permittee shall estimate the number of acres of IA and DCIA that have been added or removed during the prior year. The permittee shall include in its estimates the additions and reductions resulting from development, redevelopment, or retrofit projects undertaken directly by the permittee; or by private developers and other parties in a voluntary manner on in compliance with the permittee's regulations.

Program Flexibility Elements:

- (xi) The permittee may use storm water educational materials locally developed or provided by EPA (refer to <http://water.epa.gov/polwaste/npdes/swbmp/index.cfm>, <http://www.epa.gov/smartgrowth/parking.htm>, and <http://www.epa.gov/smartgrowth/stormwater.htm>); the NMED; environmental, public interest or trade organizations; and/or other MS4s.
- (xii) When choosing appropriate BMPs, the permittee may participate in locally-based watershed planning efforts, which attempt to involve a diverse group of stakeholders including interested citizens. When developing a program that is consistent with this measure's intent, the permittee may adopt a planning process that identifies the municipality's program goals (e.g., minimize water quality impacts resulting from post-construction runoff from new development and redevelopment), implementation strategies (e.g., adopt a combination of structural and/or non-structural BMPs), operation and maintenance policies and procedures, and enforcement procedures.

- (xiii) The permittee may incorporate the following elements in the Post-Construction Stormwater Management in New Development and Redevelopment program required in Part I.D.5.b.(ii)(b):
- (a) Provide requirements and standards to direct growth to identified areas to protect environmentally and ecologically sensitive areas such as floodplains and/or other areas with endangered species and historic properties concerns;
 - (b) Include requirements to maintain and/or increase open space/buffers along sensitive water bodies, minimize impervious surfaces, and minimize disturbance of soils and vegetation; and
 - (c) Encourage infill development in higher density urban areas, and areas with existing storm sewer infrastructure.

Table 3. Post-Construction Stormwater Management in New Development and Redevelopment - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Development of strategies as required in Part I.D.5.b.(ii).(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Development of an ordinance or other regulatory mechanism as required in Part I.D.5.b.(ii).(b)	Twenty (24) months from effective date of permit	Thirty (30) months from effective date of permit	Thirty six (36) months from effective date of permit	Thirty six (36) months from effective date of permit	Thirty six (36) months from effective date of permit
Implementation and enforcement, via the ordinance or other regulatory mechanism, of site design standards as required in Part I.D.5.b.(ii).(b)	Within thirty six (36) months from effective date of the permit	Within forty two (42) months from the effective date of the permit	Within forty eight (48) months from effective date of the permit	Within forty eight (48) months from effective date of the permit	Within forty eight (48) months from effective date of the permit
Ensure appropriate implementation of structural controls as required in Part I.D.5.b.(ii).(c) and Part I.D.5.b.(ii).(d)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop procedures as required in Part I.D.5.b.(ii).(e), Part I.D.5.b.(ii).(f), Part I.D.5.b.(ii).(g), and Part I.D.5.b.(ii).(h)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit

Coordinate internally with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area as required in Part I.D.5.b.(iii)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	One (1) year from effective date of permit
As required in Part I.D.5.b.(iv), the permittee must assess all existing codes, ordinances, planning documents and other applicable regulations, for impediments to the use of GI/LID/Sustainable practices	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit
As required in Part I.D.5.b.(iv), develop and submit a report of the assessment findings on GI/LID/Sustainable practices.	Eleven (11) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Twenty seven (27) months from effective date of permit
Estimation of the number of acres of IA and DCIA as required in Part I.D.5.b.(vi)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Inventory and priority ranking as required in section in Part I.D.5.b.(vii)	Within fifteen (15) months from effective date of the permit	Within twenty four (24) months from effective date of the permit	Within thirty six (36) months from effective date of the permit	Within thirty six (36) months from effective date of the permit	Within forty two (42) months from effective date of the permit
Incorporate watershed protection elements as required in Part I.D.5.b.(viii)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.b.(ix) and Part I.D.5.b.(x).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include program elements in Part I.D.5.b.(xi) and Part I.D.5.b.(xii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.

(**) or MS4s designated by the Director

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

c. Pollution Prevention/Good Housekeeping for Municipal/Co-permittee Operations.

- (i) The permittee must develop, revise and implement an operation and maintenance program that includes a training component and the ultimate goal of preventing or reducing pollutant runoff from municipal operations. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The program must include:
- (a) Development and implementation of an employee training program to incorporate pollution prevention and good housekeeping techniques into everyday operations and maintenance activities. The employee training program must be designed to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance. The permittee must also develop a tracking procedure and ensure that employee turnover is considered when determining frequency of training;
 - (b) Maintenance activities, maintenance schedules, and long term inspections procedures for structural and non-structural storm water controls to reduce floatable, trash, and other pollutants discharged from the MS4.
 - (c) **Controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations, snow disposal areas operated by the permittee, and waste transfer stations;**
 - (d) Procedures for properly disposing of waste removed from the separate storm sewers and areas listed in Part I.D.5.c.(i).(c) (such as dredge spoil, accumulated sediments, floatables, and other debris); and
 - (e) Procedures to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection devices or practices.

Note: The permittee may use training materials that are available from EPA, NMED, Tribe, or other organizations.

- (ii) The Pollution Prevention/Good Housekeeping program must include the following elements:
- (a) Develop or update the existing list of all stormwater quality facilities by drainage basin, including location and description;
 - (b) Develop or modify existing operational manual for de-icing activities addressing alternate materials and methods to control impacts to stormwater quality;
 - (c) Develop or modify existing program to control pollution in stormwater runoff from equipment and vehicle maintenance yards and maintenance center operations located within the MS4;
 - (d) Develop or modify existing street sweeping program. Assess possible benefits from changing frequency or timing of sweeping activities or utilizing different equipment for sweeping activities;
 - (e) **A description of procedures used by permittees to target roadway areas most likely to contribute pollutants to and from the MS4 (i.e., runoff discharges directly to sensitive receiving water, roadway receives majority of de-icing material, roadway receives excess litter, roadway receives greater loads of oil and grease);**
 - (f) Develop or revise existing standard operating procedures for collection of used motor vehicle fluids (at a minimum oil and antifreeze) and toxics (including paint, solvents, fertilizers, pesticides, herbicides,

and other hazardous materials) used in permittee operations or discarded in the MS4, for recycle, reuse, or proper disposal;

- (g) Develop or revised existing standard operating procedures for the disposal of accumulated sediments, floatables, and other debris collected from the MS4 and during permittee operations to ensure proper disposal;
 - (h) Develop or revised existing litter source control programs to include public awareness campaigns targeting the permittee audience; and
 - (i) **Develop or review and revise, as necessary, the criteria, procedures and schedule to evaluate existing flood control devices, structures and drainage ways to assess the potential of retrofitting to provide additional pollutant removal from stormwater.** Implement routine review to ensure new and/or innovative practices are implemented where applicable.
 - (j) Enhance inspection and maintenance programs by coordinating with maintenance personnel to ensure that a target number of structures per basin are inspected and maintained per quarter;
 - (k) Enhance the existing program to control the discharge of floatables and trash from the MS4 by implementing source control of floatables in industrial and commercial areas;
 - (l) Include in each annual report, a cumulative summary of retrofit evaluations conducted during the permit term on existing flood control devices, structures and drainage ways to benefit water quality. Update the SWMP to include a schedule (with priorities) for identified retrofit projects;
 - (m) Flood management projects: review and revise, as necessary, technical criteria guidance documents and program for the assessment of water quality impacts and incorporation of water quality controls into future flood control projects. The criteria guidance document must include the following elements:
 - A. Describe how new flood control projects are assessed for water quality impacts.
 - B. Provide citations and descriptions of design standards that ensure water quality controls are incorporated in future flood control projects.
 - C. Include method for permittees to update standards with new and/or innovative practices.
 - D. Describe master planning and project planning procedures and design review procedures.
 - (n) Develop procedures to control the discharge of pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied, by the permittee's employees or contractors, to public right-of-ways, parks, and other municipal property. The permittee must provide an updated description of the data monitoring system for all permittee departments utilizing pesticides, herbicides and fertilizers.
- (iii) Comply with the requirements included in the EPA Multi Sector General Permit (MSGP) to control runoff from industrial facilities (as defined in 40 CFR 122.26(b)(14)(i)-(ix) and (xi)) owned or operated by the permittees and ultimately discharge to the MS4. The permittees must develop or update:
- (a) A list of municipal/permittee operations impacted by this program,
 - (b) A map showing the industrial facilities owned and operated by the MS4,
 - (c) A list of the industrial facilities (other than large construction activities defined as industrial activity) that will be included in the industrial runoff control program by category and by basin. The list must include the permit authorization number or a MSGP NOI ID for each facility as applicable.

- (iv) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.c.(i) throughout Part I.D.5.c.(iii) and its corresponding measurable goal.
- (v) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Table 4. Pollution Prevention/Good Housekeeping for Municipal/Co-permittee Operations - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
-Develop or update the Pollution Prevention/Good House Keeping program to include the elements in Part I.D.5.c.(i)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit	Fourteen (14) months from effective date of the permit	Eighteen (18) months from effective date of the permit
-Enhance the program to include the elements in Part I.D.5.c.(ii)	Ten (10) months from effective date of the permit	One (1) year from effective date of the permit	Two (2) years from effective date of the permit	Two (2) years from effective date of the permit	Thirty (30) months from effective date of the permit
-Develop or update a list and a map of industrial facilities owned or operated by the permittee as required in Part I.D.5.c.(iii)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit	One (1) year from effective date of the permit	Eighteen (18) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.c.(iv) and Part I.D.5.c.(v)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs
(**) or MS4s designated by the Director

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

d. Industrial and High Risk Runoff (Applicable only to Class A permittees)

- (i) The permittee must control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity as defined in 40 CFR 122.26(b)(14)(i)-(ix) and (xi). If no such industrial activities are in a permittees jurisdiction, that permittee may certify that this program element does not apply.
- (ii) The permittee must continue implementation and enforcement of the Industrial and High Risk Runoff program, assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the annual report. The program shall include:
 - (a) A description of a program to identify, monitor, and control pollutants in stormwater discharges to the MS4 from municipal landfills; other treatment, storage, or disposal facilities for municipal waste (e.g. transfer stations, incinerators, etc.); hazardous waste treatment, storage, disposal and recovery facilities; facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee(s) determines are contributing a substantial pollutant loading to the

MS4. (Note: If no such facilities are in a permittees jurisdiction, that permittee may certify that this program element does not apply.); and

(b) Priorities and procedures for inspections and establishing and implementing control measures for such discharges.

(iii) Permittees must comply with the monitoring requirements specified in Part III.A.4;

(iv) The permittee must modify the following as necessary:

(a) The list of the facilities included in the program, by category and basin;

(b) Schedules and frequency of inspection for listed facilities. Facility inspections may be carried out in conjunction with other municipal programs (e.g. pretreatment inspections of industrial users, health inspections, fire inspections, etc.), but must include random inspections for facilities not normally visited by the municipality;

(c) The priorities for inspections and procedures used during inspections (e.g. inspection checklist, review for NPDES permit coverage; review of stormwater pollution prevention plan; etc.); and

(d) Monitoring frequency, parameters and entity performing monitoring and analyses (MS4 permittees or subject facility). The monitoring program may include a waiver of monitoring for parameters at individual facilities based on a “no-exposure” certification;

(v) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.d.(i) throughout Part I.D.5.d.(iv) and its corresponding measurable goal.

(vi) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Program Flexibility Elements:

(vii) The permittee may:

(a) Use analytical monitoring data, on a parameter-by-parameter basis, that a facility has collected to comply with or apply for a State or NPDES discharge permit (other than this permit), so as to avoid unnecessary cost and duplication of effort;

(b) Allow the facility to test only one (1) outfall and to report that the quantitative data also apply to the substantially identical outfalls if:

A. A Type 1 or Type 2 industrial facility has two (2) or more outfalls with substantially identical effluents, and

B. Demonstration by the facility that the stormwater outfalls are substantially identical, using one (1) or all of the following methods for such demonstration. The NPDES Stormwater Sampling Guidance Document (EPA 833-B-92-001), available on EPA’s website at provides detailed guidance on each of the three options: (1) submission of a narrative description and a site map; (2) submission of matrices; or (3) submission of model matrices.

(c) Accept a copy of a “no exposure” certification from a facility made to EPA under 40 CFR §122.26(g), in lieu of analytic monitoring.

Table 5: Industrial and High Risk Runoff - Program Development and Implementation Schedules:

Activity	Permittee Class	
	A Phase I MS4s	Cooperative (*) Any Permittee with cooperative programs
Ordinance (or other control method) as required in Part I.D.5.d.(i)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Continue implementation and enforcement of the Industrial and High Risk Runoff program, assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the annual report as required in Part I.D.5.d.(ii)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Meet the monitoring requirements in Part I.D.5.d.(iii)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Include requirements in Part I.D.5.d.(iv)	Ten (10) months from permit effective date of the permit	Twelve (12) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.d.(v) and Part I.D.5.d.(vi)	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.d.(vii)	Update as necessary	Update as necessary

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

e. Illicit Discharges and Improper Disposal

- (i) The permittee shall develop, revise, implement, and enforce a program to detect and eliminate illicit discharges (as defined at 40 CFR 122.26(b)(2)) entering the MS4. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The permittee must:
 - (a) Develop, if not already completed, a storm sewer system map, showing the names and locations of all outfalls as well as the names and locations of all waters of the United States that receive discharges from those outfalls. Identify all discharges points into major drainage channels draining more than twenty (20) percent of the MS4 area;
 - (b) To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance or other regulatory mechanism, non-stormwater discharges into the MS4, and implement appropriate enforcement procedures and actions;
 - (c) Develop and implement a plan to detect and address non-stormwater discharges, including illegal dumping, to the MS4. The permittee must include the following elements in the plan:
 - A. Procedures for locating priority areas likely to have illicit discharges including field test for selected pollutant indicators (ammonia, boron, chlorine, color, conductivity, detergents, *E. coli*, enterococci, total coliform, fluoride, hardness, pH, potassium, conductivity, surfactants), and visually screening outfalls during dry weather;

- B. Procedures for enforcement, including enforcement escalation procedures for recalcitrant or repeat offenders;
 - C. Procedures for removing the source of the discharge;
 - D. Procedures for program evaluation and assessment; and
 - E. Procedures for coordination with adjacent municipalities and/or state, tribal, or federal regulatory agencies to address situations where investigations indicate the illicit discharge originates outside the MS4 jurisdiction.
- (d) Develop an education program to promote, publicize, and facilitate public reporting of illicit connections or discharges, and distribution of outreach materials. The permittee shall inform public employees, businesses and the general public of hazards associated with illegal discharges and improper disposal of waste.
- (e) Establish a hotline to address complaints from the public.
- (f) Investigate suspected significant/severe illicit discharges within forty-eight (48) hours of detection and all other discharges as soon as practicable; elimination of such discharges as expeditiously as possible; and, requirement of immediate cessation of illicit discharges upon confirmation of responsible parties.
- (g) Review complaint records for the last permit term and develop a targeted source reduction program for those illicit discharge/improper disposal incidents that have occurred more than twice in two (2) or more years from different locations. (Applicable only to class A and B permittees)
- (h) If applicable, implement the program using the priority ranking develop during last permit term
- (ii) The permittee shall address the following categories of non-stormwater discharges or flows (e.g., illicit discharges) only if they are identified as significant contributors of pollutants to the MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(90)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water.
- Note:* Discharges or flows from fire fighting activities are excluded from the effective prohibitions against non-stormwater and need only be addressed where they are identified a significant sources of pollutants to water of the United States).
- (iii) The permittee must screen the entire jurisdiction at least once every five (5) years and high priority areas at least once every year. High priority areas include any area where there is ongoing evidence of illicit discharges or dumping, or where there are citizen complaints on more than five (5) separate events within twelve (12) months. The permittee must:
- (a) Include in its SWMP document a description of the means, methods, quality assurance and controls protocols, and schedule for successfully implementing the required screening, field monitoring, laboratory analysis, investigations, and analysis evaluation of data collected.
 - (b) Comply with the dry weather screening program established in Table 6 and the monitoring requirements specified in Part III.A.2.
 - (c) If applicable, implement the priority ranking system develop in previous permit term.

- (iv) Waste Collection Programs: The permittee must develop, update, and implement programs to collect used motor vehicle fluids (at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal, and to collect household hazardous waste materials (including paint, solvents, fertilizers, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. Where available, collection programs operated by third parties may be a component of the programs. Permittees shall enhance these programs by establishing the following elements as a goal in the SWMP:
 - A. Increasing the frequency of the collection days hosted;
 - B. Expanding the program to include commercial fats, oils and greases; and
 - C. Coordinating program efforts between applicable permittee departments.
- (v) Spill Prevention and Response. The permittee must develop, update and implement a program to prevent, contain, and respond to spills that may discharge into the MS4. The permittees must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit. The Spill Prevention and Response program shall include:
 - (a) Where discharge of material resulting from a spill is necessary to prevent loss of life, personal injury, or severe property damage, the permittee(s) shall take, or insure the party responsible for the spill takes, all reasonable steps to control or prevent any adverse effects to human health or the environment: and
 - (b) The spill response program may include a combination of spill response actions by the permittee (and/or another public or private entity), and legal requirements for private entities within the permittee's municipal jurisdiction.
- (vi) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.e.(i) throughout Part I.D.5.e.(v) and its corresponding measurable goal. A description of the means, methods, quality assurance and controls protocols, and schedule for successfully implementing the required screening, field monitoring, laboratory analysis, investigations, and analysis evaluation of data collected
- (vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.
- (viii) The permittee must expeditiously revise as necessary, within nine (9) months from the effective date of the permit, the existing permitting/certification program to ensure that any entity applying for the use of Right of Way implements controls in their construction and maintenance procedures to control pollutants entering the MS4. (Only applicable to NMDOT)

Program Flexibility Elements

- (ix) The permittee may:
 - (a) Divide the jurisdiction into assessment areas where monitoring at fewer locations would still provide sufficient information to determine the presence or absence of illicit discharges within the larger area;
 - (b) Downgrade high priority areas after the area has been screened at least once and there are citizen complaints on no more than five (5) separate events within a twelve (12) month period;
 - (c) Rely on a cooperative program with other MS4s for detection and elimination of illicit discharges and illegal dumping;

- (d) If participating in a cooperative program with other MS4s, required detection program frequencies may be based on the combined jurisdictional area rather than individual jurisdictional areas and may use assessment areas crossing jurisdictional boundaries to reduce total number of screening locations (e.g., a shared single screening location that would provide information on more than one jurisdiction); and
- (e) After screening a non-high priority area once, adopt an “in response to complaints only” IDDE for that area provided there are citizen complaints on no more than two (2) separate events within a twelve (12) month period.
- (f) Enhance the program to utilize procedures and methodologies consistent with those described in “Illicit Discharge Detection and Elimination, A Guidance Manual for Program Development and Technical Assessments.”

Table 6. Illicit Discharges and Improper Disposal - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census ***)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Mapping as required in Part I.D.5.e.(i)(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Fourteen (14) months from effective date of permit
Ordinance (or other control method) as required in Part I.D.5.e.(i)(b)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop and implement a IDDE plan as required in Part I.D.5.e.(i)(c)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop an education program as required in Part I.D.5.e.(i)(d)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Establish a hotline as required in Part I.D.5.e.(i)(e)	Update as necessary	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Investigate suspected significant/severe illicit discharges as required in Part I.D.5.e.(i)(f)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Review complaint records and develop a targeted source reduction program as required in Part I.D.5.e.(i)(g)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	N/A	N/A	One (1) year from effective date of permit

Screening of system as required in Part I.D.5.e.(iii) as follows: a.) High priority areas**	1 / year	1 / year	1 / year	1 / year	1 / year
b.) Whole system	-Screen 20% of the MS4 per year	- Screen 20% of the MS4 per year	-Years 1 – 2: develop procedures as required in Part I.D.5.e.(i)(c) -Year 3: screen 30% of the MS4 -Year 4: screen 20% of the MS4 -Year 5: screen 50% of the MS4	-Years 1 – 2: develop procedures as required Part I.D.5.e.(i)(c) -Year 3: screen 30% of the MS4 -Year 4: screen 20% of the MS4 -Year 5: screen 50% of the MS4	-Years 1 – 3: develop procedures as require in Part I.D.5.e.(i)(c) -Year 4: screen 30% of the MS4 -Year 5: screen 70% of the MS4
Develop, update, and implement a Waste Collection Program as required in Part I.D.5.e.(iv)	Ten (10) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop, update and implement a Spill Prevention and Response program to prevent, contain, and respond to spills that may discharge into the MS4 as required in Part I.D.5.e.(v)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.e.(iii), Part I.D.5.e.(vi), and Part I.D.5.e.(vii).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.e.(ix)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.

(**) High priority areas include any area where there is ongoing evidence of illicit discharges or dumping, or where there are citizen complaints on more than five (5) separate events within twelve (12) months (***) or MS4s designated by the Director

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

f. Control of Floatables Discharges

- (i) The permittee must develop, update, and implement a program to address and control floatables in discharges into the MS4. The floatables control program shall include source controls and, where necessary, structural controls. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The following elements must be included in the program:

- (a) Develop a schedule for implementation of the program to control floatables in discharges into the MS4 (Note: AMAFCA and the City of Albuquerque should update the schedule according to the findings of the 2005 AMAFCA/COA Floatable and Gross Pollutant Study and other studies); and
 - (b) Estimate the annual volume of floatables and trash removed from each control facility and characterize the floatable type.
- (ii) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.f.(i).
- (iii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Table 7. Control of Floatables Discharges - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
- Develop a schedule to implement the program as required in Part I.D.5.f.(i)(a)	Ten (10) months from the effective date of the permit	Ten (10) months from the effective date of the permit	One (1) year from the effective date of the permit	One (1) year from the effective date of the permit	Eighteen (18) months from the effective date of the permit
-Estimate the annual volume of floatables and trash removed from each control facility and characterize the floatable type as required in Part I.D.5.f.(i)(b)	Ten (10) months from the effective date of the permit	One (1) year from the effective date of the permit	Two (2) years from the effective date of the permit	Two (2) years from the effective date of the permit	Thirty (30) months from the effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.f.(ii) and Part I.D.5.f.(iii).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.

(**) or MS4s designated by the Director

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

g. Public Education and Outreach on Stormwater Impacts

- (i) The permittee shall, individually or cooperatively, develop, revise, implement, and maintain a comprehensive stormwater program to educate the community, employees, businesses, and the general public of hazards associated with the illegal discharges and improper disposal of waste and about the impact that stormwater discharges on local waterways, as well as the steps that the public can take to reduce pollutants in stormwater. **Permittees previously covered under NMS000101 and NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.**
- (ii) The permittee must implement a public education program to distribute educational knowledge to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff. The permittee must:

- (a) Define the goals and objectives of the program based on high priority community-wide issues;
 - (b) Develop or utilize appropriate educational materials, such as printed materials, billboard and mass transit advertisements, signage at select locations, radio advertisements, television advertisements, and websites;
 - (c) Inform individuals and households about ensuring proper septic system maintenance, ensuring the proper use and disposal of landscape and garden chemicals including fertilizers and pesticides, protecting and restoring riparian vegetation, and properly disposing of used motor oil or household hazardous wastes;
 - (d) Inform individuals and groups how to become involved in local stream and beach restoration activities as well as activities that are coordinated by youth service and conservation corps or other citizen groups;
 - (e) Use tailored public education program, using a mix of locally appropriate strategies, to target specific audiences and communities. Examples of strategies include distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age children, and conducting community-based projects such as storm drain stenciling, and watershed cleanups; and
 - (f) Use materials or outreach programs directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant stormwater impacts. For example, providing information to restaurants on the impact of grease clogging storm drains and to garages on the impact of oil discharges. The permittee may tailor the outreach program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as any special concerns relating to children. The permittee must make information available for non-English speaking residents, where appropriate.
- (iii) The permittee must include the following information in the Stormwater Management Program (SWMP) document:
- (a) A description of a program to promote, publicize, facilitate public reporting of the presence of illicit discharges or water quality associated with discharges from municipal separate storm sewers;
 - (b) A description of the education activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and
 - (c) A description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.g.(i) and Part I.D.5.g.(ii) and its corresponding measurable goal.
- (iv) The permittee must assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the Annual Report.

Program Flexibility Elements

- (v) Where necessary to comply with the Minimum Control Measures established in Part I.D.5.g.(i) and Part I.D.5.g.(ii), the permittee should develop a program or modify/revise an existing education and outreach program to:
 - (a) Promote, publicize, and facilitate the use of Green Infrastructure (GI)/Low Impact Development (LID)/Sustainability practices; and
 - (b) Include an integrated public education program (including all permittee departments and programs within the MS4) regarding litter reduction, reduction in pesticide/herbicide use, recycling and proper

disposal (including yard waste, hazardous waste materials, and used motor vehicle fluids), and GI/LID/Sustainable practices (including xeriscaping, reduced water consumption, water harvesting practices allowed by the New Mexico State Engineer Office).

- (vi) The permittee may collaborate or partner with other MS4 operators to maximize the program and cost effectiveness of the required outreach.
- (vii) The education and outreach program may use citizen hotlines as a low-cost strategy to engage the public in illicit discharge surveillance.
- (viii) The permittee may use stormwater educational materials provided by the State, Tribe, EPA, environmental, public interest or trade organizations, or other MS4s. The permittee may also integrate the education and outreach program with existing education and outreach programs in the Middle Rio Grande area. Example of existing programs include:
 - (a) Classroom education on stormwater;
 - A. Develop watershed map to help students visualize area impacted.
 - B. Develop pet-specific education
 - (b) Establish a water committee/advisor group;
 - (c) Contribute and participate in Stormwater Quality Team;
 - (d) Education/outreach for commercial activities;
 - (e) Hold regular employee trainings with industry groups
 - (f) Education of lawn and garden activities;
 - (g) Education on sustainable practices;
 - (h) Education/outreach of pet waste management;
 - (i) Education on the proper disposal of household hazardous waste;
 - (j) Education/outreach programs aimed at minority and disadvantaged communities and children;
 - (k) Education/outreach of trash management;
 - (l) Education/outreach in public events;
 - A. Participate in local events—brochures, posters, etc.
 - B. Participate in regional events (i.e., State Fair, Balloon Fiesta).
 - (m) Education/outreach using the media (e.g. publish local newsletters);
 - (n) Education/outreach on water conservation practices designed to reduce pollutants in storm water for home residences.

Table 8. Public Education and Outreach on Stormwater Impacts - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Develop, revise, implement, and maintain an education and outreach program as required in Part I.D.5.g.(i) and Part I.D.5.g.(ii)	Ten (10) months from the effective date of the permit	Eleven (11) months from the effective date of the permit	Twelve (12) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.g.(iii) and Part I.D.5.g.(iv)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.g.(v) through Part I.D.5.g.(viii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.

(**) or MS4s designated by the Director

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

h. Public Involvement and Participation

- (i) The permittee must provide local public notice of and make available for public review a copy of the complete NOI and attachments (see Part I.B.2). Local public notice may be made by newspaper notice, notice at a council meeting, posting on the internet, or other method consistent with state/tribal/local public notice requirements.

The permittee must consider all public comments received during the public notice period and modify the NOI, or include a schedule to modify the SWMP, as necessary, or as required by the Director modify the NOI or/and SWMP in response to such comments. The Permittees must include in the NOI any unresolved public comments and the MS4's response to these comments. Responses provided by the MS4 will be considered as part of EPA's decision-making process. See also Appendix E Providing Comments or Requesting a Public Hearing on an Operator's NOI.

- (ii) The permittee shall develop, revise, implement and maintain a plan to encourage public involvement and provide opportunities for participation in the review, modification and implementation of the SWMP; develop and implement a process by which public comments to the plan are received and reviewed by the person(s) responsible for the SWMP; and, make the SWMP available to the public and to the operator of any MS4 or Tribal authority receiving discharges from the MS4. **Permittee previously covered under NMS000101 or NMR040000 must continue existing public involvement and participation programs while updating those programs, as necessary, to comply with the requirements of this permit.**

- (iii) The plan required in Part I.D.5.h.(ii) shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The permittee must include the following elements in the plan:
 - (a) A detailed description of the general plan for informing the public of involvement and participation opportunities, including types of activities; target audiences; how interested parties may access the SWMP; and how the public was involved in development of the SWMP;
 - (b) The development and implementation of at least one (1) assessment of public behavioral change following a public education and/or participation event;
 - (c) A process to solicit involvement by environmental groups, environmental justice communities, civic organizations or other neighborhoods/organizations interested in water quality-related issues, including but not limited to the Middle Rio Grande Water Quality Work Group, the Middle Rio Grande Bosque Initiative, the Middle Rio Grande Endangered Species Act Collaborative Program, the Middle Rio Grande-Albuquerque Reach Watershed Group, the Pueblos of Santa Ana, Sandia and Isleta, Albuquerque Bernalillo County Water Utility Authority, UNM Colleges and Schools, and Chartered Student Organizations; and
 - (d) An evaluation of opportunities to utilize volunteers for stormwater pollution prevention activities and awareness throughout the area.
- (iv) The permittee shall comply with State, Tribal and local public notice requirements when implementing a public involvement/ participation program.
- (v) The public participation process must reach out to all economic and ethnic groups. Opportunities for members of the public to participate in program development and implementation include serving as citizen representatives on a local stormwater management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other pre-existing programs, or participating in volunteer monitoring efforts.
- (vi) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Parts I.D.5.h.(i) throughout Part I.D.5.h.(iv) and its corresponding measurable goal.
- (vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.
- (viii) The permittee must provide public accessibility of the Storm Water Management Program (SWMP) document and Annual Reports online via the Internet and during normal business hours at the MS4 operator's main office, a local library, posting on the internet and/or other readily accessible location for public inspection and copying consistent with any applicable federal, state, tribal, or local open records requirements. Upon a showing of significant public interest, the MS4 operator is encouraged to hold a public meeting (or include in the agenda of in a regularly scheduled city council meeting, etc.) on the NOI, SWMP, and Annual Reports. (See Part III B)

Program Flexibility Elements

- (ix) The permittee may integrate the public Involvement and participation program with existing education and outreach programs in the Middle Rio Grande area. Example of existing programs include: Adopt-A-Stream Programs; Attitude Surveys; Community Hotlines (e.g. establishment of a "311"-type number and system established to handle storm-water-related concerns, setting up a public tracking/reporting

system, using phones and social media); Revegetation Programs; Storm Drain Stenciling Programs; Stream cleanup and Monitoring program/events.

Table 9. Public Involvement and Participation - *Program Development and Implementation Schedules*

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Develop (or update), implement, and maintain a public involvement and participation plan as required in Part I.D.5.h.(ii) and Part I.D.5.h.(iii)	Ten (10) months from effective date of the permit	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit
Comply with State, Tribal, and local notice requirements when implementing a Public Involvement and Participation Program as required in Part I.D.5.h.(iv)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	Twelve (12) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit
Include elements as required in Part I.D.5.h.(v)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit	One (1) year from effective date of the permit	Eighteen (18) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.h.(vi), Part I.D.5.h.(vii), and Part I.D.5.h.(viii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.h.(ix)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.

(**) or MS4s designated by the Director

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

6. Stormwater Management Program Review and Modification.

- a. **Program Review.** Permittee shall participate in an annual review of its SWMP in conjunction with preparation of the annual report required in Part III.B. Results of the review shall be discussed in the annual report and shall include an assessment of:
 - (i) SWMP implementation, progress in achieving measurable goals, and compliance with program elements and other permit conditions;
 - (ii) the effectiveness of its SWMP, and any necessary modifications, in complying with the permit, including requirements to control the discharge of pollutants, and comply with water quality standards and any applicable approved TMDLs; and the adequacy of staff, funding levels, equipment, and support capabilities to fully implement the SWMP and comply with permit conditions.

- (a) Project staffing requirements, in man hours, for the implementation of the MS4 program during the upcoming year.
 - (b) Staff man hours used during the previous year for implementing the MS4 program. Man hours may be estimated based on staff assigned, assuming a forty (40) hour work week.
- b. Program Modification. The permittee(s) may modify its SWMP with prior notification or request to the EPA and NMED in accordance with this section.
 - (i) Modifications adding, but not eliminating, replacing, or jeopardizing fulfillment of any components, controls, or requirements of its SWMP may be made by the permittee(s) at any time upon written notification to the EPA.
 - (ii) Modifications replacing or eliminating an ineffective or unfeasible component, control or requirement of its SWMP, including monitoring and analysis requirements described in Parts III.A and V, may be requested in writing at any time. If request is denied, the EPA will send a written explanation of the decision. Modification requests shall include the following:
 - (a) a description of why the SWMP component is ineffective, unfeasible (including cost prohibitions), or unnecessary to support compliance with the permit;
 - (b) expectations on the effectiveness of the proposed replacement component; and
 - (c) an analysis of how the proposed replacement component is expected to achieve the goals of the component to be replaced.
 - (iii) Modifications resulting from schedules contained in Part VI may be requested following completion of an interim task or final deadline.
 - (iv) Modification requests or notifications shall be made in writing, signed in accordance with Part IV.H.
- c. Program Modifications Required by EPA. Modifications requested by EPA shall be made in writing, set forth the time schedule for the permittee(s) to develop the modifications, and offer the permittee(s) the opportunity to propose alternative program modifications to meet the objective of the requested modification. The EPA may require changes to the SWMP as needed to:
 - (i) Address impacts on receiving water quality caused, or contributed to, by discharges from the MS4;
 - (ii) Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements;
 - (iii) Include such other conditions deemed necessary by the EPA to comply with the goals and requirements of the Clean Water Act; or
 - (iv) If, at any time, EPA determines that the SWMP does not meet permit requirements.
- d. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation: The permittee(s) shall implement the SWMP:
 - (i) On all new areas added to their portion of the MS4 (or for which they become responsible for implementation of stormwater quality controls) as expeditiously as possible, but not later than one (1) year from addition of the new areas. Implementation may be accomplished in a phased manner to allow additional time for controls that cannot be implemented immediately;

- (ii) Within ninety (90) days of a transfer of ownership, operational authority, or responsibility for SWMP implementation, the permittee(s) shall have a plan for implementing the SWMP on all affected areas. The plan may include schedules for implementation; and information on all new annexed areas and any resulting updates required to the SWMP shall be submitted in the annual report.
7. **Retention of Program Records.** The permittee shall retain SWMP records developed in accordance with Part I.D, Part IV.P, and Part VI for at least five (5) years after coverage under this permit terminates.
 8. **Qualifying State, Tribal or Local Program.** The permittee may substitute the BMPs and measurable goals of an existing storm water pollution control program to qualify for compliance with one or more of the minimum control measures if the existing measure meets the requirements of the minimum control measure as established in Part I.D.5

PART II. NUMERIC DISCHARGE LIMITATIONS

A. DISCHARGE LIMITATIONS. Reserved

PART III. MONITORING, ASSESSMENT, AND REPORTING REQUIREMENTS:

A. MONITORING AND ASSESSMENT

The permittee must develop, in consultation with NMED and EPA (and affected Tribes if monitoring locations would be located on Tribal lands), and implement a comprehensive monitoring and assessment program designed to meet the following objectives:

- Assess compliance with this permit;
- Assess the effectiveness of the permittee's stormwater management program;
- Assess the impacts to receiving waters resulting from stormwater discharges;
- Characterize stormwater discharges;
- Identify sources of elevated pollutant loads and specific pollutants;
- Detect and eliminate illicit discharges and illegal connections to the MS4; and
- Assess the overall health and evaluate long-term trends in receiving water quality.

The permittee shall select specific monitoring locations sufficient to assess effects of storm water discharges on receiving waters. The monitoring program may take advantage of monitoring stations/efforts utilized by the permittees or others in previous stormwater monitoring programs or other water quality monitoring efforts. Data collected by others at such stations may be used to satisfy part, or all, of the permit monitoring requirements provided the data collection by that party meets the requirements established in Part III.A.1 throughout Part III.A.5. The comprehensive monitoring and assessment program shall be described in the SWMP document and the results must be provided in each annual report.

Implementation of the comprehensive monitoring and assessment program may be achieved through participation with other permittees to satisfy the requirements of Part III.A.1 throughout Part III.A.5 below in lieu of creating duplicate program elements for each individual permittee.

1. **Wet Weather Monitoring:** The permittees shall conduct wet weather monitoring to gather information on the response of receiving waters to wet weather discharges from the MS4 during both wet season (July 1 through October 31) and dry Season (November 1 through June 30). Wet Weather Monitoring shall be conducted at outfalls, internal sampling stations, and/or in-stream monitoring locations at each water of the US that runs in each entity or entities' jurisdiction(s). Permittees may choose either Option A or Option B below:
 - a. *Option A:* Individual monitoring
 - (i) Class A: Perform wet weather monitoring at a location coming into the MS4 jurisdictional area (upstream) and leaving the MS4 jurisdictional area (downstream), see Appendix D. Monitor for TSS, TDS, COD, BOD₅, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and gross alpha. Monitoring of temperature shall be also conducted at outfalls and/or Rio Grande monitoring locations. Phase I permittees must include additional parameters from monitoring conducted under permit NMS000101 (from last 10 years) whose mean values are at or above a WQS. Permittee must sample these pollutants a minimum of 10 events during the permit term with at least 5 events in wet season and 4 events in dry season.
 - (ii) Class B, C, and D: Perform wet weather monitoring at a location coming into the MS4 jurisdictional area (upstream) and leaving the MS4 jurisdictional area (downstream), see Appendix D. Monitor for TSS, TDS, COD, BOD₅, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and gross alpha. Monitoring of temperature shall be also

conducted at outfalls and/or Rio Grande monitoring locations. If applicable, include additional parameters from monitoring conducted under permits NMR040000 or/and NMR04000I whose mean values are at or above a WQS; sample these pollutants a minimum of 8 events per location during the permit term with at least 4 events in wet season and 2 events in dry season.

b. *Option B: Cooperative Monitoring Program*

Develop a cooperative wet weather monitoring program with other permittees in the Middle Rio Grande watershed (see map in Appendix A). The program will monitor waters coming into the watershed (upstream) and leaving the watershed (downstream), see suggested sampling locations in Appendix D. The program must include sampling for TSS, TDS, COD, BOD5, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and Gross alpha. Monitoring of temperature shall be also conducted at outfalls and/or Rio Grande monitoring locations. Permittees must include additional parameters from monitoring conducted under permits NMS000101, NMR040000 or/and NMR04000I whose mean values are at or above a WQS. The monitoring program must sample the pollutants for a minimum of 7 storm events per location during the permit term with at least 3 events wet season and 2 events in dry season.

Note: Seasonal monitoring periods are: Wet Season: July 1 through October 31; Dry Season: November 1 through June 30.

- c. Wet weather monitoring shall be performed only when the predicted (or actual) rainfall magnitude of a storm event is greater than 0.25 inches and an antecedent dry period of at least forty-eight (48) hours after a rain event greater than 0.1 inch in magnitude is satisfied. Monitoring methodology will consist of collecting a minimum of four (4) grab samples spaced at a minimum interval of fifteen (15) minutes each (or a flow weighted automatic composite, see Part III.A.5.a.(i)). Individual grab samples shall be preserved and delivered to the laboratory where samples will be combined into a single composite sample from each monitoring location.
- d. Monitoring methodology at each MS4 monitoring location shall be collected during any portion of the monitoring location's discharge hydrograph (i.e. first flush, rising limb, peak, and falling limb) after a discernible increase in flow at the tributary inlet.
- e. The permittee must comply with the schedules contained in Table 10. The results of the Wet Weather Monitoring must be provided in each annual report.
- f. DO, pH, conductivity, and temperature shall be analyzed in the field within fifteen (15) minutes of sample collection.
- g. Alternate wet weather monitoring locations established in Part III.A.1.a or Part III.A.1.b may be substituted for just cause during the term of the permit. Requests for approval of alternate monitoring locations shall be made to the EPA and NMED in writing and include the rationale for the requested monitoring station relocation. Unless disapproved by the EPA, use of an alternate monitoring location (except for those with numeric effluent limitations) may commence thirty (30) days from the date of the request. For monitoring locations where numeric effluent limitations have been established, the permit must be modified prior to substitution of alternate monitoring locations. At least six (6) samples shall be collected during the first year of monitoring at substitute monitoring locations. If there are less than six sampleable events, this should be document for reporting purposes.

- h. Response to monitoring results: The monitoring program must include a contingency plan for collecting additional monitoring data within the MS4 or at additional appropriate instream locations should monitoring results indicate that MS4 discharges may be contributing to instream exceedances of WQS. The purpose of this additional monitoring effort would be to identify sources of elevated pollutant loadings so they could be addressed by the SWMP.

Table 10. Wet Weather Monitoring Program Implementation Schedules:

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Submit wet weather monitoring preference to EPA (i.e., individual monitoring program vs. cooperative monitoring program) with NOI submittals	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)
Submit a detailed description of the monitoring scheme to EPA and NMED for approval. The monitoring scheme should include: a list of pollutants; a description of monitoring sites with an explanation of why those sites were selected; and a detailed map of all proposed monitoring sites	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Twelve (12) months from effective date of permit
Submit certification that all wet weather monitoring sites are operational and begin sampling	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Thirteen (13) months from effective date of permit	Thirteen (13) months from effective date of permit	Fourteen (14) months from effective date of permit
Update SWMP document and submit annual reports	Annually	Annually	Annually	Annually	Annually

() or MS4s designated by the Director**

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

2. **Dry Weather Discharge Screening of MS4:** Each permittee shall identify, investigate, and address areas within its jurisdiction that may be contributing excessive levels of pollutants to the Municipal Separate Storm Sewer System as a result of dry weather discharges (i.e., discharges from separate storm sewers that occur without the direct influence of runoff from storm events, e.g. illicit discharges, allowable non-stormwater, groundwater infiltration, etc.). Due to the arid and semi-arid conditions of the area, the dry weather discharges screening program may be carried out during both wet season (July 1 through October 31) and dry Season (November 1 through June 30). Results of the assessment

shall be provided in each annual report. This program may be coordinated with the illicit discharge detection and elimination program required in Part I.D.5.e. The dry weather screening program shall be described in the SWMP and comply with the schedules contained in Part I.D.5.e.(iii). The permittee shall

- a. Include sufficient screening points to adequately assess pollutant levels from all areas of the MS4.
- b. Screen for, at a minimum, BOD₅, sediment or a parameter addressing sediment (e.g., TSS or turbidity), E. coli, Oil and Grease, nutrients, any pollutant that has been identified as cause of impairment of a waterbody receiving discharges from that portion of the MS4, including temperature.
- c. Specify the sampling and non-sampling techniques to be issued for initial screening and follow-up purposes. Sample collection and analysis need not conform to the requirements of 40 CFR Part 136; and
- d. Perform monitoring only when an antecedent dry period of at least seventy-two (72) hours after a rain event greater than 0.1 inch in magnitude is satisfied. Monitoring methodology shall consist of collecting a minimum of four (4) grab samples spaced at a minimum interval of fifteen (15) minutes each. Grab samples will be combined into a single composite sample from each station, preserved, and delivered to the laboratory for analysis. A flow weighted automatic composite sample may also be used.

3. Floatable Monitoring: The permittees shall establish locations for monitoring/assessing floatable material in discharges to and/or from their MS4. Floatable material shall be monitored at least twice per year at priority locations and at minimum of two (2) stations except as provided in Part III.A.3. below. The amount of collected material shall be estimated in cubic yards.

- a. One (1) station should be located in the North Diversion (only applicable to the COA and AMAFCA).
- b. Non-traditional MS4 as defined in Part VII shall sample/assess at one (1) station.
- c. Phase II MS4s shall sample/assess at one (1) station within their jurisdiction or participate in a cooperative floatable monitoring plan addressing impacts on perennial waters of the US on a larger watershed basis.

A cooperative monitoring program may be established in partnership with other MS4s to monitor and assess floatable material in discharges to and/or from a joint jurisdictional area or watershed basis.

4. Industrial and High Risk Runoff Monitoring (Applicable only to Class A permittees): The permittees shall monitor stormwater discharges from Type 1 and 2 industrial facilities which discharge to the MS4 provided such facilities are located in their jurisdiction. (Note: if no such facilities are in the permittee's jurisdiction, the permittee must certify that this program element does not apply). The permittee shall:

- a. Conduct analytical monitoring of Type 1 facilities that discharge to the MS4. Type 1 facilities are municipal landfills; hazardous waste treatment, disposal and recovery facilities; facilities that are subject to EPCRA Title III, Section 313; and industrial facilities the permittee(s) determines are contributing a substantial pollutant loading to the MS4.
 - (i) The following parameters shall be monitored:
 - any pollutants limited in an existing NPDES permit to a subject facility;

- oil and grease;
 - chemical oxygen demand (COD);
 - pH;
 - biochemical oxygen demand, five-day (BOD₅);
 - total suspended solids (TSS);
 - total phosphorous;
 - total Kjeldahl nitrogen (TKN);
 - nitrate plus nitrite nitrogen;
 - any discharge information required under 40 CFR §122.21(g)(7)(iii) and (iv);
 - total cadmium;
 - total chromium;
 - total copper;
 - total lead;
 - total nickel;
 - total silver;
 - total zinc; and,
 - PCBs.
- (ii) Frequency of monitoring shall be established by the permittee(s), but may not be less than once per year;
- (iii) In lieu of the above parameter list, the permittee(s) may alter the monitoring requirement for any individual Type 1 facility:
- (a) To coincide with the corresponding industrial sector-specific monitoring requirements of the 2008 Multi-Sector General Stormwater Permit or any applicable general permit issued after September 2008. This exception is not contingent on whether a particular facility is actually covered by the general permit; or
 - (b) To coincide with the monitoring requirements of any individual permit for the stormwater discharges from that facility, and
 - (c) Any optional monitoring list must be supplemented by pollutants of concern identified by the permittee(s) for that facility.
- b. Conduct appropriate monitoring (e.g. analytic, visual), as determined by the permittee(s), at Type 2 facilities that discharge to the MS4. Type 2 facilities are other municipal waste treatment, storage, or disposal facilities (e.g. POTWs, transfer stations, incinerators) and industrial or commercial facilities the permittee(s) believed contributing pollutants to the MS4. The permittee shall include in each annual report, a list of parameters of concern and monitoring frequencies required for each type of facility.**
- c. May use analytical monitoring data, on a parameter-by-parameter basis, that a facility has collected to comply with or apply for a State or NPDES discharge permit (other than this permit), so as to avoid unnecessary cost and duplication of effort;
- d. May allow the facility to test only one (1) outfall and to report that the quantitative data also apply to the substantially identical outfalls if:
- (i) A Type 1 or Type 2 industrial facility has two (2) or more outfalls with substantially identical effluents, and

- (ii) Demonstration by the facility that the stormwater outfalls are substantially identical, using one (1) or all of the following methods for such demonstration. The NPDES Stormwater Sampling Guidance Document (EPA 833-B-92-001), available on EPA's website at provides detailed guidance on each of the three options: (1) submission of a narrative description and a site map; (2) submission of matrices; or (3) submission of model matrices.
- b. May accept a copy of a "no exposure" certification from a facility made to EPA under 40 CFR §122.26(g), in lieu of analytic monitoring.

5. **Additional Sample Type, Collection and Analysis:**

- a. **Wet Weather (or Storm Event) Discharge Monitoring:** If storm event discharges are collected to meet the objectives of the Comprehensive Monitoring and Assessment Program required in Part III.A (e.g., assess compliance with this permit; assess the effectiveness of the permittee's stormwater management program; assess the impacts to receiving waters resulting from stormwater discharges), the following requirements apply:
 - (i) **Composite Samples:** Flow-weighted composite samples shall be collected as follows:
 - (a) **Composite Method –** Flow-weighted composite samples may be collected manually or automatically. For both methods, equal volume aliquots may be collected at the time of sampling and then flow-proportioned and composited in the laboratory, or the aliquot volume may be collected based on the flow rate at the time of sample collection and composited in the field.
 - (b) **Sampling Duration –** Samples shall be collected for at least the first three (3) hours of discharge. Where the discharge lasts less than three (3) hours, the permittee should report the value. .
 - (c) **Aliquot Collection –** A minimum of three (3) aliquots per hour, separated by at least fifteen (15) minutes, shall be collected. Where more than three (3) aliquots per hour are collected, comparable intervals between aliquots shall be maintained (e.g. six aliquots per hour, at least seven (7) minute intervals).
 - (ii) **Grab Samples:** Grab samples shall be taken during the first two (2) hours of discharge.
- b. **Analytical Methods:** Analysis and collection of samples shall be done in accordance with the methods specified at 40 CFR §136. Where an approved 40 CFR §136 method does not exist, any available method may be used unless a particular method or criteria for method selection (such as sensitivity) has been specified in the permit. The minimum quantification levels (MQLs) in Appendix F are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

Screening level tests may utilize less expensive "field test kits" using test methods not approved by EPA under 40 CFR 136, provided the manufacturers published detection ranges are adequate for the illicit discharge detection purposes.

EPA Method 1668 shall be utilized when PCB water column monitoring is conducted to determine compliance with permit requirements. For purposes of sediment sampling in dry weather as part of a screening program to identify area(s) where PCB control/clean-up efforts may need to be focused, either the Arochlor test (EPA Method 8082) or USGS test method (8093) may be utilized, but must use EPA Method 1668 (latest revision) for confirmation and determination of specific PCB levels at that location.

EPA Method 900.0 shall be utilized when gross alpha water column monitoring is conducted to determine compliance with permit requirements.

B. ANNUAL REPORT

The permittees shall submit an annual report to be submitted by no later than **December 1st**. See suggested form at <http://epa.gov/region6/water/npdes/sw/ms4/index.htm>. The report shall cover the previous year from **July 1st to June 30rd** and include the below separate sections. Additionally, the year one (1) and year four (4) annual report shall include submittal of a complete SWMP revision.

At least forty five (45) days prior to submission of each Annual Report, the permittee must provide public notice of and make available for public review and comment a draft copy of the Annual Report. All public input must be considered in preparation of the final Annual Reports and any changes to the SWMP.

Note: A complete copy of the signed Annual Report should be maintained on site.

1. **SWMP(s) status of implementation:** shall include the status of compliance with all schedules established under this permit and the status of actions required in Parts I, III, and VI.
2. **SWMP revisions:** shall include revisions, if necessary, to the assessments of controls or BMPs reported in the permit application (or NOI for coverage under this permit) under 40 CFR §122.26(d)(2)(v) and §122.34(d)(1)(i) are to be included, as well as a cumulative list of all SWMP revisions during the permit term.

Class A permittees shall include revisions, if necessary, to the fiscal analysis reported in the permit application (or NOI for coverage under this permit) under §122.26(d)(2)(vi).

3. **Performance assessment:** shall include:
 - a. an assessment of performance in terms of measurable goals, including, but not limited to, a description of the number and nature of enforcement actions and inspections, public education and public involvement efforts;
 - b. a summary of the data, including monitoring data, that is accumulated throughout the monitoring year (July 1 to June 30); actual values of representative monitoring results shall be included, if results are above minimum quantification level (MQL); and
 - c. an identification of water quality improvements or degradation.
4. **Annual expenditures:** for the reporting period, with a breakdown for the major elements of the stormwater management program and the budget for the year following each annual report. (Applicable only to Class A permittees)
5. **Annual Report Responsibilities for Cooperative Programs:** preparation of a system-wide report with cooperative programs may be coordinated among cooperating MS4s and then used as part of individual Annual Reports. The report of a cooperative program element shall indicate which, if any, permittee(s) have failed to provide the required information on the portions of the MS4 for which they are responsible to the cooperation permittees.
 - a. Joint responsibility for reports covering cooperative programs elements shall be limited to participation in preparation of the overview for the entire system and inclusion of the identity of any permittee who failed to provide input to the annual report.

- b. Individual permittees shall be individually responsible for content of the report relating to the portions of the MS4 for which they are responsible and for failure to provide information for the system-wide annual report no later than July 31st of each year.
6. **Public Review and Comment:** a brief summary of any issues raised by the public on the draft Annual Report, along with permittee's responses to the public comments.
7. **Signature on Certification of Annual Reports:** The annual report shall be signed and certified, in accordance with Part IV.H and include a statement or resolution that the permittee's governing body or agency (or delegated representative) has reviewed or been apprised of the content of the Annual Report. Annual report shall be due no later than December 1st of each year. A complete copy of the signed Annual Report should be maintained on site.

C. CERTIFICATION AND SIGNATURE OF RECORDS.

All reports required by the permit and other information requested by the EPA shall be signed and certified in accordance with Part IV.H.

D. REPORTING: WHERE AND WHEN TO SUBMIT

1. Monitoring results (Part III.A.1, Part III.A.3, Part III.A.5.a) obtained during the reporting period running from July 1st to June 30th shall be submitted on discharge monitoring report (DMR) forms along with the annual report required by Part III.B. A separate DMR form is required for each monitoring period (season) specified in Part III.A.1. If any individual analytical test result is less than the minimum quantification level (MQL) listed for that parameter, then a value of zero (0) may be used for that test result for the discharge monitoring report (DMR) calculations and reporting requirements. The annual report shall include the actual value obtained, if test result is less than the MQL (See Appendix F).
2. Signed copies of DMRs required under Part III, the Annual Report required by Part III.B, and all other reports required herein, shall be submitted in electronic form to R6_MS4Permits@epa.gov (note: there is an underscore between R6 and MS4).

Copy of a suggested Annual Report Format is located in EPA R6 website:
<http://epa.gov/region6/water/npdes/sw/ms4/index.htm>.

Electronic submittal of the documents required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

3. Requests for SWMP updates, modifications in monitoring locations, or application for an individual permit shall, be submitted to,:

U.S. EPA, Region 6
Water Quality Protection Division
Operations Support Office (6WQ-O)
1445 Ross Avenue
Dallas, Texas 75202-2733

4. Additional Notification. Permittee(s) shall also provide copies of NOIs, DMRs, annual reports, NOTs, requests for SWMP updates, items for compliance with permit requirements for Compliance with Water Quality Standards in Part I.C.1, TMDL's reports established in Part I.C.2, monitoring scheme, reports, and certifications required in Part III.A.1, programs or changes in monitoring locations, and all other reports required herein, to:

New Mexico Environment Department
Attn: Bruce Yurdin, Program Manager
Surface Water Quality Bureau
Point Source Regulation Section
P.O. Box 5469
Santa Fe, New Mexico 87502

Pueblo of Sandia Environment Department
Attn: Scott Bulgrin, Water Quality Manager
481 Sandia Loop
Bernalillo, NM 87004

(Note: Only those MS4s with discharges upstream of or to waters under the jurisdictional of the Pueblo of Sandia: AMAFCA, Sandoval County, Village of Corrales, City of Rio Rancho, Town of Bernalillo, SSCAFCA, and ESCAFCA)

Pueblo of Isleta
Attn: Ramona M. Montoya, Environment Division Manager
P.O. Box 1270
Isleta NM 87022

(Notes: Only the City of Albuquerque, Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA), New Mexico Department of Transportation (NMDOT) District 3, KAFB (Kirtland Air Force Base), Sandia Labs (DOE), and Bernalillo County). All parties submitting an NOI or NOT shall notify the Pueblo of Isleta in writing that a NOI or NOT has been submitted to EPA

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

(Note: Only those MS4s with discharges upstream of or to waters under the jurisdictional of the Pueblo of Santa Ana)

PART IV. STANDARD PERMIT CONDITIONS

A. DUTY TO COMPLY.

The permittee(s) must comply with all conditions of this permit insofar as those conditions are applicable to each permittee, either individually or jointly. Any permit noncompliance constitutes a violation of the Clean Water Act (The Act) and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

B. PENALTIES FOR VIOLATIONS OF PERMIT CONDITIONS.

The EPA will adjust the Civil and administrative penalties listed below in accordance with the Civil Monetary Penalty Inflation Adjustment Rule (Federal Register: Dec. 31, 1996, Volume 61, No. 252, pages 69359-69366, as corrected, March 20, 1997, Volume 62, No. 54, pages 13514-13517) as mandated by the Debt Collection Improvement Act of 1996 for inflation on a periodic basis. This rule allows EPA's penalties to keep pace with inflation. The Agency is required to review its penalties at least once every four years thereafter and to adjust them as necessary for inflation according to a specified formula. The civil and administrative penalties listed below were adjusted for inflation starting in 1996.

1. Criminal Penalties.

- a. **Negligent Violations:** The Act provides that any person who negligently violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one (1) year, or both.
- b. **Knowing Violations:** The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than three (3) years, or both.
- c. **Knowing Endangerment:** The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act and who knows at that time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than \$250,000, or by imprisonment for not more than fifteen (15) years, or both.
- d. **False Statement:** The Act provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than two (2) years, or by both. If a conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than four (4) years, or by both. (See Section 309(c)(4) of the Act).

2. Civil Penalties. The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed \$27,500 per day for each violation.

3. Administrative Penalties. The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to an administrative penalty, as follows:

- a. **Class I penalty:** Not to exceed \$11,000 per violation nor shall the maximum amount exceed \$27,500.

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- b. Class II penalty: Not to exceed \$11,000 per day for each day during which the violation continues nor shall the maximum amount exceed \$137,500.
- C. DUTY TO REAPPLY.** If the permittee wishes to continue an activity regulated by this permit after the permit expiration date, the permittee must apply for and obtain a new permit. The application shall be submitted at least 180 days prior to expiration of this permit. The EPA may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date. Continuation of expiring permits shall be governed by regulations promulgated at 40 CFR §122.6 and any subsequent amendments.
- D. NEED TO HALT OR REDUCE ACTIVITY NOT A DEFENSE.** It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.
- E. DUTY TO MITIGATE.** The permittee(s) shall take all reasonable steps to control or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.
- F. DUTY TO PROVIDE INFORMATION.** The permittee(s) shall furnish to the EPA, within a time specified by the EPA, any information which the EPA may request to determine compliance with this permit. The permittee(s) shall also furnish to the EPA upon request copies of records required to be kept by this permit.
- G. OTHER INFORMATION.** When the permittee becomes aware that he or she failed to submit any relevant facts or submitted incorrect information in any report to the EPA, he or she shall promptly submit such facts or information.
- H. SIGNATORY REQUIREMENTS.** For a municipality, State, or other public agency, all DMRs, SWMPs, reports, certifications or information either submitted to the EPA or that this permit requires be maintained by the permittee(s), shall be signed by either a:
1. Principal executive officer or ranking elected official; or
 2. Duly authorized representative of that person. A person is a duly authorized representative only if:
 - a. The authorization is made in writing by a person described above and submitted to the EPA.
 - b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either a named individual or any individual occupying a named position.
 3. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new written authorization satisfying the requirements of this paragraph must be submitted to the EPA prior to or together with any reports, information, or applications to be signed by an authorized representative.
 4. Certification: Any person signing documents under this section shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

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- I. PENALTIES FOR FALSIFICATION OF MONITORING SYSTEMS.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by fines and imprisonment described in Section 309 of the Act.
- J. OIL AND HAZARDOUS SUBSTANCE LIABILITY.** Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under section 311 of the Act or section 106 of CERCLA.
- K. PROPERTY RIGHTS.** The issuance of this permit does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.
- L. SEVERABILITY.** The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit shall not be affected thereby.
- M. REQUIRING A SEPARATE PERMIT.**
1. The EPA may require any permittee authorized by this permit to obtain a separate NPDES permit. Any interested person may petition the EPA to take action under this paragraph. The Director may require any permittee authorized to discharge under this permit to apply for a separate NPDES permit only if the permittee has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form (as necessary), a statement setting a deadline for the permittee to file the application, and a statement that on the effective date of the separate NPDES permit, coverage under this permit shall automatically terminate. Separate permit applications shall be submitted to the address shown in Part III.D. The EPA may grant additional time to submit the application upon request of the applicant. If an owner or operator fails to submit, prior to the deadline of the time extension, a separate NPDES permit application as required by the EPA, then the applicability of this permit to the permittee is automatically terminated at the end of the day specified for application submittal.
 2. Any permittee authorized by this permit may request to be excluded from the coverage of this permit by applying for a separate permit. The permittee shall submit a separate application as specified by 40 CFR §122.26(d) for Class A permittees and by 40 CFR §122.33(b)(2) for Class B, C, and D permittees, with reasons supporting the request to the Director. Separate permit applications shall be submitted to the address shown in Part III.D.3. The request may be granted by the issuance of a separate permit if the reasons cited by the permittee are adequate to support the request.
 3. When an individual NPDES permit is issued to a discharger otherwise subject to this permit, or the permittee is authorized to discharge under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit or the date of authorization of coverage under the alternative general permit, whichever the case may be. When an individual NPDES permit is denied to an operator otherwise subject to this permit, or the operator is denied for coverage under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the date of such denial, unless otherwise specified by the permitting authority.
- N. STATE / ENVIRONMENTAL LAWS.**
1. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by section 510 of the Act.

2. No condition of this permit shall release the permittee from any responsibility or requirements under other environmental statutes or regulations.

O. PROPER OPERATION AND MAINTENANCE. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit and with the requirements of stormwater management programs. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee only when necessary to achieve compliance with the conditions of the permit.

P. MONITORING AND RECORDS.

1. The permittee must retain records of all monitoring information, including, all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, copies of Discharge Monitoring Reports (DMRs), a copy of the NPDES permit, and records of all data used to complete the NOI for this permit, for a period of at least three years from the date of the sample, measurement, report or application, or for the term of this permit, whichever is longer. This period may be extended by request of the permitting authority at any time.
2. The permittee must submit its records to the permitting authority only when specifically asked to do so. The permittee must retain a description of the SWMP required by this permit (including a copy of the permit language) at a location accessible to the permitting authority. The permittee must make its records, including the NOI and the description of the SWMP, available to the public if requested to do so in writing.
3. Records of monitoring information shall include:
 - a. The date, exact place, and time of sampling or measurements;
 - b. The initials or name(s) of the individual(s) who performed the sampling or measurements;
 - c. The date(s) analyses were performed;
 - d. The time(s) analyses were initiated;
 - e. The initials or name(s) of the individual(s) who performed the analyses;
 - f. References and written procedures, when available, for the analytical techniques or methods used; and
 - g. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.
4. The permittee must maintain, for the term of the permit, copies of all information and determinations used to document permit eligibility under Parts I.A.5.f and Part I.A.3.b.

Q. MONITORING METHODS. Monitoring must be conducted according to test procedures approved under 40 CFR §136, unless other test procedures have been specified in this permit. The minimum quantification levels (MQLs) in Appendix F are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

R. INSPECTION AND ENTRY. The permittee shall allow the EPA or an authorized representative of EPA, or the State, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter the permittee's premises where a regulated facility or activity is located or conducted or where records must be kept under the conditions of this permit;
2. Have access to and copy at reasonable times, any records that must be kept under the conditions of this permit;

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3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
4. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substance or parameters at any location.

S. PERMIT ACTIONS. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

T. ADDITIONAL MONITORING BY THE PERMITTEE(S). If the permittee monitors more frequently than required by this permit, using test procedures approved under 40 CFR §136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report (DMR). Such increased monitoring frequency shall also be indicated on the DMR.

U. ARCHEOLOGICAL AND HISTORIC SITES (Applicable to areas within the corporate boundary of the City of Albuquerque and Tribal lands). This permit does not authorize any stormwater discharges nor require any controls to control stormwater runoff which are not in compliance with any historic preservation laws.

1. In accordance with the Albuquerque Archaeological Ordinance (Section 2-12-2, 14-16-5, and 14-14-3-4), an applicant for either:
 - a. A preliminary plan for any subdivision that is five acres or more in size; or
 - b. A site development plan or master development plan for a project that is five acres or more in size on property that is zoned SU-1 Special Use, IP Industrial Park, an SU-2 zone that requires site plan review, PC Planned Community with a site, or meets the Zoning Code definition of a Shopping Center must first obtain either a Certificate of No Effect or a Certificate of Approval from the City Archaeologist. Details of the requirements for a Certificate of No Effect or a Certificate of Approval are described in the ordinance. Failure to obtain a certificate as required by ordinance shall subject the property owner to the penalties of §1-1-99 ROA 1994.
2. If municipal excavation and/or construction projects implementing requirements of this permit will result in the disturbance of previously undisturbed land, and the project is not required to have a separate NPDES permit (e.g. general permit for discharge of stormwater associated with construction activity), then the permittee may seek authorization for stormwater discharges from such sites of disturbance by:
 - a. Submitting, thirty (30) days prior to commencing land disturbance, the following to the State Historic Preservation Officer (SHPO) and to appropriate Tribes and Tribal Historic Preservation Officers for evaluation of possible effects on properties listed or eligible for listing on the National Register of Historic Places:
 - (i) A description of the construction or land disturbing activity and the potential impact that this activity may have upon the ground, and
 - (ii) A copy of a USGS topographic map outlining the location of the project and other ancillary impact areas.
 - (iii) The addresses of the SHPO, Sandia Pueblo, and Isleta Pueblo are:

State Historic Preservation Officer
New Mexico Historic Preservation Division

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Bataan Memorial Building
407 Galisteo Street, Ste. 236
Santa Fe, New Mexico 87501

Pueblo of Sandia Environment Department
Attn: Frank Chaves, Environment Director
481 Sandia Loop
Bernalillo, New Mexico 87004

Pueblo of Isleta
Department of Cultural and Historic Preservation
Attn: Daniel Waseta, Director
P.O. Box 1270
Isleta NM 87022

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

3. If the permittee receives a request for an archeological survey or notice of adverse effects from the SHPO, the permittee shall delay such activity until:
 - a. A cultural resource survey report has been submitted to the SHPO for a review and a determination of no effect or no adverse effect has been made, and
 - b. If an adverse effect is anticipated, measures to minimize harm to historic properties have been agreed upon between the permittee and the SHPO.
 4. If the permittee does not receive notification of adverse effects or a request for an archeological survey from the SHPO within thirty (30) days, the permittee may proceed with the activity.
 5. Alternately, the permittee may obtain authorization for stormwater discharges from such sites of disturbance by applying for a modification of this permit. The permittee may apply for a permit modification by submitting the following information to the Permitting Authority 180 days prior to commencing such discharges:
 - a. A letter requesting a permit modification to include discharges from activities subject to this provision, in accordance with the signatory requirements in Part IV.H.
 - b. A description of the construction or land disturbing activity and the potential impact that this activity may have upon the ground; County in which the facility will be constructed; type of facility to be constructed; size area (in acres) that the facility will encompass; expected date of construction; and whether the facility is located on land owned or controlled by any political subdivision of New Mexico; and
 - c. A copy of a USGS topographic map outlining the location of the project and other ancillary impact areas.
- V. **CONTINUATION OF THE EXPIRED GENERAL PERMIT.** If this permit is not reissued or replaced prior to the expiration date, it will be administratively continued in accordance with the Administrative Procedures Act and remain in force and effect. Any permittee who was granted permit coverage prior to the expiration date will automatically remain covered by the continued permit until the earlier of:

NPDES Permit No. NMR04A000

1. Reissuance or replacement of this permit, at which time the permittee must comply with the Notice of Intent conditions of the new permit to maintain authorization to discharge; or
 2. Issuance of an individual permit for your discharges; or
 3. A formal permit decision by the permitting authority not to reissue this general permit, at which time the permittee must seek coverage under an alternative general permit or an individual permit.
- W. **PERMIT TRANSFERS:** This permit is not transferable to any person except after notice to the permitting authority. The permitting authority may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Act.
- X. **ANTICIPATED NONCOMPLIANCE.** The permittee must give advance notice to the permitting authority of any planned changes in the permitted small MS4 or activity which may result in noncompliance with this permit. (see
- Y. **PROCEDURES FOR MODIFICATION OR REVOCATION:** Permit modification or revocation will be conducted according to 40 CFR 122.62, 122.63, 122.64 and 124.5.

PART V. PERMIT MODIFICATION

- A. MODIFICATION OF THE PERMIT.** The permit may be reopened and modified, in accordance with 40 CFR §122.62, §122.63, and §124.5, during the life of the permit to address:
1. Changes in the State's Water Quality Management Plan, including Water Quality Standards;
 2. Changes in applicable water quality standards, statutes or regulations;
 3. A new permittee who is the owner or operator of a portion of the MS4;
 4. Changes in portions of the SWMP that are considered permit conditions;
 5. Construction activities implementing requirements of this permit that will result in the disturbance of previously undisturbed land and not required to have a separate NPDES permit; or
 6. Other modifications deemed necessary by the EPA to meet the requirements of the Act.
- B. MODIFICATION OF THE SWMP(s).** Only those portions of the SWMPs specifically required as permit conditions shall be subject to the modification requirements of 40 CFR §124.5. Addition of components, controls, or requirements by the permittee(s); replacement of an ineffective or infeasible control implementing a required component of the SWMP with an alternate control expected to achieve the goals of the original control; and changes required as a result of schedules contained in Part VI shall be considered minor changes to the SWMP and not modifications to the permit. (See also Part I.D.6)
- C. CHANGES IN REPRESENTATIVE MONITORING SITES.** Changes in monitoring sites, other than those with specific numeric effluent limitations (as described in Part III.A.1.g), shall be considered minor modifications to the permit and shall be made in accordance with the procedures at 40 CFR §122.63.

PART VI. SCHEDULES FOR IMPLEMENTATION AND COMPLIANCE.

- A. IMPLEMENTATION AND AUGMENTATION OF THE SWMP(s).** The permittee(s) shall comply with all elements identified in Parts I and III for SWMP implementation and augmentation, and permit compliance. The EPA shall have sixty (60) days from receipt of a modification or augmentation made in compliance with Part VI to provide comments or request revisions. During the initial review period, EPA may extend the time period for review and comment. The permittee(s) shall have thirty (30) days from receipt of the EPA's comments or required revisions to submit a response. All changes to the SWMP or monitoring plans made to comply with schedules in Parts I and III must be approved by EPA prior to implementation.
- B. COMPLIANCE WITH EFFLUENT LIMITATIONS.** Reserved.
- C. REPORTING COMPLIANCE WITH SCHEDULES.** No later than fourteen (14) days following a date for a specific action (interim milestone or final deadline) identified in the Part VI schedule(s), the permittee(s) shall submit a written notice of compliance or noncompliance to the EPA in accordance with Part III.D.
- D. MODIFICATION OF THE SWMP(s).** The permittee(s) shall modify its SWMP, as appropriate, in response to modifications required in Part VI.A. Such modifications shall be made in accordance with Part V.B.

PART VII. DEFINITIONS

All definitions contained in Section 502 of the Act shall apply to this permit and are incorporated herein by reference. Unless otherwise specified, additional definitions of words or phrases used in this permit are as follows:

- (1) **Baseline Load** means the load for the pollutant of concern which is present in the waterbody before BMPs or other water quality improvement efforts are implemented.
- (2) **Best Management Practices (BMPs)** means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.
- (3) **Bioretention** means the water quality and water quantity stormwater management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from stormwater runoff.
- (4) **Canopy Interception** means the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.
- (5) **Contaminated Discharges:** The following discharges are considered contaminated:
 - Has had a discharge resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at any time since November 16, 1987; or
 - Has had a discharge resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or
 - Contributes to a violation of an applicable water quality standard.
- (6) **Controls or Control Measures or Measures** means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or control the pollution of waters of the United States. Controls also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.
- (7) **Controllable Sources:** Sources, private or public, which fall under the jurisdiction of the MS4.
- (8) **CWA or The Act** means Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et.seq.
- (9) **Co-permittee** means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.
- (10) **Composite Sample** means a sample composed of two or more discrete samples. The aggregate sample will reflect the average water quality covering the compositing or sample period.
- (11) **Core Municipality** means, for the purpose of this permit, the municipality whose corporate boundary (unincorporated area for counties and parishes) defines the municipal separate storm sewer system. (ex. City of Dallas for the Dallas Municipal Separate Storm Sewer System, Harris County for unincorporated Harris County).
- (12) **Direct Connected Impervious Area (DCIA)** means the portion of impervious area with a direct hydraulic connection to the permittee's municipal separate storm sewer system or a waterbody via continuous paved surfaces, gutters, pipes, and other impervious features. Direct connected impervious area typically does not include isolated impervious areas with an indirect hydraulic connection to the municipal separate storm sewer system (e.g., swale or detention basin) or that otherwise drain to a pervious area.
- (13) **Director** means the Regional Administrator or an authorized representative.
- (14) **Discharge** for the purpose of this permit, unless indicated otherwise, means discharges from the municipal separate storm sewer system.
- (15) **Discharge-related activities** include: activities which cause, contribute to, or result in storm water point source pollutant discharges; and measures to control storm water discharges, including the siting, construction and operation of best management practices (BMPs) to control, reduce or prevent storm water pollution.
- (16) **Engineered Infiltration** means an underground device or system designed to accept stormwater and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the exfiltration rate.
- (17) **Evaporation** means rainfall that is changed or converted into a vapor.
- (18) **Evapotranspiration** means the sum of evaporation and transpiration of water from the earth's surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration of plants.
- (19) **Extended Filtration** means a structural stormwater practice which filters stormwater runoff through vegetation and engineered soil media. A portion of the stormwater runoff drains into an underdrain system which slowly releases it after the storm is over.

- (20) **Facility** means any NPDES "point source" or any other facility (including land or appurtenances thereto) that is subject to regulation under the NPDES program.
- (21) **Flood Control Projects** mean major drainage projects developed to control water quantity rather than quality, including channelization and detention.
- (22) **Flow-weighted composite sample** means a composite sample consisting of a mixture of aliquots collected at a constant time interval, where the volume of each aliquot is proportional to the flow rate of the discharge.
- (23) **Grab Sample** means a sample which is taken from a wastestream on a one-time basis without consideration of the flow rate of the wastestream and without consideration of time.
- (24) **Green Infrastructure** means an array of products, technologies, and practices that use natural systems – or engineered systems that mimic natural processes – to enhance overall environmental quality and provide utility services. As a general principal, Green Infrastructure techniques use soils and vegetation to infiltrate, evapotranspire, and/or recycle stormwater runoff. When used as components of a stormwater management system, Green Infrastructure practices such as green roofs, porous pavement, rain gardens, and vegetated swales can produce a variety of environmental benefits. In addition to effectively retaining and infiltrating rainfall, these technologies can simultaneously help filter air pollutants, reduce energy demands, mitigate urban heat islands, and sequester carbon while also providing communities with aesthetic and natural resource benefits.
- (25) **Hydromodification** means the alteration of the natural flow of water through a landscape, and often takes the form of channel straightening, widening, deepening, or relocating existing, natural stream channels. It also can involve excavation of borrow pits or canals, building of levees, streambank erosion, or other conditions or practices that change the depth, width or location of waterways. Hydromodification usually results in water quality and habitat impacts.
- (26) **Illicit connection** means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.
- (27) **Illicit discharge** means any discharge to a municipal separate storm sewer that is not composed entirely of stormwater except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.
- (28) **Impervious Area (IA)** means conventional pavements, sidewalks, driveways, roadways, parking lots, and rooftops.
- (29) **Indian Country** means:
- All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
 - All dependent Indian communities within the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and
 - All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. This definition includes all land held in trust for an Indian tribe.
- (30) **Individual Residence** means, for the purposes of this permit, single or multi-family residences. (e.g. single family homes and duplexes, town homes, apartments, etc.)
- (31) **Infiltration** means the process by which stormwater penetrates the soil.
- (32) **Land application unit** means an area where wastes are applied onto or incorporated into the soil surface (excluding manure spreading operations) for treatment or disposal.
- (33) **Landfill** means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit, surface impoundment, injection well, or waste pile.
- (34) **Land Use** means the way in which land is used, especially in farming and municipal planning.
- (35) **Large or medium municipal separate storm sewer system** means all municipal separate storm sewers that are either: (i) located in an incorporated place (city) with a population of 100,000 or more as determined by the latest Decennial Census by the Bureau of Census (these cities are listed in Appendix F of 40 CFR §122); or (ii) located in the counties with unincorporated urbanized populations of 100,000 or more, except municipal separate storm sewers are located in the incorporated places, townships, or towns within such counties (these counties are listed in Appendices H and I of 40 CFR §122); or (iii) owned or operated by a municipality other than those described in Paragraph (i) or (ii) and that are designated by the Regional Administrator as part of the large or medium municipal separate storm sewer system.
- (36) **MEP** means maximum extent practicable, the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges. A discussion of MEP as it applies to small MS4s is found at 40 CFR 122.34. CWA section 402(p)(3)(B)(iii) requires that a municipal permit "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system design, and engineering methods, and other provisions such as the Administrator or the State determines appropriate for the control of such pollutants.
- (37) **Measurable Goal** means a quantitative measure of progress in implementing a component of storm water management program.

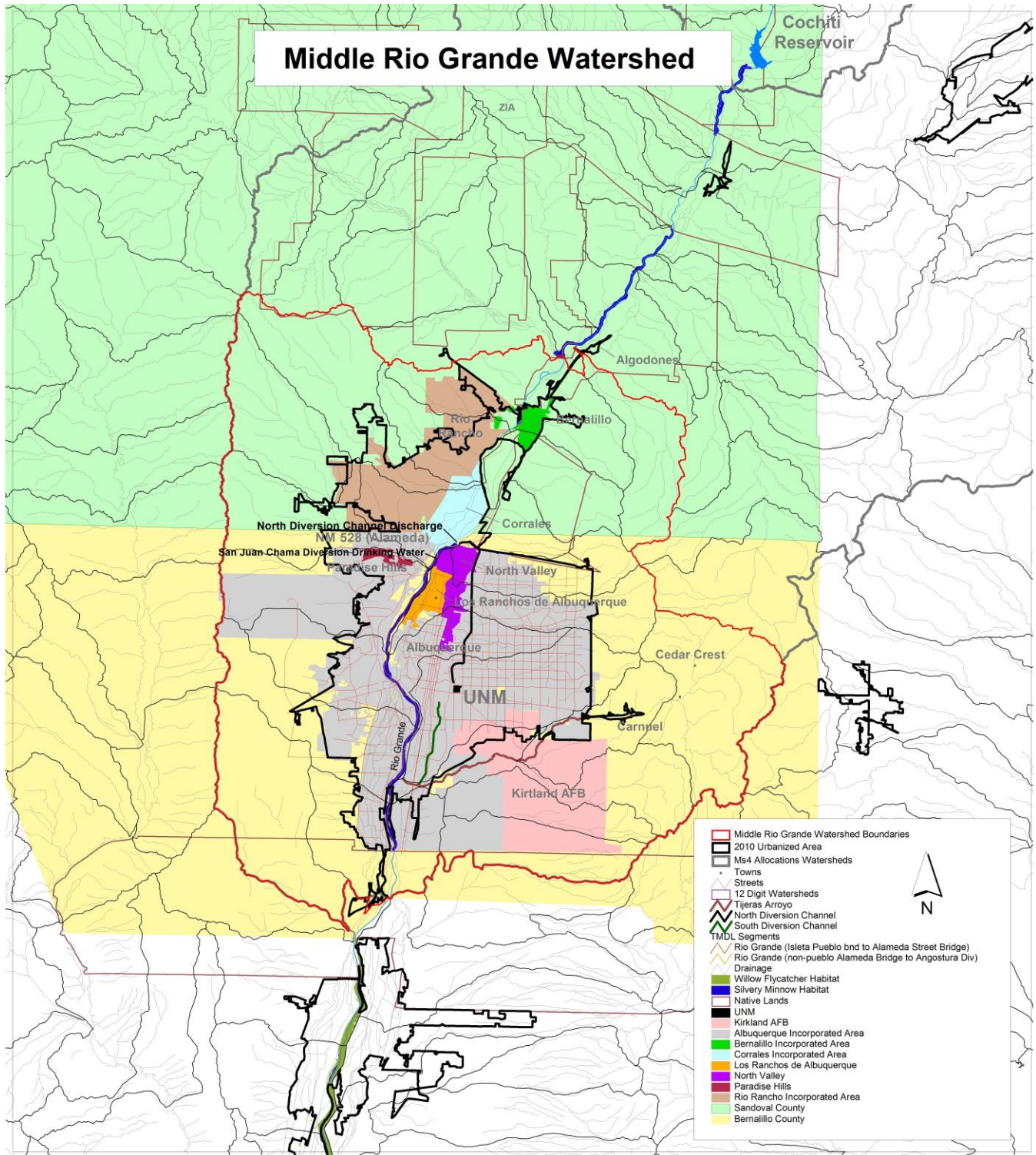
- (38) **Municipal Separate Storm Sewer (MS4)** means all separate storm sewers that are defined as “large” or “medium” or “small” municipal separate storm sewer systems pursuant to paragraphs 40 CFR §122.26(b)(4), (b)(7), and (b)(16), or designated under paragraph 40 CFR §122.26(a)(1)(v).
- (39) **Non-traditional MS4** means systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings. 40 CFR 122.26(a)(16)(iii).
- (40) **NOI** means Notice of Intent to be covered by this permit (see Part I.B of this permit)
- (41) **NOT** means Notice of Termination.
- (42) **Outfall** means a *point source* as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.
- (43) **Percent load reduction** means the difference between the baseline load and the target load divided by the baseline load.
- (44) **Owner or operator** means the owner or operator of any “facility or activity” subject to regulation under the NPDES program.
- (45) **Permittee** refers to any person (defined below) authorized by this NPDES permit to discharge to Waters of the United States.
- (46) **Permitting Authority** means EPA, Region 6.
- (47) **Person** means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.
- (48) **Point Source** means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.
- (49) **Pollutant** is defined at 40 CFR 122.2. Pollutant means dredged spoil, solid waste, incinerator residue, filter back-wash, sewage, garbage, sewage sludge. Munitions, chemical waste, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011), heat, wrecked or discarded equipment, rock sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.
- (50) **Pre-development Hydrology**, Predevelopment hydrology is generally the rain volume at which runoff would be produced when a site or an area is in its natural condition, prior to development disturbances. For the Middle Rio Grande area, EPA considers predevelopment conditions to be a mix of woods and desert shrub.
- (51) **Rainfall and Rainwater Harvesting** means the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.
- (52) **Soil amendment** means adding components to in-situ or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.
- (53) **Storm drainage projects** include stormwater inlets, culverts, minor conveyances and a host of other structures or devices.
- (54) **Storm sewer**, unless otherwise indicated, means a municipal separate storm sewer.
- (55) **Stormwater** means stormwater runoff, snow melt runoff, and surface runoff and drainage.
- (56) **Stormwater Discharge Associated with Industrial Activity** means the discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant (See 40 CFR §122.26(b)(14) for specifics of this definition).
- (57) **Target load** means the load for the pollutant of concern which is necessary to attain water quality goals (e.g. applicable water quality standards).
- (58) **Stormwater Management Program (SWMP)** means a comprehensive program to manage the quality of stormwater discharged from the municipal separate storm sewer system. For the purposes of this permit, the Stormwater Management Program is considered a single document, but may actually consist of separate programs (e.g. "chapters") for each permittee.
- (59) **Targeted controls** means practices implemented to address particular pollutant of concern. For example litter program targets floatables.
- (60) **Time-weighted composite** means a composite sample consisting of a mixture of equal volume aliquots collected at a constant time interval.
- (61) **Total Maximum Daily Load (TMDL)** means a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards. A TMDL is the sum of individual wasteload allocations for point sources (WLA), load allocations for non-point sources and natural background (LA), and must consider seasonal variation and include a margin of safety. The TMDL comes in the form of a technical document or plan.

- (62) **Toxicity** means an LC50 of <100% effluent.
- (63) **Waste load allocation (WLA)** means the portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.
- (64) **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- (65) **Whole Effluent Toxicity (WET)** means the aggregate toxic effect of an effluent measured directly by a toxicity test.

PART VIII PERMIT CONDITIONS APPLICABLE TO SPECIFIC AREAS OR INDIAN COUNTY LANDS

Reserved

Appendix A - Middle Rio Grande Watershed Jurisdictions and Potential Permittees



Middle Rio Grande Watershed Jurisdictions and Potential Permittees

Class A:

City of Albuquerque
AMAFCA (Albuquerque Metropolitan Arroyo Flood Control Authority)
UNM (University of New Mexico)
NMDOT (New Mexico Department of Transportation District 3)

Class B:

Bernalillo County
Sandoval County
Village of Corrales
City of Rio Rancho
Los Ranchos de Albuquerque
KAFB (Kirtland Air Force Base)
Town of Bernalillo
EXPO (State Fairgrounds/Expo NM)
SSCAFCA (Southern Sandoval County Arroyo Flood Control Authority)
NMDOT (New Mexico Department of Transportation District 3)

Class C:

ESCAFCA (Eastern Sandoval County Arroyo Flood Control Authority)
Sandia Labs (DOE)

Class D:

Pueblo of Sandia
Pueblo of Isleta
Pueblo of Santa Ana

Note: There could be additional potential permittees.

NMDOT Dist. 3 falls into the Class A type permittee, if an individual program is developed or/and implemented. The timelines for cooperative programs should be used, if NMDOT Dist. 3 cooperates with other permittees.

Appendix B - Total Maximum Daily Loads (TMDLs)

B.1. Approved Total Maximum Daily Loads (TMDLs) Tables

A bacteria TMDL for the Middle Rio Grande was approved by the New Mexico Water Quality Control Commission on April 13, 2010, and by EPA on June 30, 2010. The new TMDL modifies: 1) the indicator parameter for bacteria from fecal coliform to *E. coli*, and 2) the way the WLAs are assigned

Discharges to Impaired Waters – TMDL Waste Load Allocations (WLAs)² for *E. coli*: Rio Grande¹

Stream Segment	Stream Name	Permittee Class	FLOW CONDITIONS & ASSOCIATED WLA (cfu/day) ³				
			High	Moist	Mid-Range	Dray	Low
2105_50	Isleta Pueblo boundary to Alameda Street Bridge (based on flow at USGS Station NM08330000)	Class A ⁴	3.36x10 ¹⁰	8.41 x10 ¹⁰	5.66 x10 ¹⁰	2.09 x10 ¹⁰	4.67 x10 ⁹
		Class B ⁵ Class C ⁶	3.73 x10 ⁹	9.35 x10 ⁹	6.29 x10 ⁹	2.32 x10 ⁹	5.19 x10 ⁸
2105.1_00	non-Pueblo Alameda Bridge to Angostura Diversion (based on flow at USGS Station NM08329928)	Class A	5.25 x10 ¹⁰	1.52 x10 ¹⁰	–	5.43 x10 ⁹	2.80 x10 ⁹
		Class B Class C	2.62 x10 ¹¹	7.59 x10 ¹⁰	–	2.71 x10 ¹⁰	1.40 x10 ¹⁰

- 1 Total Maximum Daily Load for the Middle Rio Grande Watershed, NMED, 2010.
- 2 The WLAs for the stormwater MS4 permit was based on the percent jurisdiction area approach. Thus, the MS4 WLAs are a percentage of the available allocation for each hydrologic zone, where the available allocation = TMDL – WLA – MOS.
- 3 Flow conditions relate to percent of days the flow in the Rio Grande at a USGS Gauge exceeds a particular level: High 0-10%; Moist 10-40%; Mid-Range 40-60%; Dry 60-90%; and Low 90-100%. (Source: Figures 4.3 and 4.4 in 2010 Middle Rio Grande TMDL)
- 4 Phase I MS4s
- 5 Phase II MS4s (2000 Census)
- 6 New Phase II MS4s (2010 Census or MS4s designated by the Director)

Estimating Target Loadings for Particular Monitoring Location:

The Table in B.2 below provides a mechanism to calculate, based on acreage within a drainage area, a target loading value for a particular monitoring location.

B.2. Calculating Alternative Sub-measurable Goals

Individual permittees or a group of permittees seeking alternative sub-measurable goals under C.2.b.(i).(c).B should consult NMED. Preliminary proposals should be submitted with the Notice of Intent (NOI) under Part I.B.2.k according to the due dates specified in Part I.B.1.a of the permit. This proposal shall include, but is not limited to, the following items

B.2.1 Determine base loading for subwatershed areas consistent with TMDL

- a. Using the table below, the permittee must develop a target load consistent with the TMDL for any sampling point in the watershed (even if it includes area outside the jurisdictional area of the permit).

E. coli loading on a per area basis (cfu/sq mi/day)

	high	moist	mid	dry	low
Alameda to Isleta	1.79E+09	4.48E+08	3.02E+08	1.11E+08	2.58E+07
Angostura to Alameda	3.25E+09	9.41E+08	5.19E+08	3.37E+08	1.74E+08

- b. An estimation of the pertinent, subwatershed area that the permittee is responsible for and the basis for determining that area, including the means for excluding any tributary inholdings;
- c. Using the total loading for the watershed (from part a) and the percentage of the watershed area that is part of the permittee(s) jurisdiction (part b) to calculate a base WLA for this subwatershed.

B.2.2 Set Alternative subwatershed targets

- a. Permittee(s) may reallocate WLA within and between subwatershed based on factors including:
 - Population density within the pertinent watershed area;
 - Slope of the waterway;
 - Percent impervious surface and how that value was determined;
 - Stormwater treatment, installation of green infrastructure for the control or treatment of stormwater and stormwater pollution prevention and education programs within specific watersheds
- b. A proposal for an alternative subwatershed target must include the rationale for the factor(s) used

B.2.3 Ensure overall compliance with TMDL WLA allocation

The permittee(s) will provide calculations demonstrating the total WLA under the alternative proposed in (Part II) is consistent with the baseline calculated in (Part I) based on their total jurisdictional area. Permittee(s) will not be allowed to allocate more area within the watershed than is accorded to them under their jurisdictional area. For permittees that work cooperatively, WLA calculations may be combined and used where needed within the sub-watershed amongst the cooperating parties.

WLA calculations must be sent as part of the Notice of Intent to EPA via e-mail at R6_MS4Permits@epa.gov. These calculations must also be sent to:

Sarah Holcomb
 Industrial and Stormwater Team Leader
 NMED Surface Water Quality Bureau
 P.O. Box 5469,

Appendix C - Historic Properties Eligibility Procedures

MS4 operators must determine whether their MS4's storm water discharges, allowable non-storm water discharges, or construction of best management practices (BMPs) to control such discharges, have potential to affect a property that is either listed or eligible for listing on the National Register of Historic Places.

For existing dischargers who do not need to construct BMPs for permit coverage, a simple visual inspection may be sufficient to determine whether historic properties are affected. However, for MS4s which are new storm water dischargers and for existing MS4s which are planning to construct BMPs for permit eligibility, MS4 operators should conduct further inquiry to determine whether historic properties may be affected by the storm water discharge or BMPs to control the discharge. In such instances, MS4 operators should first determine whether there are any historic properties or places listed on the National Register or if any are eligible for listing on the register (e.g., they are "eligible for listing").

Due to the large number of entities seeking coverage under this permit and the limited number of personnel available to State and Tribal Historic Preservation Officers nationwide to respond to inquiries concerning the location of historic properties, EPA suggests that MS4 operators first access the "National Register of Historic Places" information listed on the National Park Service's web page (www.nps.gov/nr/). Addresses for State Historic Preservation Officers and Tribal Historic Preservation Officers are listed in Parts II and III of this appendix, respectively. In instances where a Tribe does not have a Tribal Historic Preservation Officer, MS4 operators should contact the appropriate Tribal government office when responding to this permit eligibility condition. MS4 operators may also contact city, county or other local historical societies for assistance, especially when determining if a place or property is eligible for listing on the register. Tribes that do not currently reside in an area may also have an interest in cultural properties in areas they formerly occupied. Tribal contact information is available at <http://www.epa.gov/region06/6dra/oejta/tribalaffairs/index.html>

The following three scenarios describe how MS4 operators can meet the permit eligibility criteria for protection of historic properties under this permit:

- (1) If historic properties are not identified in the path of an MS4's storm water and allowable non-storm water discharges or where construction activities are planned to install BMPs to control such discharges (e.g., diversion channels or retention ponds), then the MS4 operator has met the permit eligibility criteria under Part I.A.3.b.(i).
- (2) If historic properties are identified but it is determined that they will not be affected by the discharges or construction of BMPs to control the discharge, the MS4 operator has met the permit eligibility criteria under Part.I.A.3.b.(ii).
- (3) If historic properties are identified in the path of an MS4's storm water and allowable non-storm water discharges or where construction activities are planned to install BMPs to control such discharges, and it is determined that there is the potential to adversely affect the property, the MS4 operator can still meet the permit eligibility criteria under Part I.A.3.b.(ii) if he/she obtains and complies with a written agreement with the appropriate State or Tribal Historic Preservation Officer which outlines measures the MS4 operator will follow to mitigate or prevent those adverse effects. The operator should notify EPA before exercising this option.

The contents of such a written agreement must be included in the MS4's Storm Water Management Program.

In situations where an agreement cannot be reached between an MS4 operator and the State or Tribal Historic Preservation Officer, MS4 operators should contact EPA for assistance.

The term "adverse effects" includes but is not limited to damage, deterioration, alteration or destruction of the historic property or place. EPA encourages MS4 operators to contact the appropriate State or Tribal Historic Preservation Officer as soon as possible in the event of a potential adverse effect to a historic property.

MS4 operators are reminded that they must comply with applicable State, Tribal and local laws concerning the protection of historic properties and places.

I. Internet Information on the National Register of Historic Places

An electronic listing of the "National Register of Historic Places," as maintained by the National Park Service on its National Register Information System (NRIS), can be accessed on the Internet at www.nps.gov/nr/.

II. State Historic Preservation Officers (SHPO)

SHPO List for areas covered by the permit:

NEW MEXICO

Historic Preservation Div, Office of Cultural Affairs
Bataan Memorial Building, 407 Galisteo Street, Suite 236
Santa Fe, NM 87501
505-827-6320 FAX: 505-827-6338

III. Tribal Historic Preservation Officers
(THPO)

In instances where a Tribe does not have a Tribal Historic Preservation Officer, please contact the appropriate Tribal government office when responding to this permit eligibility condition.

Tribal Historic Preservation Officers:

Mescalero Apache Tribe
P.O. Box 227
Mescalero, New Mexico 88340

Pueblo of Sandia Environment Department
Attn: Frank Chaves, Environment Director
481 Sandia Loop
Bernalillo, New Mexico 87004

Pueblo of Isleta
Department of Cultural and Historic Preservation
Attn: Dr. Henry Walt, THPO
P.O. Box 1270
Isleta NM 87022

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

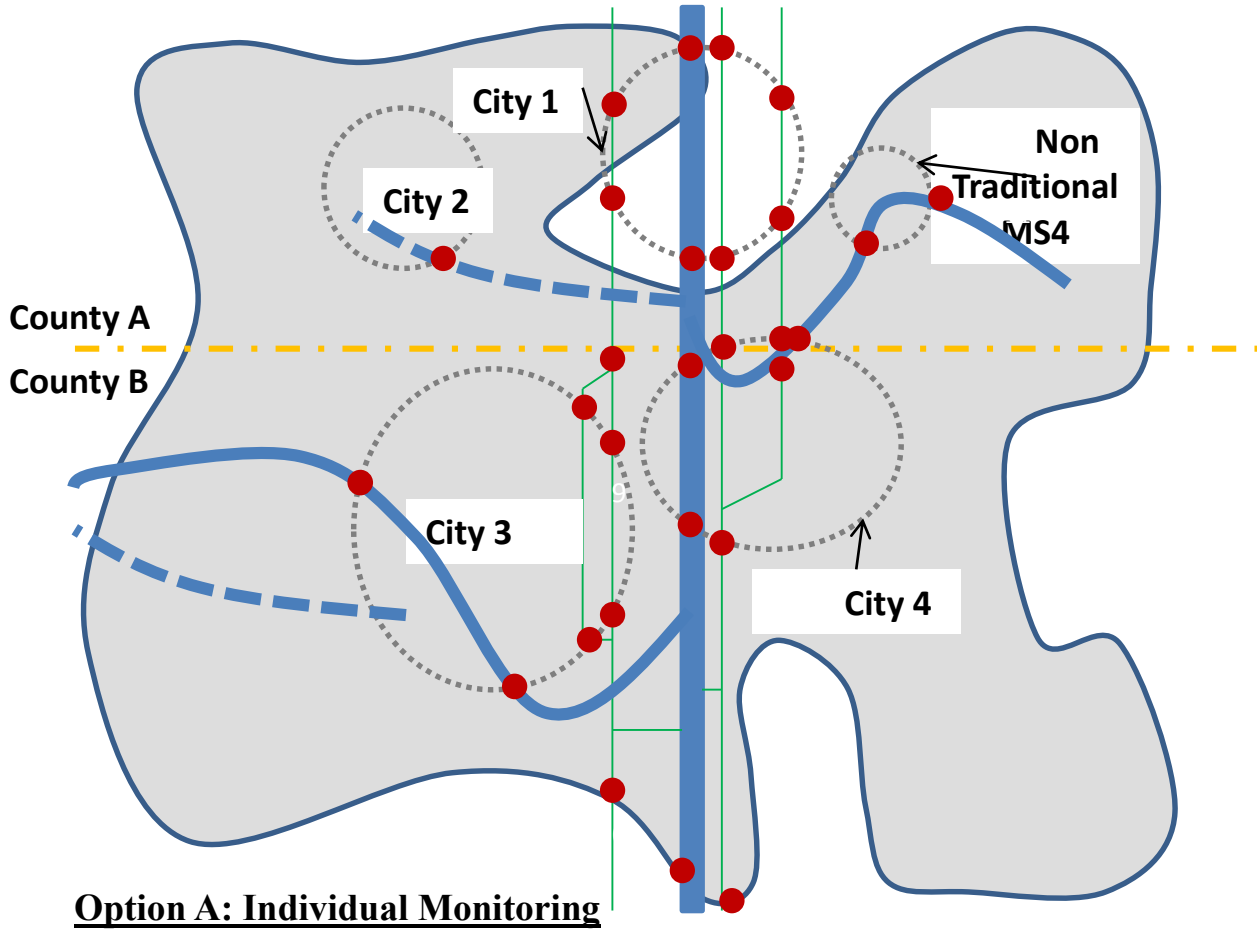
For more information:

National Association of Tribal Historic
Preservation Officers
P.O. Box 19189
Washington, DC 20036-9189
Phone: (202) 628-8476
Fax: (202) 628-2241

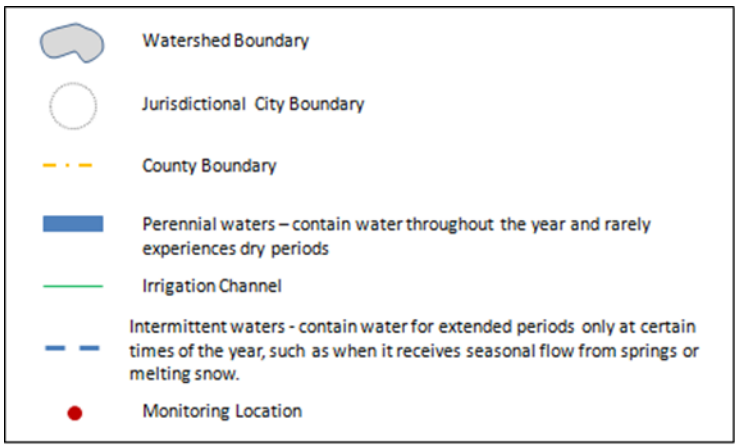
IV. Advisory Council on Historic Preservation

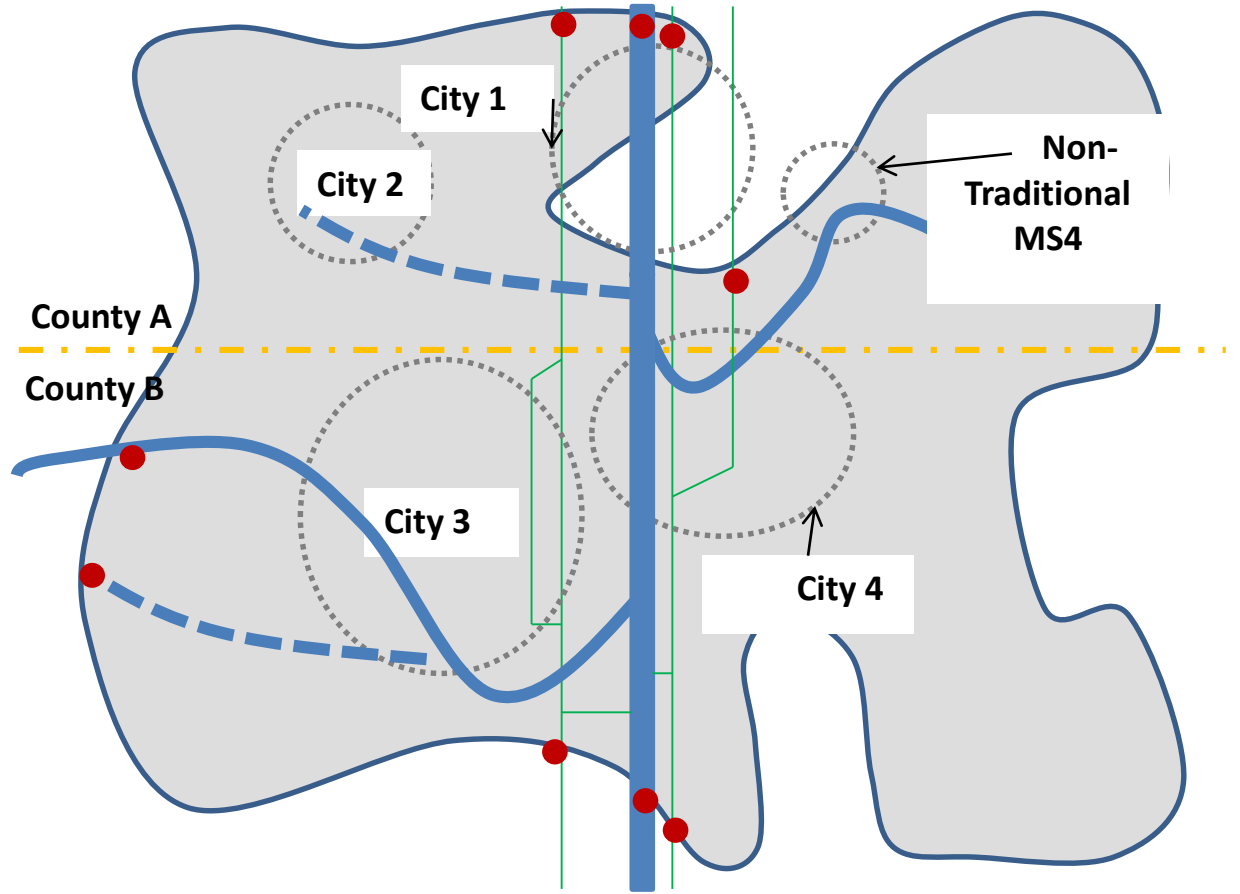
Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 803,
Washington, DC 20004 Telephone: (202) 606-8503, Fax: (202) 606-8647/8672, E-mail:
achp@achp.gov

Appendix D - Suggested Initial Phase Sampling Location Concepts – Wet Weather Monitoring

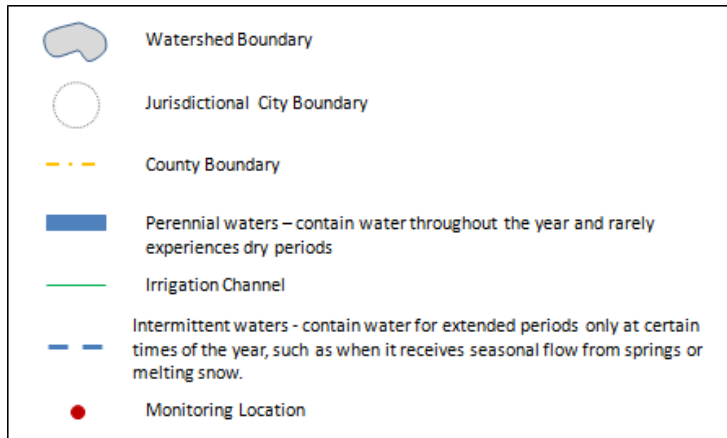


8





Option B: Cooperative Monitoring



Appendix E - Providing Comments or Requesting a Public Hearing on an MS4 Operator's NOI

NOTE: Appendix E is for public information only and does not impose conditions on the permittee.

Any interested person may provide comments or request a public hearing on a Notice of Intent (NOI) submitted under this general permit. The general permit itself is not reopened for comment during the period an NOI is available for review and comment.

A. How Will I Know A MS4 is Filing an NOI and How Can I Get a Copy?

The permittee is required to provide a local public notice that they are filing an NOI and make a copy of the draft NOI submittal available locally. EPA will put basic information from all NOIs received on the Internet at: <http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm> . You may contact the listed MS4 representative for local access to the NOI. You may also request a copy from EPA by contacting Ms. Dorothy Brown at 214-665-8141 or brown.dorothy@epa.gov or via mail at the Address in Item D below, attention Dorothy Brown.

B. When Can I File Comments or a Hearing Request?

You can file comments and/or request a hearing as soon as a NOI is filed, but your request must be postmarked or physically received by EPA within thirty (30) calendar days of the date the NOI is posted on the web site in Section A.

C. How Do I File Comments or Make My Hearing Request?

Your comments and/or hearing request must be in writing and must state the nature of the issues proposed to be raised in the hearing. You should be as specific as possible and include suggested remedies where possible. You should include any data supporting your position(s). If you are submitting the request on behalf of a group or organization, you should describe the nature and membership of the group or organization. Electronic format comments in MS-WORD or PDF format are preferred.

D. Where Do I Send Copies of My Comments or Hearing Request?

Electronic Format: Submit one copy of your comments or hearing request via e-mail to Ms. Dorothy Brown at brown.dorothy@epa.gov and copy the Operator of the MS4 at the address on the NOI (send hard copy to MS4 Operator if no e-mail address provided). You may also submit via compact disk or diskette formatted for PCs to addresses for hard copy below. (Hard Copy: You must send an original and one copy of your comments or hearing request to EPA at the address below and a copy to the Operator of the MS4 at the address provided on the NOI)

U.S. EPA Region 6
Water Quality Protection Division (6WQ-NP)
Attn: Dorothy Brown
1445 Ross Ave., Suite 1200
Dallas, TX 75202

E. How Will EPA Determine Whether or Not To Hold a Public Hearing?

EPA will evaluate all hearing requests received on an NOI to determine if a significant degree of public interest exists and whether issues raised may warrant clarification of the MS4 Operator's NOI submittal. EPA will hold a public hearing if a significant amount of public interest is evident. EPA may also, at the Agency's discretion, hold either a public hearing or an informal public meeting to clarify issues related to the NOI submittal. EPA may hold a single public hearing or public meeting covering more than one MS4 (e.g., for all MS4s in an Urbanized Area, etc.).

F. How Will EPA Announce a Public Hearing or Public Meeting?

EPA will provide public notice of the time and place for any public hearing or public meeting in a major newspaper with local distribution and via the Internet at <http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm>.

G. What Will EPA Do With Comments on an NOI?

EPA will take all comments made directly or in the course of a public hearing or public meeting into consideration in determining whether or not the MS4 that submitted the NOI is appropriately covered under the general permit. The MS4 operator will have the opportunity to provide input on issues raised. The Director may require the MS4 operator to supplement or amend the NOI submittal in order to be authorized under the general permit or may direct the MS4 Operator to submit an individual permit application. A summary of issues raised and EPA's responses will be made available online at <http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm>. A hard copy may also be requested by contacting Ms. Dorothy Brown (see paragraph D)

Appendix F - Minimum Quantification Levels (MQL's)

The following Minimum Quantification Levels (MQL's) are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

POLLUTANTS	MQL µg/l	POLLUTANTS	MQL µg/l
METALS, RADIOACTIVITY, CYANIDE and CHLORINE			
Aluminum	2.5	Molybdenum	10
Antimony	60	Nickel	0.5
Arsenic	0.5	Selenium	5
Barium	100	Silver	0.5
Beryllium	0.5	Thallium	0.5
Boron	100	Uranium	0.1
Cadmium	1	Vanadium	50
Chromium	10	Zinc	20
Cobalt	50	Cyanide	10
Copper	0.5	Cyanide, weak acid dissociable	10
Lead	0.5	Total Residual Chlorine	33
Mercury (*)	0.0005 0.005		
DIOXIN			
2,3,7,8-TCDD	0.00001		
VOLATILE COMPOUNDS			
Acrolein	50	1,3-Dichloropropylene	10
Acrylonitrile	20	Ethylbenzene	10
Benzene	10	Methyl Bromide	50
Bromoform	10	Methylene Chloride	20
Carbon Tetrachloride	2	1,1,2,2-Tetrachloroethane	10
Chlorobenzene	10	Tetrachloroethylene	10
Clorodibromomethane	10	Toluene	10
Chloroform	50	1,2-trans-Dichloroethylene	10
Dichlorobromomethane	10	1,1,2-Trichloroethane	10
1,2-Dichloroethane	10	Trichloroethylene	10
1,1-Dichloroethylene	10	Vinyl Chloride	10
1,2-Dichloropropane	10		
ACID COMPOUNDS			
2-Chlorophenol	10	2,4-Dinitrophenol	50
2,4-Dichlorophenol	10	Pentachlorophenol	5
2,4-Dimethylphenol	10	Phenol	10
4,6-Dinitro-o-Cresol	50	2,4,6-Trichlorophenol	10

POLLUTANTS	MQL µg/l	POLLUTANTS	MQL µg/l
BASE/NEUTRAL			
Acenaphthene	10	Dimethyl Phthalate	10
Anthracene	10	Di-n-Butyl Phthalate	10
Benzidine	50	2,4-Dinitrotoluene	10
Benzo(a)anthracene	5	1,2-Diphenylhydrazine	20
Benzo(a)pyrene	5	Fluoranthene	10
3,4-Benzofluoranthene	10	Fluorene	10
Benzo(k)fluoranthene	5	Hexachlorobenzene	5
Bis(2-chloroethyl)Ether	10	Hexachlorobutadiene	10
Bis(2-chloroisopropyl)Ether	10	Hexachlorocyclopentadiene	10
Bis(2-ethylhexyl)Phthalate	10	Hexachloroethane	20
Butyl Benzyl Phthalate	10	Indeno(1,2,3-cd)Pyrene	5
2-Chloronaphthalene	10	Isophorone	10
Chrysene	5	Nitrobenzene	10
Dibenzo(a,h)anthracene	5	n-Nitrosodimethylamine	50
1,2-Dichlorobenzene	10	n-Nitrosodi-n-Propylamine	20
1,3-Dichlorobenzene	10	n-Nitrosodiphenylamine	20
1,4-Dichlorobenzene	10	Pyrene	10
3,3'-Dichlorobenzidine	5	1,2,4-Trichlorobenzene	10
Diethyl Phthalate	10		
PESTICIDES AND PCBS			
Aldrin	0.01	Beta-Endosulfan	0.02
Alpha-BHC	0.05	Endosulfan sulfate	0.02
Beta-BHC	0.05	Endrin	0.02
Gamma-BHC	0.05	Endrin Aldehyde	0.1
Chlordane	0.2	Heptachlor	0.01
4,4'-DDT and derivatives	0.02	Heptachlor Epoxide	0.01
Dieldrin	0.02	PCBs **	0.2
Alpha-Endosulfan	0.01	Toxaphene	0.3

(MQL's Revised November 1, 2007)

(*) Default MQL for Mercury is 0.005 unless Part I of your permit requires the more sensitive Method 1631 (Oxidation / Purge and Trap / Cold vapor Atomic Fluorescence Spectrometry), then the MQL shall be 0.0005.

(**) EPA Method 1668 should be utilized when PCB water column monitoring is conducted to determine compliance with permit requirements. Either the Arochlor test (EPA Method 8082) or USGS test method (8093) may be utilized for purposes of sediment sampling as part of a screening program, but must use EPA Method 1668 (latest revision) for confirmation and determination of specific PCB levels at that location.

Appendix G – Oxygen Saturation and Dissolved Oxygen Concentrations North Diversion Channel Area

Concentrations of dissolved oxygen in water at various atmospheric pressures and temperatures with 100 percent oxygen saturation, 54.3 percent oxygen saturation (associated with hypoxia and harassment of silvery minnows), and 8.7 percent oxygen saturation (associated with anoxia and lethality of silvery minnows) at the North Diversion Channel (NDC) (based on USGS DO website <<http://water.usgs.gov/software/DOTABLES/>> for pressures between 628 to 648 millimeters of mercury (Hg)). Source: Biological Consultation Cons. #22420-2011-F-0024-R001

Water temp. (°C)	100% Oxygen Saturation at NDC			54.3% saturation = Harassmen			8.7% saturation= 50%Lethality		
	628mmHg	638mmHg	648mmHg	628mmHg	638mmHg	648mmHg	628mmHg	638mmHg	64BmmHg
0	12.1	12.3	12.5	66	6.7	6.8	1.1	1.1	1.1
1	11.7	11.9	12.1	64	6.5	6.6	1.0	1.0	1.1
2	11.4	11.6	11.8	6.2	6.3	8.4	1.0	1.0	1.0
3	11.1	11.3	11.5	6.0	6.1	6.2	1.0	1.0	1.0
4	10.8	11	11.2	5.9	6.0	6.1	0.9	1.0	1.0
5	10.5	10.7	10.9	5.7	5.8	5.9	0.9	0.9	0.9
6	10.3	10.4	10.6	5.6	5.8	5.0	0.9	0.9	0.9
7	10	10.2	10.3	5.4	5.5	5.6	0.9	0.9	0.9
8	9.8	9.9	10.1	5.3	5.4	5.5	0.9	0.9	0.9
8	9.5	9.7	9.6	5.2	5.3	5.3	0.8	0.8	0.9
10	9.3	9.5	9.6	5.0	5.2	5.2	0.8	0.8	0.8
11	9.1	9.2	9.4	4.9	5.0	5.1	0.8	0.8	0.8
12	8.9	9	9.2	4.8	4.9	5.0	0.8	0.8	0.8
13	8.7	8.8	9	4.7	4.8	4.9	0.8	0.8	0.8
14	8.5	8.6	8.8	4.8	4.7	4.8	0.7	0.7	0.0
15	8.3	8.4	8.8	4.5	4.6	4.7	0.7	0.7	0.7
16	8.1	8.3	8.4	4.4	4.5	4.6	0.7	0.7	0.7
17	8	8.1	8.2	4.3	4.4	4.5	0.7	0.7	0.7
18	7.8	7.9	8	4.2	4.3	4.3	0.7	0.7	0.7
19	7.6	7.8	7.9	4.1	4.2	4.3	0.7	0.7	0.7
20	7.5	7.6	7.7	4.1	4.1	4.2	0.7	0.7	0.7
21	7.3	7.4	7.6	4.0	4.0	4.1	0.6	0.6	0.7
22	7.2	7.3	7.4	3.9	4.0	4.0	0.6	0.6	0.6
23	7	7.2	7.3	3.8	3.9	4.0	0.6	0.6	0.6
24	6.9	7	7.1	3.7	3.8	3.9	0.6	0.6	0.6
25	6.8	6.9	7	3.7	3.7	3.6	0.6	0.6	0.6
26	6.7	6.8	6.9	3.6	3.7	3.7	0.6	0.6	0.6
27	6.5	6.6	6.8	3.5	3.6	3.7	0.6	0.6	0.8
28	6.4	6.5	6.6	3.5	3.5	3.6	0.6	0.8	0.8
29	6.3	6.4	6.5	3.4	3.5	3.5	0.5	0.6	0.8
30	6.2	6.3	6.4	3.4	3.4	3.5	0.5	0.5	0.8
31	6.1	6.2	6.3	3.3	3.4	3.4	0.5	0.5	0.8
32	6	6.1	6.2	3.3	3.3	3.4	0.5	0.5	0.5
33	5.0	6	6.1	3.2	3.3	3.3	0.5	0.5	0.5
34	5.8	5.9	6	3.1	3.2	3.3	0.5	0.5	0.5
35	5.7	5.6	5.9	3.1	3.1	3.2	0.5	0.5	0.5

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Exhibit 3

Boise, ID – Boise/Garden City Area MS4 Permit (Permit No. IDS-
027561)

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United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

**Authorization to Discharge Under the
National Pollutant Discharge Elimination System**

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, as amended by the Water Quality Act of 1987, P.L. 100-4, the "Act",

**Ada County Highway District,
Boise State University,
City of Boise,
City of Garden City,
Drainage District #3,
and the Idaho Transportation Department District #3,

(hereinafter "the Permittees")**

are authorized to discharge from all municipal separate storm sewer system (MS4) outfalls existing as of the effective date of this Permit to waters of the United States, including the Boise River and its tributaries, in accordance with the conditions set forth herein.

This Permit will become effective February 1, 2013.

This Permit, and the authorization to discharge, expires at midnight, January 30, 2018.

Permittees must reapply for permit reissuance on or before August 3, 2017, 180 days before the expiration of this Permit, if the Permittees intend to continue operations and discharges from the MS4s beyond the term of this Permit.

Signed this 12th day of December, 2012.


Daniel D. Opalski, Director
Office of Water and Watersheds, Region 10
U.S. Environmental Protection Agency

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I. Applicability

A. Permit Area. This Permit covers all areas within the corporate boundary of the City of Boise and Garden City, Idaho, which are served by the municipal separate storm sewer systems (MS4s) owned or operated by the Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3, and/or the Idaho Transportation Department District #3 (the Permittees).

B. Discharges Authorized Under This Permit. Subject to the conditions set forth herein, the Permittees are authorized to discharge storm water to waters of the United States from the MS4s identified in Part I.A.

As provided in Part I.D, this Permit also authorizes the discharge of flows from the MS4s which are categorized as allowable non-storm water discharge, storm water discharge associated with industrial activity, and storm water discharge associated with construction activity.

C. Permittees' Responsibilities

1. **Individual Responsibility.** Each Permittee is individually responsible for Permit compliance related only to portions of the MS4 owned or operated solely by that Permittee, or where this Permit requires a specific Permittee to take an action.
2. **Joint Responsibility.** Each Permittee is jointly responsible for Permit compliance:
 - a) related to portions of the MS4 where operational or storm water management program (SWMP) implementation authority has been transferred to all of the Permittees in accordance with an intergovernmental agreement or agreement between the Permittees;
 - b) related to portions of the MS4 where Permittees jointly own or operate a portion of the MS4;
 - c) related to the submission of reports or other documents required by Parts II and IV of this Permit; and
 - d) Where this Permit requires the Permittees to take an action and a specific Permittee is not named.
3. **Intergovernmental Agreement.** The Permittees must maintain an intergovernmental agreement describing each organization's respective roles and responsibilities related to this Permit. Any previously signed agreement may be updated, as necessary, to comply with this requirement. An updated intergovernmental agreement must be completed no later than July 1, 2013. A copy of the updated intergovernmental agreement must be submitted to the Environmental Protection Agency (EPA) with the 1st Year Annual Report.

D. Limitations on Permit Coverage

1. **Non-Storm Water Discharges.** Permittees are not authorized to discharge non-storm water from the MS4, except where such discharges satisfy one of the following three conditions:

- a) The non-storm water discharges are in compliance with a separate NPDES permit;
- b) The non-storm water discharges result from a spill and:
 - (i) are the result of an unusual and severe weather event where reasonable and prudent measures have been taken to prevent and minimize the impact of such discharge; or
 - (ii) consist of emergency discharges required to prevent imminent threat to human health or severe property damage, provided that reasonable and prudent measures have been taken to prevent and minimize the impact of such discharges;

or

c) The non-storm water discharges satisfy each of the following two conditions:

- (i) The discharges consist of uncontaminated water line flushing; potable water sources; landscape irrigation (provided all pesticides, herbicides and fertilizer have been applied in accordance with manufacturer's instructions); lawn watering; irrigation water; flows from riparian habitats and wetlands; diverted stream flows; springs; rising ground waters; uncontaminated ground water infiltration (as defined at 40 CFR § 35.2005(20)) to separate storm sewers; uncontaminated pumped ground water or spring water; foundation and footing drains (where flows are not contaminated with process materials such as solvents); uncontaminated air conditioning or compressor condensate; water from crawlspace pumps; individual residential car washing; dechlorinated swimming pool discharges; routine external building wash down which does not use detergents; street and pavement wash waters, where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed); fire hydrant flushing; or flows from emergency firefighting activities; and
- (ii) The discharges are not sources of pollution to waters of the United States. A discharge is considered a source of pollution to waters of the United States if it:
 - 1) Contains hazardous materials in concentrations found to be of public health significance or to impair beneficial uses in receiving waters. (Hazardous materials are those

that are harmful to humans and animals from exposure, but not necessarily ingestion);

- 2) Contains toxic substances in concentrations that impair designated beneficial uses in receiving waters. (Toxic substances are those that can cause disease, malignancy, genetic mutation, death, or similar consequences);
- 3) Contains deleterious materials in concentrations that impair designated beneficial uses in receiving waters. (Deleterious materials are generally substances that taint edible species of fish, cause taste in drinking waters, or cause harm to fish or other aquatic life);
- 4) Contains radioactive materials or radioactivity at levels exceeding the values listed in 10 CFR Part 20 in receiving waters;
- 5) Contains floating, suspended, or submerged matter of any kind in concentrations causing nuisance or objectionable conditions or in concentrations that may impair designated beneficial uses in receiving waters;
- 6) Contains excessive nutrients that can cause visible slime growths or other nuisance aquatic growths that impair designated beneficial uses in receiving waters;
- 7) Contains oxygen-demanding materials in concentrations that would result in anaerobic water conditions in receiving waters; or
- 8) Contains sediment above quantities specified in IDAPA 58.01.02.250.02.e or in the absence of specific sediment criteria, above quantities that impair beneficial uses in receiving waters; or
- 9) Contains material in concentrations that exceed applicable natural background conditions in receiving waters (IDAPA 58.01.02.200.09). Temperature levels may be increased above natural background conditions when allowed under IDAPA 58.01.02.401.

2. **Discharges Threatening Water Quality.** Permittees are not authorized to discharge storm water that will cause, or have the reasonable potential to cause or contribute to, an excursion above the Idaho water quality standards.
3. **Snow Disposal to Receiving Waters.** Permittees are not authorized to push or dispose of snow plowed within the Permit area directly into waters of the United States, or directly into the MS4(s). Discharges from any Permittee's snow disposal and snow management practices are authorized under this Permit only when such sites and practices are designed, conducted, operated, and maintained to prevent and reduce pollutants in the discharges to the maximum

extent practicable so as to avoid excursions above the Idaho water quality standards.

4. **Storm Water Discharge Associated with Industrial and Construction Activity.** Permittees are authorized to discharge storm water associated with industrial activity (as defined in 40 CFR 122.26(b)(14)), and storm water associated with construction activity (as defined in 40 CFR 122.26(b)(14)(x) and (b)(15)), from their MS4s, only when such discharges are otherwise authorized under an appropriate NPDES permit.

II. Storm Water Management Program (SWMP) Requirements

A. General Requirements

1. **Reduce pollutants to the maximum extent practicable.** The Permittees must implement and enforce a SWMP designed to reduce the discharge of pollutants from their MS4 to the maximum extent practicable (MEP), and to protect water quality in receiving waters. The SWMP as defined in this Permit must include best management practices (BMPs), controls, system design, engineering methods, and other provisions appropriate to control and minimize the discharge of pollutants from the MS4s.
 - a) **SWMP Elements.** The required SWMP control measures are outlined in Part II.SWMP assessment/monitoring requirements are described in Part IV. Each Permittee must use practices that are selected, implemented, maintained, and updated to ensure that storm water discharges do not cause or contribute to an exceedance of an applicable Idaho water quality standard.
 - b) **SWMP Documentation.** Each Permittee must prepare written documentation of the SWMP as implemented within their jurisdiction. The SWMP documentation must be organized according to the program components in Parts II and IV of this Permit, and must provide a current narrative physical description of the Permittee's MS4, illustrative maps or graphics, and all related ordinances, policies and activities as implemented within their jurisdiction. Each Permittee's SWMP documentation must be submitted to EPA with the 1st Year Annual Report.
 - (i) Each Permittee must provide an opportunity for public review and comment on their SWMP documentation, consistent with applicable state or local requirements and Part II.B.6 of this Permit.
 - (ii) Each Permittee's SWMP documentation must be updated at least annually and submitted as part of each subsequent Annual Report. (The document format used for Annual Report(s) submitted to EPA by the Permittees' prior to the effective date of this Permit may be modified to meet this requirement.)
 - c) **SWMP Information.** The SWMP must include an ongoing program for gathering, tracking, maintaining, and using information to set priorities, evaluate SWMP implementation and Permit compliance.

- d) **SWMP Statistics.** Permittees must track the number of inspections, official enforcement actions and types of public education activities and outcomes as stipulated by the respective program component. This information must be included in the Annual Report.
2. **Shared Implementation with outside entities.** Implementation of one or more of the SWMP minimum control measures may be shared with or delegated to another entity other than the Permittee(s). A Permittee may rely on another entity only if:
 - a) The other entity, in fact, implements the minimum control measure;
 - b) The action, or component thereof, is at least as stringent as the corresponding Permit requirement; and
 - c) The other entity agrees to implement the minimum control measure on the Permittee's behalf. A binding written acceptance of this obligation is required. Each Permittee must maintain and record this obligation as part of the SWMP documentation. If the other entity agrees to report on the minimum control measure, the Permittees must supply the other entity with the reporting requirements in Part IV.C of this Permit. The Permittees remain responsible for compliance with the Permit obligation if the other entity fails to implement the required minimum control measure.
 3. **Modification of the SWMP.** Minor modifications to the SWMP may be made in accordance with Part II.E of this Permit.
 4. **Subwatershed Planning.** No later than September 30, 2016, the Permittees must jointly complete at least two individual sub-watershed plans for areas served by the MS4s within the Permit area. For the purposes of this Permit, the terms "subwatershed" and "storm sewershed" are defined as in Part VII. For each plan document, the subwatershed planning area must drain to at least one of the water bodies listed in Table II.C.

Selected subwatersheds must be identified in the 1st Year Annual Report. Two completed subwatershed plan documents must be submitted to EPA as part of the 4th Year Annual Report.

 - a) The Permittees must actively engage stakeholders in the development of each plan, and must provide opportunities for public input, consistent with Part II.B.6.
 - b) The Permittees may modify and update any existing watershed planning document(s) to address the requirements of this Part.
 - c) Each subwatershed plan must describe the extent and nature of the existing storm sewershed, and identify priority aquatic resources and beneficial uses to be protected or restored within the subwatershed planning area. Each subwatershed plan must contain a prioritized list of potential locations or opportunities for protecting or restoring such resources or beneficial uses through storm water infiltration, evapotranspiration or rainfall

harvesting/reuse, or other site-based low impact development (LID) practices. See Parts II.B.2.a, and II.B.2.c.

- d) Each subwatershed plan must include consideration and discussion of how the Permittees will provide incentives, or enforce requirements, through their respective Stormwater Management Programs to address the following principles:
- (i) Minimize the amount of impervious surfaces (roads, parking lots, roofs) within each watershed, by minimizing the creation, extension and widening of roads and associated development.
 - (ii) Preserve, protect, create and restore ecologically sensitive areas that provide water quality benefits and serve critical watershed functions. These areas may include, but are not limited to; riparian corridors, headwaters, floodplains and wetlands.
 - (iii) Prevent or reduce thermal impacts to water bodies, including requiring vegetated buffers along waterways, and disconnecting discharges to surface waters from impervious surfaces such as parking lots.
 - (iv) Seek to avoid or prevent hydromodification of streams and other water bodies caused by development, including roads, highways, and bridges.
 - (v) Preserve and protect trees, and other vegetation with important evapotranspirative qualities.
 - (vi) Preserve and protect native soils, prevent topsoil stripping, and prevent compaction of soils.

B. Minimum Control Measures. The following minimum control measures must be accomplished through each Permittee's Storm Water Management Program:

1. **Construction Site Runoff Control Program.** The Permittees must implement a construction site runoff control program to reduce discharges of pollutants from public and private construction activity within its jurisdiction. The Permittees' construction site management program must include the requirements described below:
 - a) **Ordinance and/or other regulatory mechanism.** To the extent allowable under local or state law, Permittees must adopt, implement, and enforce requirements for erosion controls, sediment controls, and materials management techniques to be employed and maintained at each construction project from initial clearing through final stabilization. Each Permittee must require construction site operators to maintain adequate and effective controls to reduce pollutants in storm water discharges from construction sites. The Permittees must use enforcement actions (such as, written warnings, stop work orders or fines) to ensure compliance.

No later than September 30, 2015, each Permittee must update their ordinances or other regulatory mechanisms, as necessary, to be consistent with this Permit and with the current version of the *NPDES General Permit for Storm Water Discharges from Construction Activities*, Permit #IDR12-0000 (NPDES Construction General Permit or CGP).

- b) **Manuals Describing Construction Storm Water Management Controls and Specifications.** The Permittees must require construction site operators within their jurisdiction to use construction site management controls and specifications as defined within manuals adopted by the Permittees.

No later than September 30, 2015, the Permittees must update their respective manuals, as necessary, to include requirements for the proper installation and maintenance of erosion controls, sediment controls, and material containment/pollution prevention controls during all phases of construction activity. The manual(s) must include all acceptable control practices, selection and sizing criteria, illustrations, and design examples, as well as recommended operation and maintenance of each practice. At a minimum, the manual(s) must include requirements for erosion control, sediment control, and pollution prevention which complement and do not conflict with the current version of the CGP. If the manuals previously adopted by the individual Permittee do not meet these requirements, the Permittee may create supplemental provisions to include as part of the adopted manual in order to comply with this Permit.

- c) **Plan Review and Approval.** The Permittees must review and approve preconstruction site plans from construction site operators within their jurisdictions. Permittees must ensure that the construction site operator is prohibited from commencing construction activity prior to receipt of written approval.
- (i) The Permittees must not approve any erosion and sediment control (ESC) plan or Storm Water Pollution Prevention Plan (SWPPP) unless it contains appropriate site-specific construction site control measures meeting the Permittee's requirements as outlined in Part II.B.1.b.
 - (ii) Prior to the start of a construction project disturbing one or more acres, or disturbing less than one acre but is part of a larger common plan of development, the Permittees must advise the construction site operator(s) to seek or obtain necessary coverage under the NPDES Construction General Permit.
 - (iii) Permittees must use qualified individuals, knowledgeable in the technical review of ESC plans/SWPPPs, to conduct such reviews.
 - (iv) Permittees must document the review of each ESC plan and/or SWPPP using a checklist or similar process.
- d) **Construction Site Inspections.** The Permittees must inspect construction sites occurring within their jurisdictions to ensure compliance with their

applicable requirements. The Permittees may establish an inspection prioritization system to identify the frequency and type of inspection based upon such factors as project type, total area of disturbance, location, and potential threat to water quality. If a prioritization system is used, the Permittee must include a description of the current inspection prioritization in the SWMP document required in Part II.A, and summarize the nature and number of inspections conducted during the previous reporting period in each Annual Report.

(i) Inspections of construction sites must include, but not be limited to:

- As applicable, a check for coverage under the Construction General Permit by reviewing any authorization letter or Notice of Intent (NOI) during initial inspections;
- Review the applicable ESC plan/SWPPP to determine if control measures have been installed, implemented, and maintained as approved;
- Assessment of compliance with the Permittees' ordinances/requirements related to storm water runoff, including the implementation and maintenance of required control measures;
- Assessment of the appropriateness of planned control measures and their effectiveness;
- Visual observation of non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
- Education or instruction related to on storm water pollution prevention practices, as needed or appropriate; and
- A written or electronic inspection report.

(ii) The Permittees must track the number of construction site inspections conducted throughout the reporting period, and verify that the sites are inspected at the minimum frequencies required by the inspection prioritization system. Construction site inspections must be tracked and reported with each Annual Report.

(iii) Based on site inspection findings, each Permittee must take all necessary follow-up actions (i.e., re-inspection, enforcement) to ensure compliance. Follow-up and enforcement actions must be tracked and reported with each Annual Report.

- e) **Enforcement Response Policy for Construction Site Management Program.** No later than September 30, 2016, each Permittee must develop and implement a written escalating enforcement response policy (ERP) appropriate to their organization. Upon implementation of the policy in its jurisdiction, each Permittee must submit its completed ERP to EPA with the 4th Year Annual Report. The ERP for City of Boise, City of Garden City, and Ada County Highway District must address enforcement of construction site runoff controls for all currently regulated construction projects within their jurisdictions. The ERP for Idaho Transportation Department District 3, Drainage District 3, and Boise State University must address contractual enforcement of construction site runoff controls at construction sites within their jurisdictions. Each ERP must describe the Permittee's potential responses to violations with an appropriate educational or enforcement response. The ERP must address repeat violations through progressively stricter responses as needed to achieve compliance. Each ERP must describe how the Permittee will use the following types of enforcement response, as available, based on the type of violation:
- (i) **Verbal Warnings:** Verbal warnings are primarily consultative in nature. At a minimum, verbal warnings must specify the nature of violation and required corrective action.
 - (ii) **Written Notices:** Written notices must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.
 - (iii) **Escalated Enforcement Measures:** The Permittees must have the legal ability to employ any combination of the enforcement actions below (or their functional equivalent):
 - The ERP must indicate when the Permittees will initiate a Stop Work Order. Stop work orders must require that construction activities be halted, except for those activities directed at cleaning up, abating discharge, and installing appropriate control measures.
 - The Permittees must also use other escalating measures provided under local or state legal authorities, such as assessing monetary penalties. The Permittees may perform work necessary to improve erosion control measures and collect the funds from the responsible party in an appropriate manner, such as collecting against the project's bond, or directly billing the responsible party to pay for work and materials.
- f) **Construction General Permit Violation Referrals.** For those construction projects which are subject to the NPDES Construction General Permit and do not respond to Permittee educational efforts, the Permittee may provide to EPA information regarding construction project operators which cannot demonstrate that they have appropriate NPDES Permit

coverage and/or site operators deemed by the Permittee as not complying with the NPDES Construction General Permit. Permittees may submit such information to the EPA NPDES Compliance Hotline in Seattle, Washington, by telephone, at (206) 553-1846, and include, at a minimum, the following information:

- Construction project location and description;
 - Name and contact information of project owner/ operator;
 - Estimated construction project disturbance size; and
 - An account of information provided by the Permittee to the project owner/ operator regarding NPDES filing requirements.
- (i) **Enforcement Tracking.** Permittees must track instances of non-compliance either in hard-copy files or electronically. The enforcement case documentation must include, at a minimum, the following:
- Name of owner/operator;
 - Location of construction project;
 - Description of violation;
 - Required schedule for returning to compliance;
 - Description of enforcement response used, including escalated responses if repeat violations occur;
 - Accompanying documentation of enforcement response (e.g., notices of noncompliance, notices of violations, etc.); and
 - Any referrals to different departments or agencies.
- g) **Construction Program Education and Training.** Throughout the Permit term, the Permittees must ensure that all staff whose primary job duties are related to implementing the construction program (including permitting, plan review, construction site inspections, and enforcement) are trained to conduct such activities. The education program must also provide regular training opportunities for construction site operators. This training must include, at a minimum:
- (i) *Erosion and Sediment Control/Storm Water Inspectors:*
- Initial training regarding proper control measure selection, installation and maintenance as well as administrative requirements such as inspection reporting/tracking and the implementation of the enforcement response policy; and

- Annual refresher training for existing inspection staff to update them on preferred BMPs, regulation changes, Permit updates, and policy or standards updates.
- (ii) *Other Construction Inspectors:* Initial training on general storm water issues, basic control measure implementation information, and procedures for notifying the appropriate personnel of noncompliance.
- (iii) *Plan Reviewers:*
- Initial training regarding control measure selection, design standards, review procedures;
 - Annual training regarding new control measures, innovative approaches, Permit updates, regulation changes and policy or standard updates.
- (iv) *Third-Party Inspectors and Plan Reviewers.* If the Permittee utilizes outside parties to either conduct inspections and or review plans, these outside staff must be trained per the requirements listed in Part II.B.1.f.i.-iii above.
- (v) *Construction Operator Education.* At a minimum, the Permittees must educate construction site operators within the Permit area as follows:
- At least once per year, the Permittees must either provide information to all construction companies on existing training opportunities or develop new training for construction operators regarding appropriate selection, installation, and use of required construction site control measures at sites within the Permit area.
 - The Permittees must require construction site operators to have at least one person on-site during construction that is appropriately trained in erosion and sediment control.
 - The Permittees must require construction operators to attend training at least once every three years.
 - The Permittees must provide appropriate information and outreach materials to all construction operators who may disturb land within their jurisdiction.

2. Storm Water Management for Areas of New Development and

Redevelopment. At a minimum, the Permittees must implement and enforce a program to control storm water runoff from new development and redevelopment projects that result in land disturbance of 5,000 square feet or more, excluding individual one or two family dwelling development or redevelopment. This program must apply to private and public sector development, including roads and streets. The program implemented by the Permittees must ensure that permanent controls or practices are utilized at each new development and redevelopment site to protect water quality. The program must include, at a minimum, the elements described below:

- a) **Ordinance or other regulatory mechanisms.** No later than the expiration date of this Permit, each Permittee must update its applicable ordinance or regulatory mechanism which requires the installation and long-term maintenance of permanent storm water management controls at new development and redevelopment projects. Each Permittee must update their ordinance/regulatory mechanism to the extent allowed by local and state law, consistent with the individual Permittee's respective legal authority. Permittees must submit their revised ordinance/regulatory mechanism as part of the 5th Year Annual Report.
 - (i) The ordinance/regulatory mechanism must include site design standards for all new and redevelopment that require, in combination or alone, storm water management measures that keep and manage onsite the runoff generated from the first 0.6 inches of rainfall from a 24-hour event preceded by 48 hours of no measureable precipitation. Runoff volume reduction can be achieved by canopy interception, soil amendments, bioretention, evapotranspiration, rainfall harvesting, engineered infiltration, extended filtration, and/or any combination of such practices that will capture the first 0.6 inches of rainfall. An Underground Injection Control permit may be required when certain conditions are met. The ordinance or regulatory mechanism must require that the first 0.6 inches of rainfall be 100% managed with no discharge to surface waters, except when the Permittee chooses to implement the conditions of II.B.2.a.ii below.
 - (ii) For projects that cannot meet 100% infiltration/evapotranspiration/reuse requirements onsite, the Permittees' program may allow offsite mitigation within the same subwatershed, subject to siting restrictions established by the Permittee. The Permittee allowing this option must develop and apply criteria for determining the circumstances under which offsite mitigation may be allowed. A determination that the onsite retention requirement cannot be met must be based on multiple factors, including but not limited to technical feasibility or logistic practicality (e.g. lack of available space, high groundwater, groundwater contamination, poorly infiltrating soils, shallow bedrock, and/or a land use that is inconsistent with

capture and reuse or infiltration of storm water). Determinations may not be based solely on the difficulty and/or cost of implementing such measures. The Permittee(s) allowing this option must create an inventory of appropriate mitigation projects and develop appropriate institutional standards and management systems to value, estimate and track these situations. Using completed subwatershed plans or other mechanisms, the Permittee(s) must identify priority areas within subwatersheds in which off-site mitigation may be conducted.

- (iii) The ordinance or regulatory mechanism must include the following water quality requirements:
 - Projects with potential for excessive pollutant loading(s) must provide water quality treatment for associated pollutants before infiltration.
 - Projects with potential for excessive pollutant loading(s) that cannot implement adequate preventive or water quality treatment measures to ensure compliance with Idaho surface water standards must properly convey storm water to a NPDES permitted wastewater treatment facility or via a licensed waste hauler to a permitted treatment and disposal facility.
 - (iv) The ordinance or other regulatory mechanism must include procedures for the Permittee's review and approval of permanent storm water management plans for new development and redevelopment projects consistent with Part II.B.1.d.
 - (v) The ordinance or other regulatory mechanism must include sanctions (including fines) to ensure compliance, as allowed under state or local law.
- b) **Storm Water Design Criteria Manual.** No later than September 30, 2015, each Permittee must update as necessary their existing Storm Water Design Criteria Manual specifying acceptable permanent storm water management and control practices. The manual must contain design criteria for each practice. In lieu of updating a manual, a Permittee may adopt a manual created by another entity which complies with this section. The manual must include:
- (i) Specifications and incentives for the use of site-based practices appropriate to local soils and hydrologic conditions;
 - (ii) A list of acceptable practices, including sizing criteria, performance criteria, design examples, and guidance on selection and location of practices; and
 - (iii) Specifications for proper long term operation and maintenance, including appropriate inspection interval and self-inspection checklists for responsible parties.

c) Green Infrastructure/Low Impact Development (LID) Incentive Strategy and Pilot Projects. No later than September 30, 2015, the Permittees must develop a strategy to provide incentives for the increased use of LID techniques in private and public sector development projects within each Permittee's jurisdiction. Permittees must comply with applicable State and local public notice requirements when developing this Strategy. Pursuant to Part IV.A.2.a, the Strategy must reference methods of evaluating at least three (3) Green Infrastructure/LID pilot projects as described below. Permittees must implement the Green Infrastructure/LID Incentive Strategy, and complete an effectiveness evaluation of at least three pilot projects, prior to the expiration date of this Permit.

(i) As part of the 3rd Year Annual Report, the Permittees must submit the written Green Infrastructure /LID Incentive Strategy; the Strategy must include a description of at least three selected pilot projects, and a narrative report on the progress to evaluate the effectiveness of each selected LID technique or practice included in the pilot project. Each pilot project must include an evaluation of the effectiveness of LID technique(s) or practice(s) used for on-site control of water quality and/or quantity. Each Pilot Project must involve at least one or more of the following characteristics:

- The project manages runoff from at least 3,000 square feet of impervious surface;
- The project involves transportation related location(s) (including parking lots);
- The drainage area of the project is greater than five acres in size; and/or
- The project involves mitigation of existing storm water discharges to one or more of the water bodies listed in Table II.C.

(ii) Consistent with Part IV.A.10, the Permittees must evaluate the performance of LID technique(s) or practice(s) in each pilot project, and include a progress report on overall strategy implementation in the 4th Annual Report. Final pilot project evaluations must be submitted in the 5th Year Annual Report. The Permittees must monitor, calculate or model changes in runoff quantities for each of the pilot project sites in the following manner:

- For retrofit projects, changes in runoff quantities shall be calculated as a percentage of 100% pervious surface before and after implementation of the LID technique(s) or practice(s).
- For new construction projects, changes in runoff quantities shall be calculated for development scenarios both with LID technique(s) or practice(s) and without LID technique(s) or practice(s).

- The Permittees must measure runoff flow rate and subsequently prepare runoff hydrographs to characterize peak runoff rates and volumes, discharge rates and volumes, and duration of discharge volumes. The evaluation must include quantification and description of each type of land cover contributing to surface runoff for each pilot project, including area, slope, vegetation type and condition for pervious surfaces, and the nature of impervious surfaces.
 - The Permittees must use these runoff values to evaluate the overall effectiveness of various LID technique(s) or practice(s) and to develop recommendations for future adoption of LID technique(s) or practice(s) that address appropriate use, design, type, size, soil type and operation and maintenance practices.
- (iii) **Riparian Zone Management and Outfall Disconnection.** No later than September 30, 2015, the Permittees must identify and prioritize riparian areas appropriate for Permittee acquisition and protection. Prior to the expiration date of this Permit, the Permittees must undertake and complete at least one project designed to reduce the flow of untreated urban storm water discharging through the MS4 system through the use of vegetated swales, storm water treatment wetlands and/or other appropriate techniques. The Permittees must submit the list of prioritized riparian protection areas, and a status report on the planning and implementation of the outfall disconnection project, as part of the 3rd Year Annual Report. Documentation of the completed outfall disconnection project must be included in the 5th Year Annual Report.
- (iv) **Repair of Public Streets, Roads and Parking Lots.** When public streets, roads or parking lots are repaired (as defined in Part VII), the Permittees performing these repairs must evaluate the feasibility of incorporating runoff reduction techniques into the repair by using canopy interception, bioretention, soil amendments, evaporation, rainfall harvesting, engineered infiltration, rain gardens, infiltration trenches, extended filtration and/or evapotranspiration and/or any combination of the aforementioned practices. Where such practices are found to be technically feasible, the Permittee performing the repair must use such practices in the design and repair. These requirements apply only to projects whose design process is started after the effective date of this Permit. As part of the 5th Year Annual Report, the Permittees must list the locations of street, road and parking lot repair work completed since the effective date of the Permit that have incorporated such runoff reduction practices, and the receiving water body(s) benefitting from such practices. This documentation must include a general description of the project design, estimated total cost, and estimates of total flow

volume and pollutant reduction achieved compared to traditional design practices.

- d) **Plan Review and Approval.** The Permittees must review and approve pre-construction plans for permanent storm water management. The Permittees must review plans for consistency with the ordinance/regulatory mechanism and Storm Water Design Criteria Manual required by this Part. The Permittees must ensure that the project operator is prohibited from commencing construction activity prior to receipt of written approval from the Permittee.
- (i) The Permittees must not approve or recommend for approval any plans for permanent storm water controls that do not contain appropriate permanent storm water management practices that meet the minimum requirements specified in this Part.
 - (ii) Permittees must use qualified individuals, knowledgeable in the technical review of plans for permanent storm water controls to conduct such reviews.
 - (iii) Permittees must document the review of each plan using a checklist or similar process.

e) Operation and Maintenance (O&M) of Permanent Storm Water Management Controls.

- (i) **Inventory and Tracking.** The Permittees must maintain a database tracking all new public and private sector permanent storm water controls. No later than January 30, 2018, all of the available data on existing permanent storm water controls known to the Permittees must be included in the inventory database. For the purposes of this Part, new permanent controls are those installed after February 1, 2013; existing permanent controls are those installed prior to February 1, 2013. The tracking must begin in the plan review stage with a database that incorporates geographic information system (GIS) information. The tracking system must also include, at a minimum: type and number of practices; O&M requirements, activity and schedule; responsible party; and self-inspection schedule.
- (ii) **O&M Agreements.** Where parties other than the Permittees are responsible for operation and maintenance of permanent storm water controls, the Permittees must require a legally enforceable and transferable O&M agreement with the responsible party, or other mechanism, that assigns permanent responsibility for maintenance of structural or treatment control storm water management practices.

f) Inspection and Enforcement of Permanent Storm Water Management Controls. The Permittees must ensure proper long term operation and

maintenance of all permanent storm water management practices within the Permittees' respective jurisdiction. The Permittees must implement an inspection program, and define and prioritize new development and redevelopment sites for inspections of permanent storm water management controls. Factors used to prioritize sites must include, but not be limited to: size of new development or redevelopment area; sensitivity and/or impaired status of receiving water(s); and, history of non-compliance at the site during the construction phase.

- (i) No later than September 30, 2017, all high priority locations must be inventoried and associated inspections must be scheduled to occur at least once annually. The inspections must determine whether storm water management or treatment practices have been properly installed (i.e., an "as built" verification). The inspections must evaluate the operation and maintenance of such practices, identify deficiencies and potential solutions, and assess potential impacts to receiving waters.
 - (ii) No later than September 30, 2017, the Permittees must develop checklists to be used by inspectors during these inspections, and must maintain records of all inspections conducted on new development and redevelopment sites.
 - (iii) No later than September 30, 2017, the Permittees must develop and implement an enforcement strategy similar to that required in Section II.B.1.e to maintain the integrity of permanent storm water management and treatment practices.
- g) **Education and Training on Permanent Storm Water Controls.** No later than September 30, 2015, the Permittees must begin a training program for appropriate audiences regarding the selection, design, installation, operation and maintenance of permanent storm water controls. The training program and materials must be updated as necessary to include information on updated or revised storm water treatment standards, design manual specifications, Low Impact Development techniques or practices, and proper operation and maintenance requirements.
 - (i) No later than September 30, 2016, and annually thereafter, all persons responsible for reviewing plans for new development and redevelopment and/or inspecting storm water management practices and treatment controls must receive training sufficient to determine the adequacy of storm water management and treatment controls at proposed new development and redevelopment sites.
 - (ii) No later than September 30, 2016, and at least annually thereafter, Permittees must provide training to local audiences on the storm water management requirements described in this Part.

3. Industrial and Commercial Storm Water Discharge Management. The Permittees must implement a program to reduce to the MEP the discharge of pollutants from industrial and commercial operations within their jurisdiction. Throughout the Permit term, the Permittees must conduct educational and/or enforcement efforts to reduce the discharge of pollutants from those industrial and commercial locations which are considered to be significant contributors of phosphorus, bacteria, temperature, and/or sediment to receiving waters. At a minimum, the program must include the following elements:

a) Inventory of Industrial and Commercial Facilities/Activities. No later than September 30, 2016, the Permittees must update the inventory and map of facilities and activities discharging directly to their MS4s.

(i) At a minimum, the inventory must include information listing the watershed/receiving water body, facility name, address, nature of business or activity, and North American or Standard Industrial Classification code(s) that best reflect the facility's product or service;

(ii) The inventory must include the following types of facilities: municipal landfills (open and closed); Permittee-owned maintenance yards and facilities; hazardous waste recovery, treatment, storage and disposal facilities; facilities subject to Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11023; all industrial sectors listed in 40 CFR §122.26(b)(14); vehicle or equipment wash systems; commercial animal facilities, including kennels, race tracks, show facilities, stables, or other similar commercial locations where improper management of domestic animal waste may contribute pollutants to receiving waters or to the MS4; urban agricultural activities; and other industrial or commercial facility that the Permittees determine is contributing a substantial pollutant loading to the MS4 and associated receiving waters.

(iii) The Permittees must collectively identify at least two specific industrial/commercial activities or sectors operating within the Permit area for which storm water discharges are not being adequately addressed through existing programs. No later than September 30, 2016, the Permittees must develop best management practices for each activity, and educate the selected industrial/commercial audiences regarding these performance expectations. Example activities for consideration include, but are not limited to: landscaping businesses; wholesale or retail agricultural and construction supply businesses; urban agricultural activities; power washers; commercial animal facilities; commercial car/truck washing operations; and automobile repair shops.

b) Inspection of Industrial and Commercial Facilities/Activities. The Permittees must work cooperatively throughout the Permit term to prioritize

and inspect selected industrial and commercial facilities/activities which discharge to receiving waters or to the MS4. No later than September 30, 2016, any existing agreements between the Permittees to accomplish such inspections must be updated as necessary to comply with this permit. At a minimum, the industrial and commercial facility inspection program must include:

- (i) Priorities and procedures for inspections, including inspector training, and compliance assistance or education materials to inform targeted facility/activity operators of applicable requirements;
 - (ii) Provisions to record observations of a facility or activity;
 - (iii) Procedures to report findings to the inspected facility or activity, and to follow-up with the facility/activity operator as necessary;
 - (iv) A monitoring (or self monitoring) program for facilities that assesses the type and quantity of pollutants discharging to the MS4s;
 - (v) Procedures to exercise legal authorities to ensure compliance with applicable local storm water ordinances.
- c) **Maintain Industrial and Commercial Facility/Activity Inventory.** The industrial and commercial facility/activity inventory must be updated at least annually. The updated inventory and a summary of the compliance assistance and inspection activities conducted, as well as any follow-up actions, must be submitted to EPA with each Annual Report.

4. Storm Water Infrastructure and Street Management. The Permittees must maintain their MS4 and related facilities to reduce the discharge of pollutants from the MS4 to the MEP. All Permittee-owned and operated facilities must be properly operated and maintained. This maintenance requirement includes, but is not limited to, structural storm water treatment controls, storm sewer systems, streets, roads, parking lots, snow disposal sites, waste facilities, and street maintenance and material storage facilities. The program must include the following:

- a) **Storm Sewer System Inventory and Mapping.** No later than January 30, 2018, the Permittees must update current records to develop a comprehensive inventory and map of the MS4s and associated outfall locations. The inventory must identify all areas over which each Permittee has responsibility. The inventory must include:
 - (i) the location of all inlets, catch basins and outfalls owned/operated by the Permittee;
 - (ii) the location of all MS4 collection system pipes (laterals, mains, etc.) owned/operated by the Permittee, including locations where the MS4 is physically interconnected to the MS4 of another operator ;

- (iii) the location of all structural flood control devices, if different from the characteristics listed above;
- (iv) the names and locations of receiving waters of the U.S. that receive discharges from the outfalls;
- (v) the location of all existing structural storm water treatment controls;
- (vi) identification of subwatersheds, associated land uses, and approximate acreage draining into each MS4 outfall; and
- (vii) the location of Permittee-owned vehicle maintenance facilities, material storage facilities, maintenance yards, and snow disposal sites; Permittee-owned or operated parking lots and roadways.

A summary description of the Permittees' storm sewer system inventory and a map must be submitted to EPA as part of the reapplication package required by Part VI.B

- b) **Catch Basin and Inlet Cleaning.** No later than September 30, 2016, the Permittees must initiate an inspection program to inspect all Permittee-owned or operated catch basins and inlets at least every two years and take appropriate maintenance action based on those inspections. Inspection records must be maintained and summarized in each Annual Report.
- c) **Street and Road Maintenance.** No later than September 30, 2015, the Permittees responsible for road and street maintenance must update any standard operating procedures for storm water controls to ensure the use of BMPs that, when applied to the Permittee's activity or facility, will protect water quality, and reduce the discharge of pollutants to the MEP. The operating procedures must contain, for each activity or facility, inspection and maintenance schedules specific to the activity, and appropriate pollution prevention/good housekeeping procedures for all of the following types of facilities and/or activities listed below. Water conservation measures should be considered for all landscaped areas.
 - (i) **Streets, roads, and parking lots.** The procedures must address, but are not limited to: road deicing, anti-icing, and snow removal practices; snow disposal areas; street/road material (e.g. salt, sand, or other chemical) storage areas; maintenance of green infrastructure/low impact development practices; and BMPs to reduce road and parking lot debris and other pollutants from entering the MS4. Within four years of the effective date of this permit, the Permittees must implement all of the pollution prevention/good housekeeping practices established in the SOPs for all streets, roads, highways, and parking lots with more than 3,000 square feet of impervious surface that are owned, operated, or maintained by the Permittees.
 - (ii) **Inventory of Street Maintenance Materials.** Throughout the Permit term, all Permittees with street maintenance

responsibilities must maintain an inventory of street /road maintenance materials, including use of sand and salt, and document the inventory in the corresponding Annual Reports.

- (iii) **Manage Sand with Salt and Salt Storage Areas.** No later than September 30, 2017, the Permittees must address any sand, salt, or sand with salt material stockpiles at each of their materials storage locations to prevent pollutants in stormwater runoff from discharging to the MS4 or into any receiving waterbody. Examples how the Permittee may choose to address runoff from their material storage areas include, but are not limited to: building covered storage areas; fully containing the material stockpile area in a manner that prevents runoff from discharging to the MS4 or a receiving waterbody; relocating and/or otherwise consolidating material storage piles to alternative locations which prevents discharges to the MS4 or a receiving waterbody. The Permittees must identify their material storage locations in the SWMP documentation submitted to EPA with the 1st year Annual Report and reference the average quantity of material stored at each location in the inventory required in Part II.B.4.c.ii. Permittees must document in the 5th Year Annual Report how their material stockpiles have been addressed to prevent runoff from discharging to the MS4 or a receiving waterbody.
- d) **Street, Road and Parking Lot Sweeping.** Each Permittee with street, road, and/or public parking lot maintenance responsibilities must update their respective sweepings management plans no later than September 30, 2015. Each updated plan must designate all streets, roads, and/or public parking lots which are owned, operated or maintained by that Permittee to fit within one of the following categories for sweeping frequency based on land use, traffic volumes or other factors:
- Residential – Streets and road segments that include, but are not limited to, light traffic zones and residential zones.
 - Arterial and all other – Streets and road segments with high traffic volumes serving commercial or industrial districts.
 - Public Parking Lots – large lots serving schools and cultural facilities, plazas, sports and event venues or similar facilities.
- (i) No later than September 30, 2014, each Permittee with street, road, and/or public parking lot maintenance responsibilities must inventory and map all of their designated streets, roads, and public parking lots for sweeping frequency. The resulting inventory and map must be submitted as part of the 2nd Year Annual Report.
- (ii) No later than September 30, 2015, Permittees with street, road, and/or public parking lot maintenance responsibilities must

sweep all streets, roads, and public parking lots that are owned, operated or maintained by that Permittee according to the following schedule:

Table II.B-2

Roadway Type	Sweeping Schedule			
	Two Times Per Month	Every Six Weeks	Four Times Per Year	One Time Per Year
Downtown Areas of Boise and Garden City	X			
Arterial and Collector Roadways (non-downtown)		X		
Residential Roadways			X	
Paved Alleys and Public Parking Lots				X

- (iii) If a Permittee’s existing overall street/road/parking lot sweeping program provides equivalent or greater street sweeping frequency to the requirements above, the Permittee must continue to implement its existing street/road/parking lot sweeping program.
- (iv) For areas where sweeping is technically infeasible, the Permittees with street, road, and/or public parking lot maintenance responsibilities must document in the 1st Year Annual Report each area and indicate why sweeping is infeasible. The Permittee must document what alternative sweeping schedule will be used, or how the Permittee will increase implementation of other trash/litter control procedures to minimize pollutant discharges to the MS4 and to receiving waters.
- (v) The Permittees with street, road, and/or public parking lot maintenance responsibilities must estimate the effectiveness of their street sweeping activities to minimize pollutant discharges to the MS4 and receiving waters, and document the following in each Annual Report:

- Identify any significant changes to the designated road/street/parking lot inventory and map, and the basis for those changes;
 - Report annually on types of sweepers used, swept curb and/or lane miles, dates of sweeping by general location and frequency category, volume or weight of materials removed and a representative sample of the particle size distribution of swept material;
 - Report annually on any public outreach efforts or other means to address excess leaves and other material as well as areas that are infeasible to sweep.
- e) **Implement appropriate requirements for pesticide, herbicide, and fertilizer applications.** Permittees must continue to implement practices to reduce the discharge of pollutants to the MS4 associated with the application, storage and disposal of pesticides, herbicides and fertilizers from municipal areas and activities. Municipal areas and activities include, at a minimum, municipal facilities, public right-of-ways, parks, recreational facilities, golf courses, and landscaped areas. All employees or contractors of the Permittees applying restricted use pesticides must be registered as certified applicators.
- f) **Develop and implement Storm Water Pollution Prevention Plans.** No later than September 30, 2015, the Permittees must develop and implement SWPPPs for all Permittee-owned material storage facilities, and maintenance yards located within the Permit area and identified in the inventory required in Parts II.B.3.a and II.B.4.a.viii. Permittee-owned facilities discharging storm water associated with industrial activity as defined in 40 CFR 122.26(b)(14) must obtain separate NPDES permit coverage as required in Part I.D.4 of this permit.
- g) **Storm Water Management.** Each Permittee must ensure that any storm water management projects it undertakes after the effective date of this Permit are designed and implemented to prevent adverse impacts on water quality.
- (i) Permittees must evaluate the feasibility of retrofitting existing storm water control devices to provide additional pollutant removal from collected storm water.
 - (ii) No later than the expiration date of this Permit, Permittees must identify and define all locations where such retrofit project opportunities are feasible, identify appropriate funding sources, and outline project timelines or schedule(s) for retrofit projects designed to better control the discharge of pollutants of concern to the Boise River and its tributaries.
- h) **Litter Control.** Throughout the Permit term, each Permittee must continue to implement effective methods to reduce litter within their jurisdiction. Permittees must work with others as appropriate to control litter on a

regular basis and after major public events to reduce the discharge of pollutants to receiving waters.

- i) **Training.** The Permittees must provide regular training to appropriate Permittee staff on all operations and maintenance procedures designed to prevent pollutants from entering the MS4 and receiving waters. Appropriate Permittee staff must receive training no later than September 30, 2015, and annually thereafter.

5. Illicit Discharge Management. An illicit discharge is any discharge to an MS4 that is not composed entirely of storm water. Exceptions are described in Part I.D. of this permit. The Permittees must continue to implement their illicit discharge management program to reduce to the MEP the unauthorized and illegal discharge of pollutants to the MS4. The program must include:

- a) **Ordinance or other regulatory mechanisms.** Upon the effective date of this Permit, the Permittees must effectively prohibit non-storm water discharges to the MS4 (except those identified in Part 1.D of this permit) through enforcement of relevant ordinances or other regulatory mechanisms. Such ordinances/regulatory mechanisms must be updated prior to the expiration date of this Permit as necessary to provide adequate controls. To be considered adequate, an ordinance or regulatory mechanism must:
 - (i) Authorize the Permittee to prohibit, at a minimum, the following discharges to the MS4, unless otherwise authorized in Part 1.D:
 - Sewage;
 - Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;
 - Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility, including motor vehicles, cement-related equipment, and port-a-potty servicing, etc.;
 - Discharges of wash water from mobile operations, such as mobile automobile or truck washing, steam cleaning, power washing, and carpet cleaning, etc.;
 - Discharges of wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas - including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc. - where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed);
 - Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;

- Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; discharges of pool or fountain filter backwash water;
 - Discharges of sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and
 - Discharges of food-related wastes (grease, fish processing, and restaurant kitchen mat and trash bin wash water, etc.).
- (ii) Prohibit and eliminate illicit connections to the MS4;
- (iii) Control the discharge of spills, and prohibit dumping or disposal of materials other than storm water into the MS4.
- b) **Illicit Discharge Complaint Reporting and Response Program.** At a minimum, Permittees must respond to reports of illicit discharges from the public in the following manner:
- (i) **Complaint/Reporting Hotline.** The Permittees must maintain the dedicated telephone number and email address, or other publicly available and accessible means in addition to the website required in Part II.B.6, for use by the public to report illicit discharges. This complaint hotline must be answered by trained staff during normal business hours. During non-business hours, a system must be in place to record incoming calls to the hotline and a system must be in place to guarantee timely response. The telephone number must be printed on appropriate education, training, and public participation materials produced under Part II.B.6, and clearly listed in the local telephone book as appropriate.
- (ii) **Response to Complaints/Reports.** The Permittees must respond to all complaints or reports of illicit discharges as soon as possible, but no later than within two working days.
- (iii) **Maintain log of complaints/reports received and actions taken.** The Permittees must maintain a record documenting all complaints or reports of illicit discharges and responses taken by the Permittees.
- c) **Illicit Discharge Mapping.** No later than September 30, 2014, the Permittees must develop a map of reported and documented illicit discharges or illicit connections to identify priority areas. The map must identify, at a minimum, the location, type and relative quantity or severity of the known, recurrent or ongoing non-storm water discharges to the MS4. This map must be updated annually and used to target the specific outfall locations for that field screening season.
- d) **Dry Weather Outfall Screening Program.** Permittees must implement, and update as necessary, a dry weather analytical and field screening monitoring program. This dry weather outfall screening program must emphasize frequent, geographically widespread monitoring to detect illicit discharges and illegal connections, and to reinvestigate potentially

problematic outfalls. At a minimum, the procedures must be based on the following guidelines and criteria:

- (i) **Outfall Identification.** The Permittees must update as necessary the storm water outfall identification and screening plan, describing the reconnaissance activities that must be performed and information used to prioritize targeted outfalls and associated land uses.. The plan must discuss how chemical and microbiological analysis will be conducted on any flows identified during dry weather screening, including field screening methodologies and associated trigger thresholds to be used for determining follow-up action.
- (ii) **Monitoring Illicit Discharges.** No later than September 30, 2015, dry weather analytical and field screening monitoring must be conducted at least once annually (or more often if the Permittees deem necessary). One third of the outfalls to be screened annually must be conducted within the June 1 and September 30th timeframe.
 - Upon the effective date of the Permit, the Permittees must conduct visual dry weather screening of at least 20% of their total outfalls per year.
 - The outfalls must be geographically dispersed across the MS4 and must represent all major land uses in the Permit area. In addition, the Permittees must ensure that dry weather screening includes, but is not limited to, screening of 20% outfalls discharging to impaired waters listed in Table II.C.
 - When flows during dry weather are identified the Permittees must collect grab samples of the discharge for in-field analysis of the following indicator constituents: pH; total chlorine; detergents as surfactants; total copper; total phenols; *E. coli*; total phosphorus; turbidity; temperature; and suspended solids concentrations (to be measured in mg/L).
 - Photos may be used to document conditions.
 - Results of field sampling must be compared to established trigger threshold levels and/or existing state water quality standards. If the outfall is dry (no flowing or ponded runoff), the Permittees must make and record all applicable visual observations.
 - All dry weather flows previously identified or documented by the Permittees to be associated with irrigation flows or ground water seepage must be sampled to assess pollutant loading associated with such flows. The results must be evaluated to identify feasible actions necessary to eliminate such flows and ensure compliance with Part I.D of this Permit. If field sample

results of such irrigation or groundwater seepage comply with Part I.D of this permit, annual sampling of that dry weather flow at that outfall is no longer required. Permittees must document in the SWMP document the specific location(s) of outfalls associated with these results as well as the Permittee's rationale for the conclusion to discontinue future dry weather screening at that location..

- (iii) **Maintain Records of Dry Weather Screening.** The Permittees must keep detailed records of the dry weather screening with the following information at a minimum: time since last rain event; quantity of last rain event; site description (e.g., conveyance type, dominant watershed land uses); flow estimation (e.g., width of water surface, approximate depth of water, approximate flow velocity, flow rate); visual observations (e.g., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology); results of any in field sampling; and recommendations for follow-up actions to address identified problems, and documentation of completed follow-up actions.
- e) **Follow-up.** The Permittees must investigate recurring illicit discharges identified as a result of complaints or as a result of dry weather screening inspections and sampling within fifteen (15) days of its detection to determine the source. Permittees must take appropriate action to address the source of the ongoing illicit discharge within 45 days of its detection.
- f) **Prevent and Respond to Spills to the MS4.** Throughout the Permit term, the Permittees must coordinate appropriate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies to ensure maximum water quality protection at all times. The Permittees must respond to, contain and clean up all sewage and other spills that may discharge into the MS4 from any source (including private laterals and failing septic systems).
- g) **Facilitate Disposal of Used Oil and Toxic Materials.** The Permittees must continue to coordinate with appropriate agencies to ensure the proper management and disposal or recycling of used oil, vehicle fluids, toxic materials, and other household hazardous wastes by their employees and the public. Such a program must include educational activities, public information activities, and establishment of collection sites operated by the Permittees or other entity. The program must be implemented throughout the Permit term.
- h) **Training.** No later than September 30, 2014, and annually thereafter, the Permittees must develop and provide training to staff on identifying and eliminating illicit discharges, spill, and illicit connections to the MS4. At a minimum, the Permittee's construction inspectors, maintenance field staff, and code compliance officers must be sufficiently trained to respond to illicit discharges and spills to the MS4.

6. Education, Outreach and Public Involvement.

- a) **Comply with Applicable Requirements.** The Permittees must comply with applicable State and local public notice requirements when implementing their SWMP public involvement activities.

- b) **Implement an Ongoing Education Outreach and Involvement Program.** The Permittees must conduct, or contract with other entities to conduct, an ongoing joint education, outreach and public involvement program aimed at residents, businesses, industries, elected officials, policy makers, and Permittee planning staff /other employees.

The goal of the education and outreach program is to reduce or eliminate behaviors and practices that cause or contribute to adverse storm water impacts. The goal of the public involvement program is to engage interested stakeholders in the development and implementation of the Permittees' SWMP activities to the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law.

The Permittees' joint education and public involvement program must be designed to improve each target audience's understanding of the selected storm water issues, engage stakeholders, and help target audiences understand what they can do to positively impact water quality by preventing pollutants from entering the MS4.

- (i) No later than September 30, 2014, the Permittees must implement or participate in an education, outreach and public involvement program using a variety of methods to target each of the audiences and at least one or more of the topics listed below:

1) General Public

- Watershed characteristics and subwatershed planning efforts as required in Part II.A.4;
- General impacts of storm water flows into surface water;
- Impacts from impervious surfaces;
- Source control best management practices and environmental stewardship, actions and opportunities for pet waste control/disposal, vehicle maintenance, landscaping and vegetative buffers;
- Water wise landscaping, water conservation, water efficiency.

2) General public and businesses, including home based and mobile businesses

- Best management practices for use and storage of automotive chemicals, hazardous cleaning supplies, vehicle wash soaps and other hazardous materials;

- Proper use and application of pesticides, herbicides and fertilizers;
 - Impacts of illicit discharges and how to report them;
 - Water wise landscaping, water conservation, water efficiency.
- 3) Homeowners, homeowner's associations, landscapers, and property managers
- Yard care techniques protective of water quality, such as composting;
 - Best management practices for use and storage of pesticides, herbicides, and fertilizers;
 - Litter and trash control and recycling programs;
 - Best management practices for power washing, carpet cleaning and auto repair and maintenance;
 - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
 - Storm water treatment and flow/volume control practices;
 - Water wise landscaping, water conservation, water efficiency.
- 4) Engineers, contractors, developers, review staff, and land use planners
- Technical standards for storm water site plans;
 - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
 - Storm water treatment and flow/volume control practices;
 - Water wise landscaping, water conservation, water efficiency.
- 5) Urban farmers and managers of public and private community gardens
- Water wise landscaping, water conservation, and water efficiency.
- (ii) The Permittees must assess, or participate in an effort to assess understanding and adoption of behaviors by the target audiences.

The resulting assessments must be used to direct storm water education and outreach resources most effectively.

- (iii) The Permittees must track and maintain records of public education, outreach and public involvement activities.
- c) **Targeted Education and Training.** For the specific topics identified in the Permit sections listed below, the Permittees must develop and implement, or contract with other entities to implement, targeted training programs to educate appropriate Permittee staff or other audiences within their jurisdiction. Where joint, cooperative education efforts to address these topics are not feasible, the individual Permittee must ensure that the necessary education and training occurs for the following topics:
- (i) II.B.1.f - Construction Storm Water Management Training for construction site operators and Permittee staff;
 - (ii) II.B.2.g – Permanent Storm Water Control Training for project operators and Permittee staff;
 - (iii) II.B.4.i– Storm Water Infrastructure and Street Management/ Maintenance training for the Permittee staff; and
 - (iv) II.B.5.h – Illicit Discharge Management Training for Permittee staff.
- d) **Storm Water Website.** The Permittees must maintain and promote at least one publicly-accessible website that identifies each Permittee’s SWMP activities and seeks to educate the audiences listed in Part II.B.6.b.i. The website(s) must describe and provide relevant information regarding the activities of all Permittees. The website must be updated no later than February 1, 2014, and updated at least quarterly thereafter as new material is available. The website must incorporate the following features:
- (i) All reports, plans, or documents generated by each Permittee in compliance with this Permit must be posted on the website in draft form when input from the public is being solicited, and in final form when the document is completed.
 - (ii) Information and/or links to key sites that provide education, training, licensing, and permitting related to construction and post-construction storm water management controls and requirements for each jurisdiction. The website must include links to all applicable ordinances, policies and/or guidance documents related to the Permittees’ construction and post-construction stormwater management control programs.
 - (iii) Information and/or links to appropriate controls for industrial and commercial activities,
 - (iv) Information and/or links to assist the public to report illicit connections and illegal dumping activity;

- (v) Appropriate Permittee contact information, including phone numbers for relevant staff and telephone hotline, mailing addresses, and electronic mail addresses.

C. Discharges to Water Quality Impaired Receiving Waters.

1. The Permittees must conduct a storm water discharge monitoring program as required in Part IV.
2. For the purposes of this Permit and as listed in Table II.C, the Clean Water Act §303 (d) listed water bodies are those cited in the IDEQ 2010 Integrated Report including, but not limited to the Lower Boise River, and its associated tributaries. "Pollutant(s) of concern" refer to the pollutant(s) identified as causing or contributing to the water quality impairment. Pollutants of concern for the purposes of this Permit are: total phosphorus, sediment, temperature, and *E. coli*.
3. Each Permittees' SWMP documentation must include a description of how the activities of each minimum control measure in Part II.B are implemented by the Permittee to control the discharge of pollutants of concern and ensure that the MS4 discharges will not cause or contribute to an excursion above the applicable Idaho water quality standards. This discussion must specifically identify how the Permittee evaluates and measures the effectiveness of the SWMP to control the pollutants of concern. For those activities identified in Part II.B requiring multiple years to develop and implement, the Permittee must provide interim updates on progress to date. Consistent with Part II.A.1.b, each Permittee must submit this description of the SWMP implementation to EPA and IDEQ as part of the 1st Year Annual Report required in Part IV.C, and must update its description annually in subsequent Annual Reports.

Table II.C	
Clean Water Act §303 (d) listed Water Bodies and Pollutants of Concern	
Receiving Water Body Assessment Unit/ Description	Pollutants of Concern Causing Impairment
<i>ID17050114SW011a_06</i> <i>Boise River – Diversion Dam to River Mile 50</i>	Temperature
<i>ID17050114SW005_06</i> <i>Boise River – River Mile 50 to Star Bridge</i>	Temperature, Sediment, <i>E. coli.</i>
<i>ID17050114SW005_06a</i> <i>Boise River – Star to Middleton</i>	Temperature, Sediment, <i>E. coli.</i>
<i>ID17050114SW005_06b</i> <i>Boise River- Middleton to Indian Creek</i>	Temperature, Total phosphorus, Sediment, <i>E. coli.</i>
<i>ID17050114SW001_06</i> <i>Boise River- Indian Creek to the mouth</i>	Temperature, Total phosphorus, Sediment, <i>E. coli.</i>
<i>ID17050114SW008_03</i> <i>Tenmile Creek - 3rd order below Blacks Creek Reservoir</i>	Sediment, <i>E. coli.</i>
<i>ID17050114SW010_02</i> <i>Fivemile Creek - 1st & 2nd order tributaries</i>	<i>E. coli.</i>
<i>ID17050114SW010_03</i> <i>Fivemile Creek - 3rd order-tributaries</i>	Sediment, <i>E. coli.</i>

D. Reviewing and Updating the SWMP.

1. Permittees must annually review their SWMP actions and activities for compliance with this Permit as part of the preparation of the Annual Report required under Part IV.C.2.
2. Permittees may request changes to any SWMP action or activity specified in this Permit in accordance with the following procedures:
 - a) Changes to delete or replace an action or activity specifically identified in this Permit with an alternate action or activity may be requested by the Permittees at any time. Modification requests to EPA must include:
 - (i) An analysis of why the original action or activity is ineffective, infeasible, or cost prohibitive;
 - (ii) Expectations on the effectiveness of the replacement action or activity; and
 - (iii) An analysis of why the replacement action or activity is expected to better achieve the Permit requirements.
 - b) Change requests must be made in writing and signed by the Permittees in accordance with Part VI.E.
 - c) Documentation of any of the actions or activities required by this Permit must be submitted to EPA upon request.
 - d) EPA may review Annual Reports or other such documentation and subsequently notify the Permittees that changes to the SWMP actions and activities are necessary to:
 - (i) Address discharges from the MS4 that are causing or contributing to water quality impacts;
 - (ii) Include more stringent requirements necessary to comply with new federal or state statutory or regulatory requirements; or
 - (iii) Include other conditions deemed necessary by EPA to comply with water quality standards, and/or other goals and requirements of the CWA.
 - e) If EPA notifies the Permittees that changes are necessary pursuant to Parts II.D.2.a or II.D.2.d, the notification will offer the Permittees an opportunity to propose alternative program changes to meet the objectives of the requested modification. Following this opportunity, the Permittees must implement any required changes according to the schedule set by EPA.
4. Any modifications to this Permit will be accomplished according to Part VI.A of this Permit.

E. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation. The Permittees must implement the actions and activities of the SWMP in all new areas added or transferred to the Permittee's MS4 (or for which a Permittee becomes responsible for implementation of storm water quality controls) as expeditiously as practicable, but not later than one year from the date upon which the new areas were added. Such additions and schedules for implementation must be documented in the next Annual Report following the transfer.

F. SWMP Resources. The Permittees must continue to provide adequate finances, staff, equipment and other support capabilities to implement their SWMP actions and activities outlined in this permit. The Permittees must report on total costs associated with SWMP implementation over the prior 12 month reporting period in each Annual Report. Permittees are encouraged to consider establishing consistent funding sources for continued program implementation.

G. Legal Authority. To the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law, each Permittee must operate to, at a minimum:

- Prohibit and eliminate, through statute, ordinance, policy, permit, contract, court or administrative order or other similar means, the contribution of pollutants to the MS4 by illicit connections and discharges to the MS4. Illicit connections include pipes, drains, open channels, or other conveyances that have the potential to allow an illicit discharge to enter the MS4. Illicit discharges include all non-storm water discharges not otherwise authorized under Part I.D. of this Permit;
- Control through statute, ordinance, policy, permit, contract, court or administrative order, or other similar means, the discharge to the MS4 of spills, dumping or disposal of materials other than storm water;
- Control through interagency agreements among the Permittees the contribution of pollutants from one portion of the MS4 to another portion of the MS4;
- Require compliance with conditions in statutes, ordinances, policy, permits, contracts, or court or administrative orders; and
- Carry out all inspection, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with Permit conditions including the prohibition on illicit discharges to the MS4.

No later than January 30, 2014, each Permittee must review and revise its relevant ordinances or other regulatory mechanisms, (or adopt new ordinances or regulatory mechanisms that provide it with adequate legal authority as allowed and authorized pursuant to applicable Idaho law), to control pollutant discharges into and from its MS4 and to meet the requirements of this permit. As part of the SWMP documentation that accompanies the 1st Year Annual Report, each Permittee must summarize all of its unique legal authorities which satisfy the five criteria listed above.

III. Schedule for Implementation and Required Submissions

The Permittees must complete SWMP actions, and/or submit documentation, to EPA and IDEQ as summarized below. Unless otherwise noted, Annual Reports must include the interim or completed status of required SWMP activities occurring during the corresponding reporting period as specified in Part IV.C.3, and include program summary statistics, copies of interim or final documents, and/or other supporting information.

Table III. Schedule for Implementation and Required Submissions		
Permit Part	Item/Action	Due Date
I.C.3	Update intergovernmental agreement no later than July 1, 2013.	Submit updated intergovernmental agreement with the 1 st Year Annual Report.
II.A.1.b, II.C.3	SWMP documentation	Submit SWMP documentation with the 1 st Year Annual Report. Include updated documentation in each subsequent Annual Report.
II.A.4	Complete two subwatershed planning documents	Identify subwatersheds in 1 st Year Annual Report; Submit two completed planning documents with the 4 th Year Annual Report.
II.B.1.a	Update construction runoff control ordinances/regulatory mechanisms, if necessary	September 30, 2015; submit any updated ordinances etc w/ 3 rd Year Annual Report.
II.B.1.b	Update Construction Stormwater Management Manual(s)	September 30, 2015; submit any updated documents with 3 rd Year Annual Report.
II.B.1.e	Develop & Implement Enforcement Response Policy (ERP)	September 30, 2016; submit final ERPs w/ 4 th Year Annual Report
II.B.2.a	Update ordinance or regulatory mechanism requiring long term onsite stormwater management controls	January 30, 2018; submit ordinance or regulatory mechanism with 5 th Year Annual Report.
II.B.2.b	Update Stormwater Design Criteria Manual(s)	September 30, 2015; submit any updated ordinances etc w/ 3 rd Year Annual Report
II.B.2.c	Develop & Implement Green Infrastructure/Low Impact Development (LID) Incentive Strategy;	September 30, 2015;
II.B.2.c.i	Evaluate Effectiveness of LID Practices via three Pilot Projects;	Submit strategy document, identify 3 pilot projects in the 3 rd Year Annual Report.
II.B.2.c.ii, IV.A.10	Identify recommendations for specific LID practices to be adopted within the Permit area	Progress report on strategy implementation/ Pilot Project evaluations w/4 th Year Annual Report. Submit final evaluations & recommendations with the 5 th Year Annual Report.
II.B.2.c.iii	Develop Priority Riparian Area List	September 30, 2015; Submit priority area list with the 3 rd Year Annual Report.
II.B.2.c.iii	Complete Outfall Disconnection Project	Document progress on outfall disconnection project w/3 rd Year Annual Report. Complete outfall disconnection project by January 30, 2018; document completed project in 5 th Year Annual Report.

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.2.c.iv	Consider/install stormwater runoff reduction techniques for streets, roads & parking lot repair work entering design phase after February 1, 2013 where feasible	Document all locations of street/road/parking lot repair projects where runoff reduction techniques were installed w/5 th Year Annual Report.
II.B.2.e.i	O&M Database of new permanent stormwater controls; Incorporate all existing controls into database	Include new controls beginning February 1, 2013; Existing controls, no later than January 30, 2018.
II.B.2.f.i	Identify high priority locations; annual inspections	September 30, 2017
II.B.2.f.ii	Develop inspection checklists	September 30, 2017
II.B.2.f.iii	Enforcement Response Policy for SW controls	September 30, 2017
II.B.2.g	Conduct Education/Training on Permanent SW Controls	September 30, 2015; staff training & training for local audiences, September 30, 2016.
II.B.3.a	Inventory Industrial & Commercial facilities/activities	September 30, 2016
II.B.3.a.iii	Identify two specific activities, develop BMPs, and begin compliance assistance education program	September 30, 2016
II.B.3.b	Update Permittee agreements; inspect selected industrial & commercial facilities/activities	September 30, 2016
II.B.3.c	Document industrial & commercial inspection and compliance assistance activities	Annually
II.B.4.a	Update MS4 system inventory & map	No later than January 30, 2018; include w/5 th Year Annual Report
II.B.4.b	Inspect of catch basins at least every two years	September 30, 2016
II.B.4.c	Update SOPs for Street & Road Maintenance	September 30, 2015
II.B.4.c.iii	Cover storage facilities for sand/salt storage areas	September 30, 2017; Identify locations in SWMP w/1 st year Annual Report; Final documentation w/5 th Year Annual Report
II.B.4.d	Update Street/Road/Parking Lot Sweeping Plans	September 30, 2015
II.B.4.d.i	Inventory/map designated areas	September 30, 2014; submit w/2 st Year Annual Report
II.B.4.d.ii	Sweep according to schedule	September 30, 2015
II.B.4.d.iv,	Identify infeasible sweeping areas, alternative schedule or other program	Document in 1 st Year Annual Report
II.B.4.d.v	Estimate sweeping effectiveness	Document in each Annual Report
II.B.4.f	Develop facility& maintenance yards SWPPPs	September 30, 2015
II.B.4.i	Train Permittee staff	September 30, 2016; annually thereafter
II.B.4.g	Evaluate the feasibility of retrofitting existing control devices	January 30, 2018; submit evaluation with 5 th Year Annual Report

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.5.c	Inventory/Map Illicit Discharge Reports	September 30, 2014, update annually
II.B.5.d.ii, IV.A.11	Conduct dry weather outfall screening; update screening plan; inspect 20% of outfalls per year	September 30, 2015; inspect 20% annual ly
II.B.6.b	Conduct public education & assess understanding to specific audiences	September 30, 2014; ongoing
II.B.6.d	Maintain, Promote, and Update Storm water Website	September 30, 2014, quarterly thereafter
II.C.3, II.A.1.b	Identify how Permittee controls are implemented to reduce discharge of pollutants of concern, measure SWMP effectiveness	Include discussion in SWMP documentation submitted with 1 st Year Annual Report
II.E	Implement SWMP in all geographic areas newly added or annexed by Permittee	No later than one year from date new areas are added to Permittee's jurisdiction
II.F	Report SWMP implementation costs for the corresponding 12 month reporting period	Within each Annual Report
II.G	Review & Summarize legal authorities or regulatory mechanisms used by Permittee to implement & enforce SWMP & Permit requirements	No later than January 30, 2014, summarize legal authorities within the required SWMP documentation submitted with 1 st Annual Report
IV.A.1	Assess & Document Permit Compliance	Annually; submit with Annual Reports
IV.A.2	Develop & Complete Stormwater Monitoring & Evaluation Plan	September 30, 2014; Submit Completed Plan with 2 nd Year Annual Report
IV.A.7.a	Update <i>Boise NPDES Municipal SW Monitoring Plan</i>	September 30, 2015
IV.A.7.b	Monitor Five Representative Outfalls During Wet Weather; sample three times per year thereafter	No later than September 30, 2014
IV.A.8	If Applicable: update SW Monitoring & Evaluation Plan to include WQ Monitoring and/or Fish Tissue Sampling	If applicable: Update SW Monitoring & Evaluation Plan by September 30, 2014 to include WQ Monitoring and/or Fish Tissue Sampling; submit with 2 nd Year Annual Report
IV.A.9	Evaluate Effectiveness of 2 Structural Control Techniques Currently Required by the Permittees	Begin evaluations no later than September 30, 2015; document in Annual Report(s)
IV.C.1	Submit Stormwater Outfall Discharge Data	2 nd Year Annual Report, annually thereafter
IV.C.2	Submit WQ Monitoring or Fish Tissue Sampling Data Report (if applicable)	2 nd Year Annual Report, annually thereafter
IV.C.3	Submit Annual Reports	1 st Year Annual Report due January 30, 2014; all subsequent Annual Reports are due annually no later than January 30 th ; See Table IV.C.
VI.B	Submit Permit Renewal Application	No later than 180 days prior to Permit Expiration Date; see cover page. Alternatively, Renewal Application may be submitted as part of the 4 th Year Annual Report.

IV. Monitoring, Recordkeeping and Reporting Requirements.

A. Monitoring

1. **Assess Permit Compliance.** At least once per year, each Permittee must individually evaluate their respective organization's compliance with these Permit conditions, and progress toward implementing each of the control measures defined in Part II. The compliance evaluation must be documented in each Annual Report required in Part IV.C.2.
2. **Stormwater Monitoring and Evaluation Program Plan and Objectives.** The Permittees must conduct a wet weather monitoring and evaluation program, or contract with another entity to implement such a program. This stormwater monitoring and evaluation program must be designed to characterize the quality of storm water discharges from the MS4, and to evaluate overall effectiveness of selected storm water management practices.
 - a) No later than September 30, 2014, the Permittees must develop a stormwater monitoring and evaluation plan that includes the quality assurance requirements, outfall monitoring, in-stream and/or fish tissue monitoring (as appropriate), evaluation of permanent storm water controls and evaluation of LID pilot project effectiveness as described later in this Part. In general, the Permittees must develop and conduct a stormwater monitoring and evaluation program to:
 - (i) Broadly estimate reductions in annual pollutant loads of sediment, bacteria, phosphorus and temperature discharged to impaired receiving waters from the MS4s, occurring as a result of the implementation of SWMP activities;
 - (ii) Assess the effectiveness and adequacy of the permanent storm water controls and LID techniques or controls selected for evaluation by the Permittees and which are intended to reduce the total volume of storm water discharging from impervious surfaces and/or improve overall pollutant reduction in stormwater discharges; and
 - (iii) Identify and prioritize those portions of each Permittee's MS4 where additional controls can be accomplished to further reduce total volume of storm water discharged and/or reduce pollutants in storm water discharges to waters of the U.S.
 - b) The final, updated stormwater monitoring and evaluation plan must be submitted to EPA with the 2nd Year Annual Report.
3. **Representative Sampling.** Samples and measurements must be representative of the nature of the monitored discharge or activity.
4. **Analytical Methods.** Sample collection, preservation, and analysis must be conducted according to sufficiently sensitive methods/test procedures approved under 40 CFR Part 136, unless otherwise approved by EPA. Where an approved 40 CFR Part 136 method does not exist, and other test procedures

have not been specified, any available method may be used after approval from EPA.

5. **Quality Assurance Requirements.** The Permittees must develop or update a quality assurance plan (QAP) for all analytical monitoring conducted in accordance with this Part. The QAP must be developed concurrently as part of the stormwater monitoring and evaluation plan. The Permittees must submit the QAP as part of the stormwater monitoring and evaluation plan to EPA and IDEQ in the 2nd Year Annual Report. Any existing QAP may be modified for the requirements under this section.

- a) The QAP must be designed to assist in the collection and analysis of storm water discharges in support of this Permit and in explaining data anomalies when they occur.
- b) Throughout all sample collection, analysis and evaluation activities, Permittees must use the EPA-approved QA/QC and chain-of-custody procedures described in the most current version of the following documents:
 - (i) *EPA Requirements for Quality Assurance Project Plans EPA-QA/R-5* (EPA/240/B-01/003, March 2001). A copy of this document can be found electronically at:
<http://www.epa.gov/quality/qs-docs/r5-final.pdf>;
 - (ii) *Guidance for Quality Assurance Project Plans EPA-QA/G-5*, (EPA/600/R-98/018, February, 1998). A copy of this document can be found electronically at:
<http://www.epa.gov/r10earth/offices/oea/epaqag5.pdf> ;
 - (iii) *Urban Storm BMP Performance Monitoring*, (EPA-821-B-02-001, April 2002). A copy of this document can be found electronically at:
<http://www.epa.gov/npdes/pubs/montcomplete.pdf>

The QAP should be prepared in the format specified in these documents.

- c) At a minimum, the QAP must include the following:
 - (i) Organization chart reflecting responsibilities of key Permittee staff;
 - (ii) Details on the number of samples, type of sample containers, preservation of samples, holding times, analytical methods, analytical detection and quantitation limits for each target compound, type and number of quality assurance field samples, precision and accuracy requirements, sample representativeness and completeness, sample preparation requirements, sample shipping methods, and laboratory data delivery requirements;
 - (iii) Data quality objectives;

- (iv) Map(s) and associated documentation reflecting the location of each sampling point and physical description including street address or latitude/longitude;
 - (v) Qualification and training of personnel;
 - (vi) Name(s), address(es) and telephone number(s) of the laboratories, used by or proposed to be used by the Permittees;
 - (vii) Data management;
 - (viii) Data review, validation and verification; and
 - (ix) Data reconciliation.
- d) The Permittees must amend the QAP whenever there is a modification in sample collection, sample analysis, or other procedure addressed by the QAP. The amended QAP must be submitted to EPA as part of the next Annual Report.
- e) Copies of any current QAP must be maintained by the Permittees and made available to EPA and/or IDEQ upon request.
6. **Additional Monitoring by Permittees.** If the Permittees monitor more frequently, or in more locations, than required by this Permit, the results of any such additional monitoring must be included and summarized with other data submitted to EPA and IDEQ as required in Part IV.C.
7. **Storm Water Outfall Monitoring**
- a) No later than September 30, 2015, the Permittees must update the existing *Boise NPDES Municipal Storm Water Permit Monitoring Plan* to be consistent with the monitoring and evaluation program objectives and plan as described in Part IV.A.2. At a minimum, the plan must describe five outfall sample locations, and any additional or alternative locations, as defined by the Permittees. The outfalls selected by the Permittees to be monitored must be identified as representative of all major land uses occurring within the Permit area.
 - b) No later than September 30, 2014, the Permittees must begin monitoring discharges from the identified five storm water outfalls during wet weather events at least three times per year. The specific minimum monitoring requirements are outlined in Table IV.A, but may be augmented based on the Permittees' updated stormwater monitoring and evaluation plan required by Part IV.A.2. The Permittees must include any additional parameters to be sampled in an updated Table IV.A within the final updated stormwater monitoring and evaluation plan submitted to EPA with the 2nd Annual Report.

Table IV.A – Outfall Monitoring Requirements^{1, 2}
PARAMETER SAMPLING
Ammonia
Total Kjeldahl Nitrogen (TKN) (mg/l)
Nitrate + Nitrite
Total Phosphorus (mg/l)
Dissolved Orthophosphate (mg/l)
<i>E. coli</i>
Biological Oxygen Demand (BOD5) (mg/l)
Chemical Oxygen Demand (COD) (mg/l)
Total Suspended Solids (TSS) (mg/l)
Total Dissolved Solids (TDS) (mg/l)
Dissolved Oxygen
Turbidity (NTU)
Temperature
pH (S.U)
Flow/Discharge, Volume, in cubic feet
Arsenic – Total
Cadmium- Total and Dissolved
Copper – Dissolved
Lead – Total and Dissolved
Mercury – Total
Zinc – Dissolved
Hardness (as CaCO₃) (mg/l)
<p>¹ Five or more outfall locations will be identified in the Permittees' updated stormwater monitoring and evaluation plan</p> <p>² A minimum of <i>three (3) samples</i> must be collected during wet weather storm events in each reporting year, assuming the presence of storm events sufficient to produce a discharge.</p>

8. **Water Quality Monitoring and/or Fish Tissue Sampling.** At the Permittees' option and to augment the storm water discharge data collection required in Part IV.A.7 above, one or more of the Permittees may conduct, or contract with others to conduct, water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed.
- a) If the Permittees elect to conduct in-stream water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed, the Permittees must revise the stormwater monitoring and evaluation plan and QAP to describe the monitoring and/or sampling effort(s) per Part IV.A.2 and IV.A.5, no later September 30, 2014.
 - b) The documentation of the Permittees' intended in-stream water quality monitoring and/or fish tissue sampling activities must be included in the final updated stormwater monitoring and evaluation plan submitted with the 2nd Year Annual Report as required in Part IV.A.2.b.
 - c) The Permittees are encouraged to engage in cooperative efforts with other organizations to collect reliable methylmercury fish tissue data within a specific geographic area of the Lower Boise River Watershed. The objective of the cooperative effort is to determine if fish tissue concentrations of methylmercury in the Lower Boise River are compliant with Idaho's methylmercury fish tissue criterion of 0.3 mg/kg.
 - (i) In particular, the Permittees are encouraged to cooperate with other organizations to collect data through implementation of the Methylmercury Fish Tissue Sampling requirements specified in NPDES Permits # ID-002044-3 and ID-002398-1 as issued to the City of Boise. Beginning with the 2nd Year Annual Report, the Permittees' may (individually or collectively) submit documentation in each Annual Report which describes their specific involvement over the prior reporting period, and may reference fish tissue sampling plans and data reports as developed or published by others through the cooperative watershed effort.
9. **Evaluate the Effectiveness of Required Structural Controls.** Within two years of the effective date of this Permit, the Permittees must select and begin to evaluate at least two different types of permanent structural storm water management controls currently mandated by the Permittees at new development or redevelopment sites. For each selected control, this evaluation must determine whether the control is effectively treating or preventing the discharge of one or more of the pollutants of concern into waterbodies listed in Table II.C. The results of this evaluation, and any recommendations for improved treatment performance, must be submitted to EPA in subsequent Annual Reports as the evaluation projects are implemented and completed.
10. **Evaluate the Effectiveness of Green Infrastructure/Low Impact Development Pilot Projects.** The Permittees must evaluate the performance and effectiveness of the three pilot projects required in Part II.B.2.c of this Permit, or contract with another entity to conduct such evaluations. An evaluation summary of the LID technique or control and any recommendations

of improved treatment performance must be submitted in subsequent Annual Reports as the evaluation projects are implemented and completed.

11. **Dry Weather Discharge Screening.** The Permittees must implement a dry weather screening program, or contract with another entity to implement such a program, as required in Part II.B.5.d.

B. Recordkeeping

1. **Retention of Records.** The Permittees must retain records and copies of all information (e.g., all monitoring, calibration, and maintenance records; all original strip chart recordings for any continuous monitoring instrumentation; copies of all reports required by this Permit; storm water discharge monitoring reports; a copy of the NPDES permit; and records of all data or information used in the development and implementation of the SWMP and to complete the application for this Permit;) for a period of at least five years from the date of the sample, measurement, report or application, or for the term of this Permit, whichever is longer. This period may be extended at the request of the EPA at any time.
2. **Availability of Records.** The Permittees must submit the records referred to in Part IV.B.1 to EPA and IDEQ only when such information is requested. At a minimum, the Permittees must retain all records comprising the SWMP required by this Permit (including a copy of the Permit language and all Annual Reports) in a location and format that are accessible to EPA and IDEQ. The Permittees must make all records described above available to the public if requested to do so in writing. The public must be able to view the records during normal business hours. The Permittees may charge the public a reasonable fee for copying requests.

C. Reporting Requirements

1. **Storm Water Discharge Monitoring Report.** Beginning with the 2nd Year Annual Report, and in subsequent Annual Reports, all storm water discharge monitoring data collected to date must be submitted as part of the Annual Report. At a minimum, this Storm Water Discharge Monitoring Report must include:
 - a) Dates of sample collection and analyses;
 - b) Results of sample analyses;
 - c) Location of sample collection. and
 - d) Summary discussion and interpretation of the data collected, including a discussion of quality assurance issues and comparison to previously collected information, as appropriate.
2. **Water Quality Monitoring and/or Fish Tissue Sampling Report(s).** If the Permittees elect to conduct water quality monitoring and/or fish tissue sampling as specified in Part IV.A.8, all relevant monitoring data collected to date must

be submitted as part of each Annual Report beginning with the 2nd Year Annual Report. Summary data reports as prepared by other organizations with whom the Permittee(s) cooperate may be submitted to fulfill this requirement. At a minimum, this Water Quality Monitoring and/or Fish Tissue Sampling Report must include:

- a) Dates of sample collection and analyses;
- b) Results of sample analyses;
- c) Locations of sample collection; and
- d) Summary discussion and interpretation of the data collected, including discussion of quality assurance issues and comparison to previously collected information, as appropriate.

3. Annual Report.

- a) No later than January 30th of each year beginning in 2014, and annually thereafter, each Permittee must submit an Annual Report to EPA and IDEQ. The reporting period for the 1st Year Annual Report will be from February 1, 2013, through September 30, 2013. Reporting periods for subsequent Annual Reports are specified in Table IV.C. Copies of all Annual Reports, including each Permittee’s SWMP documentation, must be available to the public, through a Permittee-maintained website, and/or through other easily accessible means.

Table IV.C - Annual Report Deadlines		
Annual Report	Reporting Period	Due Date
1 st Year Annual Report	February 1, 2013–September 30, 2013	January 30, 2014
2 nd Year Annual Report	October 1, 2013-September 30, 2014	January 30, 2015
3 rd Year Annual Report	October 1, 2014-September 30, 2015	January 30, 2016
4 th Year Annual Report	October 1, 2015-September 30, 2016	January 30, 2017
5 th Year Annual Report	October 1, 2016-December 31, 2017	January 30, 2018

- b) Preparation and submittal of the Annual Reports must be coordinated by Ada County Highway District. Each Permittee is responsible for content of their organization’s SWMP documentation and Annual Report(s) relating to SWMP implementation for portions of the MS4s for which they are responsible.
- c) The following information must be submitted in each Annual Report:

- (i) A updated and current document describing the SWMP as implemented by the specific Permittee, in accordance with Part II.A.1.b;
 - (ii) A narrative assessment of the Permittee's compliance with this Permit, describing the status of implementing the control measures in Parts II and IV. The status of each control measure must be addressed, even if activity has previously been completed, has not yet been implemented, does not apply to the Permittee's jurisdiction or operation, or is conducted on the Permittee's behalf by another entity;
 - (iii) Discussion of any information collected and analyzed during the reporting period, including but not limited to storm water monitoring data not included with the Storm Water Discharge Monitoring Report; dry weather monitoring results; Green Infrastructure/LID pilot project evaluation results, structural control evaluation results, and any other information collected or used by the Permittee(s) to assess the success of the SWMP controls at improving receiving water quality to the maximum extent practicable;
 - (iv) A summary of the number and nature of public education programs; the number and nature of complaints received by the Permittee(s), and follow-up actions taken; and the number and nature of inspections, formal enforcement actions, or other similar activities as performed by the Permittee(s) during the reporting period;
 - (v) Electronic copies of new or updated education materials, ordinances (or other regulatory mechanisms), inventories, guidance materials, or other products produced as required by this Permit during the reporting period;
 - (vi) A description and schedule of the Permittee's implementation of additional controls or practices deemed necessary by the Permittee, based on monitoring or other information, to ensure compliance with applicable water quality standards;
 - (vii) Notice if the Permittee is relying on another entity to satisfy any of the Permit obligations, if applicable; and
 - (viii) Annual expenditures for the reporting period, and estimated budget for the reporting period following each Annual Report.
- d) If, after the effective date of this Permit, EPA provides the Permittees with an alternative Annual Report format, the Permittees may use the alternative format in lieu of the required elements of Part IV.C.3.c.

D. Addresses

Reports and other documents required by this Permit must be signed in accordance with Part VI.E and submitted to each of the following addresses:

IDEQ: Idaho Department of Environmental Quality
Boise Regional Office
Attn: Water Program Manager
1410 North Hilton
Boise, ID 83854

EPA: United States Environmental Protection Agency
Attention: Storm Water MS4 Compliance Program
NPDES Compliance Unit
1200 6th Avenue, Suite 900 (OCE-133)
Seattle, WA 98101

Any documents and/or submittals requiring formal EPA approval must also be submitted to the following address:

United States Environmental Protection Agency
Attention: Storm Water MS4 Permit Program
NPDES Permits Unit
1200 6th Avenue, Suite 900 (OWW-130)
Seattle, WA 98101

V. Compliance Responsibilities.

A. Duty to Comply. The Permittees must comply with all conditions of this Permit. Any Permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, for Permit termination, revocation and reissuance, or modification, or for denial of a Permit renewal application.

B. Penalties for Violations of Permit Conditions

1. Civil and Administrative Penalties. Pursuant to 40 CFR Part 19 and the Act, any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently \$37,500 per day for each violation).

2. Administrative Penalties. Any person may be assessed an administrative penalty by the Administrator for violating Section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of this Act. Pursuant to 40 CFR Part 19

and the Act, administrative penalties for Class I violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(A) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently \$16,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$37,500). Pursuant to 40 CFR Part 19 and the Act, penalties for Class II violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(B) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently \$16,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$177,500).

3. Criminal Penalties

- a) **Negligent Violations.** The Act provides that any person who negligently violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of \$2,500 to \$25,000 per day of violation, or imprisonment of not more than one year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than \$50,000 per day of violation, or by imprisonment of not more than two years, or both.
- b) **Knowing Violations.** Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of \$5,000 to \$50,000 per day of violation, or imprisonment for not more than three years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than \$100,000 per day of violation, or imprisonment of not more than six years, or both.
- c) **Knowing Endangerment.** Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than \$500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the Act, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than \$1,000,000 and can be fined up to \$2,000,000 for second or subsequent convictions.
- d) **False Statements.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Permit shall, upon conviction, be

punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than four years, or both. The Act further provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this Permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

C. Need to Halt or Reduce Activity not a Defense. It shall not be a defense for the Permittees in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with this Permit.

D. Duty to Mitigate. The Permittees must take all reasonable steps to minimize or prevent any discharge or disposal in violation of this Permit that has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance. The Permittees must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Permittees to achieve compliance with the conditions of this Permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the Permittees only when the operation is necessary to achieve compliance with the conditions of the Permit.

F. Toxic Pollutants. The Permittees must comply with effluent standards or prohibitions established under Section 307(a) of the Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the Permit has not yet been modified to incorporate the requirement.

G. Planned Changes. The Permittee(s) must give notice to the Director and IDEQ as soon as possible of any planned physical alterations or additions to the permitted facility whenever:

1. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as determined in 40 CFR §122.29(b);
or
2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are not subject to effluent limitations in the Permit.

H. Anticipated Noncompliance. The Permittee(s) must give advance notice to the Director and IDEQ of any planned changes in the permitted facility or activity that may result in noncompliance with this Permit.

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The Permittee(s) must report the following occurrences of noncompliance by telephone within 24 hours from the time the Permittee(s) becomes aware of the circumstances:

- a) any noncompliance that may endanger health or the environment;
- b) any unanticipated bypass that exceeds any effluent limitation in the permit (See Part IV.F., “Bypass of Treatment Facilities”);
- c) any upset that exceeds any effluent limitation in the permit (See Part IV.G., “Upset Conditions”); or
- d) any overflow prior to the stormwater treatment facility over which the Permittee(s) has ownership or has operational control. An overflow is any spill, release or diversion of municipal sewage including:
 - (1) an overflow that results in a discharge to waters of the United States; and
 - (2) an overflow of wastewater, including a wastewater backup into a building (other than a backup caused solely by a blockage or other malfunction in a privately owned sewer or building lateral) that does not reach waters of the United States.

2. The Permittee(s) must also provide a written submission within five days of the time that the Permittee(s) becomes aware of any event required to be reported under subpart 1 above. The written submission must contain:

- a) a description of the noncompliance and its cause;
- b) the period of noncompliance, including exact dates and times;
- c) the estimated time noncompliance is expected to continue if it has not been corrected; and
- d) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.
- e) if the noncompliance involves an overflow, the written submission must contain:
 - (1) The location of the overflow;

- (2) The receiving water (if there is one);
- (3) An estimate of the volume of the overflow;
- (4) A description of the sewer system component from which the release occurred (e.g., manhole, constructed overflow pipe, crack in pipe);
- (5) The estimated date and time when the overflow began and stopped or will be stopped;
- (6) The cause or suspected cause of the overflow;
- (7) Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the overflow and a schedule of major milestones for those steps;
- (8) An estimate of the number of persons who came into contact with wastewater from the overflow; and
- (9) Steps taken or planned to mitigate the impact(s) of the overflow and a schedule of major milestones for those steps.

3. The Director of the Office of Compliance and Enforcement may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the NPDES Compliance Hotline in Seattle, Washington, by telephone, (206) 553-1846.

4. Reports must be submitted to the addresses in Part IV.D (“Addresses”).

J. Bypass of Treatment Facilities

1. **Bypass not exceeding limitations.** The Permittee(s) may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs 2 and 3 of this Part.

2. Notice.

a) **Anticipated bypass.** If the Permittee(s) knows in advance of the need for a bypass, it must submit prior written notice, if possible at least 10 days before the date of the bypass.

b) **Unanticipated bypass.** The Permittee(s) must submit notice of an unanticipated bypass as required under Part III.G (“Twenty-four Hour Notice of Noncompliance Reporting”).

3. Prohibition of bypass.

a) Bypass is prohibited, and the Director of the Office of Compliance and Enforcement may take enforcement action against the Permittee(s) for a bypass, unless:

(1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and

(3) The Permittee(s) submitted notices as required under paragraph 2 of this Part.

- b) The Director of the Office of Compliance and Enforcement may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph 3.a. of this Part.

K. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the Permittee(s) meets the requirements of paragraph 2 of this Part. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

2. Conditions necessary for a demonstration of upset. To establish the affirmative defense of upset, the Permittee(s) must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

- a) An upset occurred and that the Permittee(s) can identify the cause(s) of the upset;
- b) The permitted facility was at the time being properly operated;
- c) The Permittee(s) submitted notice of the upset as required under Part V.I, “*Twenty-four Hour Notice of Noncompliance Reporting*,” and
- d) The Permittee(s) complied with any remedial measures required under Part V.D, “*Duty to Mitigate*.”

3. Burden of proof. In any enforcement proceeding, the Permittee(s) seeking to establish the occurrence of an upset has the burden of proof.

VI. General Provisions

A. Permit Actions.

1. This Permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR §§ 122.62, 122.64, or 124.5. The filing of a request by the Permittee(s) for a Permit modification, revocation and reissuance, termination, or a notification of planned changes or anticipated noncompliance, does not stay any Permit condition.

2. Permit coverage may be terminated, in accordance with the provisions of 40 CFR §§122.64 and 124.5, for a single Permittee without terminating coverage for the other Permittees subject to this Permit.

B. Duty to Reapply. If the Permittees intend to continue an activity regulated by this Permit after the expiration date of this Permit, the Permittees must apply for and obtain a

new permit. In accordance with 40 CFR §122.21(d), and unless permission for the application to be submitted at a later date has been granted by the Director, the Permittees must submit a new application at least 180 days before the expiration date of this Permit, or alternatively in conjunction with the 4th Year Annual Report. The reapplication package must contain the information required by 40 CFR §122.21(f), which includes: name and mailing address(es) of the Permittees(s) that operate the MS4(s), and names and titles of the primary administrative and technical contacts for the municipal Permittees(s). In addition, the Permittees must identify any previously unidentified water bodies that receive discharges from the MS4(s); a summary of any known water quality impacts on the newly identified receiving waters; a description of any changes to the number of applicants; and any changes or modifications to the Storm Water Management Program as implemented by the Permittees. The re-application package may incorporate by reference the 4th Year Annual Report when the reapplication requirements have been addressed within that report.

C. Duty to Provide Information. The Permittees must furnish to the Director and IDEQ, within the time specified in the request, any information that the Director or IDEQ may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Permit, or to determine compliance with this Permit. The Permittees must also furnish to the Director or IDEQ, upon request, copies of records required to be kept by this Permit.

D. Other Information. When the Permittees become aware that it failed to submit any relevant facts in a Permit application, or that it submitted incorrect information in a Permit application or any report to the Director or IDEQ, the Permittees must promptly submit the omitted facts or corrected information.

E. Signatory Requirements. All applications, reports or information submitted to the Director and IDEQ must be signed and certified as follows.

1. All Permit applications must be signed as follows:
 - a) For a corporation: by a responsible corporate officer.
 - b) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively.
 - c) For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official.
2. All reports required by the Permit and other information requested by the Director or the IDEQ must be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
 - a) The authorization is made in writing by a person described above;
 - b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or

position having overall responsibility for environmental matters for the organization; and

- c) The written authorization is submitted to the Director and IDEQ.
3. **Changes to Authorization.** If an authorization under Part VI.E.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part VI.E.2 must be submitted to the Director and IDEQ prior to or together with any reports, information, or applications to be signed by an authorized representative.
4. **Certification.** Any person signing a document under this Part must make the following certification:

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

F. Availability of Reports. In accordance with 40 CFR Part 2, information submitted to EPA pursuant to this Permit may be claimed as confidential by the Permittees. In accordance with the Act, permit applications, permits and effluent data are not considered confidential. Any confidentiality claim must be asserted at the time of submission by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice to the Permittees. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR Part 2, Subpart B (Public Information) and 41 Fed. Reg. 36902 through 36924 (September 1, 1976), as amended.

G. Inspection and Entry. The Permittees must allow the Director, IDEQ, or an authorized representative (including an authorized contractor acting as a representative of the Director), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the Permittees' premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring Permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

H. Property Rights. The issuance of this Permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or property or invasion of other private rights, nor any infringement of state or local laws or regulations.

I. Transfers. This Permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the Permit to change the name of the Permittees and incorporate such other requirements as may be necessary under the Act. (See 40 CFR 122.61; in some cases, modification or revocation and reissuance is mandatory.)

J. State/Tribal Environmental Laws

1. Nothing in this Permit shall be construed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties established pursuant to any applicable State/Tribal law or regulation under authority preserved by Section 510 of the Act.
2. No condition of this Permit releases the Permittees from any responsibility or requirements under other environmental statutes or regulations.

K. Oil and Hazardous Substance Liability Nothing in this Permit shall be constructed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties to which the Permittees is or may be subject under Section 311 of the CWA or Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

L. Severability The provisions of this Permit are severable, and if any provision of this permit, or the application of any provision of this Permit to any circumstance, is held invalid, the application of such provision to the circumstances, and the remainder of this Permit shall not be affected thereby.

VII. Definitions and Acronyms

All definitions contained in Section 502 of the Act and 40 CFR Part 122 apply to this Permit and are incorporated herein by reference. For convenience, simplified explanations of some regulatory/statutory definitions have been provided but, in the event of a conflict, the definition found in the statute or regulation takes precedence.

“Administrator” means the Administrator of the EPA, or an authorized representative.

“Animal facility” see “commercial animal facility.”

“Annual Report” means the periodic self –assessment submitted by the Permittee(s) to document incremental progress towards meeting the storm water management requirements and implementation schedules as required by this Permit. See Part IV.C.

“Best Management Practices (BMPs)” means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. See 40 CFR § 122.2. BMP refers to operational activities, physical controls or educational measures that are applied to reduce the discharge of pollutants and minimize potential impacts upon receiving waters, and accordingly, refers to both structural and nonstructural practices that have direct impacts on the release, transport, or discharge of pollutants. See also “storm water control measure (SCM).”

“Bioretention” is the water quality and water quantity storm water management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from storm water runoff.

“Canopy Interception” is the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.

“CGP” and “Construction General Permit” means the current available version of EPA’s *NPDES General Permit for Storm Water Discharges for Construction Activities in Idaho*, Permit No. IDR12-0000. EPA’s CGP is posted on EPA’s website at www.epa.gov/npdes/stormwater/cgp.

“Commercial Animal Facility” as used in this Permit, means a business that boards, breeds, or grooms animals including but not limited to dogs, cats, rabbits or horses.

“Common Plan of Development” is a contiguous construction project or projects where multiple separate and distinct construction activities may be taking place at different times on different schedules but under one plan. The “plan” is broadly defined as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot; included in this definition are most subdivisions and industrial parks.

“Construction activity” includes, but is not limited to, clearing, grading, excavation, and other site preparation work related to the construction of residential buildings and non-residential buildings, and heavy construction (e.g., highways, streets, bridges, tunnels, pipelines, transmission lines and industrial non-building structures).

“Control Measure” as used in this Permit, refers to any action, activity, Best Management Practice or other method used to prevent or reduce the discharge of pollutants in stormwater to waters of the United States.

“CWA” or “The Act” means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended by Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et seq.

“Director” means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

“Discharge” when used without a qualifier, refers to “discharge of a pollutant” as defined at 40 CFR §122.2.

“Discharge of a pollutant” means (a) any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.”

“Discharge of Storm Water Associated with Construction Activity” as used in this Permit, refers to a discharge of pollutants in storm water runoff from areas where soil disturbing activities (*e.g.*, clearing, grading, or excavation), construction materials or equipment storage or maintenance (*e.g.*, fill piles, borrow areas, concrete truck washout, fueling) or other industrial storm water directly related to the construction process are located, and which are required to be managed under an NPDES permit. See the regulatory definitions of storm water discharge associated with large and small construction activity at 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15), respectively

“Discharge of Storm Water Associated with Industrial Activity” as used in this Permit, refers to the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant included in the regulatory definition of storm water discharge associated with industrial activity at 40 CFR §122.26(b)(14).

“Discharge-related Activities” include: activities which cause, contribute to, or result in storm water point source pollutant discharges and measures to control storm water discharges, including the siting, construction, and operation of best management practices to control, reduce or prevent storm water pollution.

“Disconnect” for the purposes of this permit, means the change from a direct discharge into receiving waters to one in which the discharged water flows across a vegetated surface, through a constructed water or wetlands feature, through a vegetated swale, or other attenuation or infiltration device before reaching the receiving water.

“Engineered Infiltration” is an underground device or system designed to accept storm water and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the infiltration rate.

“Erosion” means the process of carrying away soil particles by the action of water.

“Evaporation” means rainfall that is changed or converted into a vapor.

“Evapotranspiration” means the sum of evaporation and transpiration of water from the earth’s surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration from plants.

“Extended Filtration” is a structural storm water device which filters storm water runoff through a soil media and collects it in an underdrain which slowly releases it after the storm is over.

“EPA” means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

“Entity” means a governmental body, or a public or private organization.

“Existing Permanent Controls,” in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis and that were installed prior to the effective date of this Permit.

“Facility or Activity” generally means any NPDES “point source” or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

“Fish Tissue Sampling” see “Methylmercury Fish Tissue Sampling”

“Green infrastructure” means runoff management approaches and technologies that utilize, enhance and/or mimic the natural hydrologic cycle processes of infiltration, evapotranspiration and reuse.

“Hydromodification” means changes to the storm water runoff characteristics of a watershed caused by changes in land use.

“IDEQ” means the Idaho Department of Environmental Quality or its authorized representative.

“Illicit Connection” means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

“Illicit Discharge” is defined at 40 CFR §122.26(b)(2) and means any discharge to a municipal separate storm sewer that is not entirely composed of storm water, except discharges authorized under an NPDES permit (other than the NPDES Permit for discharges from the MS4) and discharges resulting from fire fighting activities.

“Impaired Water” (or “Water Quality Impaired Water”) for purposes of this Permit means any water body identified by the State of Idaho or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards. Impaired waters include both waters with approved or established Total Maximum Daily Loads (TMDLs), and those for which a TMDL has not yet been approved or established.

“Industrial Activity” as used in this Permit refers to the eleven categories of industrial activities included in the definition of discharges of “storm water associated with industrial activity” at 40 CFR §122.26(b)(14).

“Industrial Storm Water” as used in this Permit refers to storm water runoff associated with the definition of “discharges of storm water associated with industrial activity”.

“Infiltration” is the process by which storm water penetrates into soil.

“Low Impact Development” or “LID” means storm water management and land development techniques, controls and strategies applied at the parcel and subdivision scale that emphasize conservation and use of on-site natural features integrated with engineered, small scale hydrologic controls to more closely mimic pre-development hydrologic functions.

“Major outfall” is defined in 40 CFR §122.26(b)(5) and in general, means a municipal storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more.

“MEP” or "maximum extent practicable," means the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges that was established by Section 402(p) of the Clean Water Act, 33 U.S.C §1342(p).

“Measurable Goal” means a quantitative measure of progress in implementing a component of a storm water management program.

“Methylmercury Fish Tissue Sampling” and “Methylmercury Fish Tissue Sampling Requirements” means the IDEQ-recommended cooperative data collection effort for the Lower Boise River Watershed. In particular, Methylmercury Fish Tissue Sampling requirements are otherwise specified in NPDES Permits # ID-002044-3 and ID-002398-1, as issued by EPA to the City of Boise and available online at <http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Current+ID1319>

“Minimize” means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry or municipal practices.

“MS4” means "municipal separate storm sewer system," and is used to refer to either a Large, Medium, or Small Municipal Separate Storm Sewer System as defined in 40 CFR 122.26(b). The term, as used within the context of this Permit, refers to those portions of the municipal separate storm sewer systems within the corporate limits of the City of Boise and City of Garden City that are owned and/or operated by the Permittees, namely: Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3 and/or the Idaho Transportation Department District #3.

“Municipality” means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA.

“Municipal Separate Storm Sewer” is defined in 40 CFR §122.26(b) and means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to

State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR §122.2.

“National Pollutant Discharge Elimination System” or “NPDES” means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 402, 318 and 405 of the CWA. The term includes an ‘approved program.’

“New Permanent Controls,” in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis that are installed after the effective date of this permit.

“Outfall” is defined at 40 CFR §122.26(b)(9) means a point source (see definition below) at the point where a municipal separate storm sewer discharges to waters of the United States, and does not include open conveyances connecting two municipal separate storm sewers or pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

“Owner or operator” means the owner or operator of any “facility or activity” subject to regulation under the NPDES program.

“Permanent storm water management controls” see “post-construction storm water management controls.”

“Permitting Authority” means the U.S. Environmental Protection Agency (EPA)

“Point Source” is defined at 40 CFR §122.2 and means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

"Pollutant" is defined at 40 CFR §122.2. A partial listing from this definition includes: dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial or municipal waste.

“Pollutant(s) of concern” includes any pollutant identified by IDEQ as a cause of impairment of any water body that will receive a discharge from a MS4 authorized under this Permit. See Table II.C.

“Post- construction storm water management controls” or “permanent storm water management controls” means those controls designed to treat or control runoff on a permanent basis once construction is complete. See also “new permanent controls” and “existing permanent controls.”

“QA/QC” means quality assurance/quality control.

“QAP” means Quality Assurance Plan.

“Rainfall and Rainwater Harvesting” is the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.

“Redevelopment” for the purposes of this Permit, means the alteration, renewal or restoration of any developed land or property that results in land disturbance of 5,000 square feet or more, and that has one of the following characteristics: land that currently has an existing structure, such as buildings or houses; or land that is currently covered with an impervious surface, such as a parking lot or roof; or land that is currently degraded and is covered with sand, gravel, stones, or other non-vegetative covering.

“Regional Administrator” means the Regional Administrator of Region 10 of the EPA, or the authorized representative of the Regional Administrator.

“Repair of Public Streets, Roads and Parking Lots” means repair work on Permittee-owned or Permittee-managed streets and parking lots that involves land disturbance, including asphalt removal or regrading of 5,000 square feet or more. This definition excludes the following activities: pot hole and square cut patching; overlaying existing asphalt or concrete paving with asphalt or concrete without expanding the area of coverage; shoulder grading; reshaping or regrading drainage ditches; crack or chip sealing; and vegetative maintenance.

“Runoff Reduction Techniques” means the collective assortment of storm water practices that reduce the volume of storm water from discharging off site.

“Storm Sewershed” means, for the purposes of this Permit, all the land area that is drained by a network of municipal separate storm sewer system conveyances to a single point of discharge into a water of the United States.

“Significant contributors of pollutants” means any discharge that causes or could cause or contribute to a violation of surface water quality standards.

“Small Construction Activity” – is defined at 40 CFR §122.26(b)(15) and incorporated here by reference. A small construction activity includes clearing, grading, and excavating resulting in a land disturbance that will disturb equal to or greater than one (1) acre and less than five (5) acres of land or will disturb less than one (1) acre of total land area but is part of a larger common plan of development or sale that will ultimately disturb equal to or greater than one (1) acre and less than five (5) acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the site.

“Snow management” means the plowing, relocation and collection of snow.

“Soil amendments” are components added to in situ or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes

various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.

“Source control” storm water management means practices that control storm water *before* pollutants have been introduced into storm water

“Storm event” or “measurable storm event” for the purposes of this Permit means a precipitation event that results in an actual discharge from the outfall and which follows the preceding measurable storm event by at least 48 hours (2 days).

“Storm water” and “storm water runoff” as used in this Permit means storm water runoff, snow melt runoff, and surface runoff and drainage, and is defined at 40 CFR §122.26(b)(13). “Storm water” means that portion of precipitation that does not naturally percolate into the ground or evaporate, but flows via overland flow, interflow, channels, or pipes into a defined surface water channel or a constructed infiltration facility.

“Storm Water Control Measure” (SCM) or “storm water control device,” means physical, structural, and/or managerial measures that, when used singly or in combination, reduce the downstream quality and quantity impacts of storm water. Also, SCM means a permit condition used in place of or in conjunction with effluent limitations to prevent or control the discharge of pollutants. This may include a schedule of activities, prohibition of practices, maintenance procedures, or other management practices. SCMs may include, but are not limited to, treatment requirements; operating procedures; practices to control plant site runoff, spillage, leaks, sludge, or waste disposal; or drainage from raw material storage. See “best management practices (BMPs).”

“Storm Water Facility” means a constructed component of a storm water drainage system, designed or constructed to perform a particular function or multiple functions. Storm water facilities include, but are not limited to, pipes, swales, ditches, culverts, street gutters, detention basins, retention basins, constructed wetlands, infiltration devices, catch basins, oil/water separators, sediment basins, and modular pavement.

“Storm Water Management Practice” or “Storm Water Management Control” means practices that manage storm water, including structural and vegetative components of a storm water system.

“Storm Water Management Project” means a project that takes into account the effects on the water quality of the receiving waters and whether a structural storm water control device can be retrofitted to control water quality.

“Storm Water Management Program (SWMP)” refers to a comprehensive program to manage the quality of storm water discharged from the municipal separate storm sewer system. For the purposes of this Permit, the SWMP consists of the actions and activities conducted by the Permittees as required by this Permit and described in the Permittees’ SWMP documentation. A “SWMP document” is the written summary describing the unique and/or cooperative means by which an individual Permittee or entity implements the specific storm water management controls Permittee within their jurisdiction.

“Storm Water Pollution Prevention Plan (SWPPP)” means a site specific plan designed to describe the control of soil, raw materials, or other substances to prevent pollutants in storm water runoff; a SWPPP is generally developed for a construction site, or an industrial facility. For the purposes of this permit, a SWPPP means a written document that identifies potential sources of pollution, describes practices to reduce pollutants in storm water discharges from the site, and identifies procedures or controls that the operator will implement to reduce impacts to water quality and comply with applicable Permit requirements.

“Structural flood control device” means a device designed and installed for the purpose of storm drainage during storm events.

”Subwatershed” for the purposes of this Permit means a smaller geographic section of a larger watershed unit with a drainage area between 2 to 15 square miles and whose boundaries include all the land area draining to a point where two second order streams combine to form a third order stream. A subwatershed may be located entirely within the same political jurisdiction.

“TMDL” means Total Maximum Daily Load, an analysis of pollutant loading to a body of water detailing the sum of the individual waste load allocations for point sources and load allocations for non-point sources and natural background. See 40 CFR §130.2.

“Treatment control” storm water management means practices that ‘treat’ storm water after pollutants have been incorporated into the storm water.

“Urban Agriculture” and “Urban Agricultural Activities” means the growing, processing, and distribution of food and other products through intensive plant cultivation and animal husbandry in and around cities. For the purposes of this Permit, the term includes activities allowed and/or acknowledged by the Permittees through a local comprehensive plan ordinance, or other regulatory mechanism. For example, see: *Blueprint Boise* online at http://www.cityofboise.org/BluePrintBoise/pdf/Blueprint%20Boise/0_Blueprint_All.pdf, and/or *City of Boise Urban Agriculture ordinance amendment, ZOA11-00006*.

“Waters of the United States,” as defined in 40 CFR 122.2, means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters, including interstate "wetlands";
3. All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - a. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

- c. Which are used or could be used for industrial purposes by industries in interstate commerce;
4. All impoundments of waters otherwise defined as waters of the United States under this definition;
5. Tributaries of waters identified in paragraphs 1 through 4 of this definition;
6. The territorial sea; and
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs 1 through 6 of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds for steam electric generation stations per 40 CFR Part 423) which also meet the criteria of this definition are not waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

“Watershed” is defined as all the land area that is drained by a waterbody and its tributaries.

“Wetlands” means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Exhibit 4

Washington, D.C. – District of Columbia MS4 Permit (Permit No.
DC0000221)

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PERMIT FOR THE DISTRICT OF COLUMBIA
MUNICIPAL SEPARATE STORM SEWER SYSTEM

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- 9. PERMIT DEFINITIONS

1. DISCHARGES AUTHORIZED UNDER THIS PERMIT

1.1 Permit Area

This permit covers all areas within the jurisdictional boundary of the District of Columbia served by, or otherwise contributing to discharges from, the Municipal Separate Storm Sewer System (MS4) owned or operated by the District of Columbia. This permit also covers all areas served by or contributing to discharges from MS4s owned or operated by other entities within the jurisdictional boundaries of the District of Columbia unless those areas have separate NPDES MS4 permit coverage or are specifically excluded herein from authorization under the District's stormwater program. Hereinafter these areas collectively are referred to as "MS4 Permit Area".

1.2 Authorized Discharges

This permit authorizes all stormwater point source discharges to waters of the United States from the District of Columbia's MS4 that comply with the requirements of this permit. This permit also authorizes the discharge of stormwater commingled with flows contributed by process wastewater, non-process wastewater, or stormwater associated with industrial activity provided such discharges are authorized under separate NPDES permits.

This permit authorizes the following non-stormwater discharges to the MS4 when appropriate stormwater activities and controls required through this permit have been applied and which are: (1) discharges resulting from clear water flows, roof drainage, dechlorinated water line flushing, landscape irrigation, ornamental fountains, diverted stream flows, rising ground waters, uncontaminated ground water infiltration to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation waters, springs, footing drains, lawn watering, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, wash water, fire fighting activities, and similar types of activities; and (2) which are managed so that water quality is not further impaired and that the requirements of the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and EPA regulations are met.

1.3 Limitations to Coverage

1.3.1 Non-stormwater Discharges

The permittee, as defined herein, shall effectively prohibit non-stormwater discharges into the MS4, except to the extent such discharges are regulated with an NPDES permit.

1.3.2 Waivers and Exemptions

This permit does not authorize the discharge of any pollutant from the MS4 which arises from or is based on any existing waivers and exemptions that may otherwise apply and are not consistent with the Federal Clean Water Act and other pertinent guidance, policies, and regulations. This narrative prohibition on the applicability of such waivers and exemptions extends to any activity that would otherwise be authorized under District law, regulations or

ordinance but which impedes the reduction or control of pollutants through the use of stormwater control measures and/or prevents compliance with the narrative /numeric effluent limits of this permit. Any such discharge not otherwise authorized may constitute a violation of this permit.

1.4 Discharge Limitations

The permittee must manage, implement and enforce a stormwater management program (SWMP) in accordance with the Clean Water Act and corresponding stormwater NPDES regulations, 40 C.F.R. Part 122, to meet the following requirements:

1.4.1. Effectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with existing District of Columbia Water Quality Standards (DCWQS);

1.4.2. Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body, consistent with 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.44(k)(2) and (3); and

1.4.3. Comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit.

Compliance with the provisions contained in Parts 2 through 8 of this permit, including milestones and final dates for attainment of applicable WLAs, shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term.

2. LEGAL AUTHORITY, RESOURCES AND STORMWATER PROGRAM ADMINISTRATION

2.1 Legal Authority

2.1.1 The permittee shall use its existing legal authority to control discharges to and from the Municipal Separate Storm Sewer System in order to prevent or reduce the discharge of pollutants to achieve water quality objectives, including but not limited to applicable water quality standards. To the extent deficiencies can be addressed through regulation or other Executive Branch action, the permittee shall remedy such deficiencies within 120 days. Deficiencies that can only be addressed through legislative action shall be remedied within 2 years of the effective date of this permit, except where otherwise stipulated, in accordance with the District's legislative process. Any changes to or deficiencies in the legal authority shall be explained in each Annual Report.

2.1.2 No later than 18 months following the effective date of this permit, the permittee shall update and implement Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution) ("updated DC Stormwater Regulations"), to address the control of stormwater throughout the MS4 Permit Area. Such regulations shall be consistent with this

permit, and shall be at least as protective of water quality as the federal Clean Water Act and its implementing regulations require.

2.1.3 The permittee shall ensure that the above legal authority in no way restricts its ability to enter into inter-jurisdictional agreements with other District agencies and/or other jurisdictions affected through this permit.

2.1.4 Review and revise, where applicable, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the following standards: (1) standards resulting from issuance of District stormwater regulations required by Section 2.1, paragraph 1 herein; and (2) performance standards required by this permit.

2.2 Fiscal Resources

The permittee, including all agencies and departments of the District as specified in section 2.3 below, shall provide adequate finances, staff, equipment and support capabilities to implement the existing Stormwater Management Program (SWMP) and the provisions of this permit. For the core program the permittee shall provide a dedicated funding source. Each annual report under Part 6 of this permit shall include a demonstration of adequate fiscal capacity to meet the requirements of this permit.

2.3 Stormwater Management Program Administration/Permittee Responsibilities

2.3.1 The Government of the District of Columbia is the permittee, and all activities of all agencies, departments, offices and authorities of the District must comply with the requirements of this permit. The permittee has designated the District Department of the Environment (DDOE) as the agency responsible for managing the MS4 Stormwater Management Program and all activities necessary to comply with the requirements of this permit and the Comprehensive Stormwater Management Enhancement Amendment Act of 2008 by coordinating and facilitating a collaborative effort among other city agencies and departments including but not limited to departments designated as “Stormwater Agencies” by the Comprehensive Stormwater Management Enhancement Amendment Act of 2008:

District Department of Transportation (DDOT);
Department of Public Works (DPW);
Office of Planning (OP);
Office of Public Education Facilities Modernization (OPEFM);
Department of Real Estate Services (DRES);
Department of Parks and Recreation; and
DC Water and Sewer Authority (also known as and hereinafter referred to as DC Water).

Each named entity is responsible for complying with those elements of the permit within its jurisdictional scope and authorities.

2.3.2 DDOE shall coordinate, and all agencies, offices, departments and authorities shall implement provisions of the existing MS4 Task Force Memorandum of Understanding (MOU) dated 2000, updated matrix of responsibilities (January 2008), and any subsequent updates; the MOU between DDOE and DC Water (2012) and any subsequent updates; and other institutional agreements to coordinate compliance activities among agency partners to implement the provisions of this permit. DDOE's major responsibilities under these MOUs and institutional agreements shall include:

1. Convening regular meetings and communication with MS4 Task Force agencies and other committees established to implement this permit to budget, assign and implement projects, and monitor, inspect and enforce all activities required by the MS4 permit.
2. Providing technical and administrative support for the MS4 Task Force and other committees established to implement this permit
3. Evaluating, assessing, and synthesizing results of the monitoring and assessment programs and the effectiveness of the implementation of management practices and coordinating necessary adjustments to the stormwater management program in order to ensure compliance.
4. Coordinating the completion and submission of all deliverables required by the MS4 Permit.
5. Projecting revenue needs to meet MS4 Permit requirements, overseeing the District's stormwater fees to fulfill revenue needs, and coordinating with DC Water to ensure the District's stormwater fee is collected.
6. Making available to the public and other interested and affected parties, the opportunity to comment on the MS4 stormwater management program.

2.3.3 Within 180 days of permit issuance, the permittee shall complete an assessment of additional governmental agencies and departments, non-governmental organizations, watershed groups or other community organizations in the District and adjacent states to partner with to administer required elements of the permit. Intra- and inter-agency agreements between relevant governmental and nongovernmental organizations shall be established to ensure successful coordination and implementation of stormwater management activities in accordance with the requirements of this permit. Additional government and nongovernmental organizations and programs to consider include; land use planning, brownfields redevelopment, fire department, building and safety, public health, parks and recreation, and federal departments and agencies, including but not limited to, the National Park Service, Department of Agriculture, Department of Defense, and General Services Administration, responsible for facilities in the District.

3. STORMWATER MANAGEMENT PROGRAM (SWMP) PLAN

The permittee shall continue to implement, assess and upgrade all of the controls,

procedures and management practices, described in this permit, and in the SWMP dated February 19, 2009, and any subsequent updates. This Program has been determined to reduce the discharge of pollutants to the maximum extent practicable. The Stormwater Management Program is comprised of all requirements in this permit. All existing and new strategies, elements, initiatives, schedules or programs required by this permit must be documented in the SWMP Plan, which shall be the consolidated document of all stormwater program elements. Updates to the plan shall be consistent with all compliance deadlines in this permit. A current plan shall be posted on the permittee's website at an easily accessible location at all times.

New Stormwater Management Program strategies, elements, initiatives and plans required to be submitted to EPA for review and approval are included in Table 1.

TABLE 1
Elements Requiring EPA Review and/or Approval

Element	Submittal Date (from effective date of this permit)
Anacostia River Watershed Trash Reduction Calculation Methodology (4.10)	1 year
Catch Basin Operation and Maintenance Plan (4.3.5.1)	18 months
Outfall Repair Schedule (4.3.5.3)	18 months
Off-site Mitigation/Payment-in-Lieu Program (4.1.3)	18 months
Retrofit Program (4.1.5)	2 years
Consolidated TMDL Implementation Plan (4.10.3)	2 years
Revised Monitoring Program (5.1)	2 years
Revised Stormwater Management Program Plan (3)	4 years

No later than 3 years from the issuance date of this permit the permittee shall public notice a fully updated Plan including all of the elements required in this permit. No later than 4 years from the issuance date of this permit the permittee shall submit to EPA the fully updated plan for review and approval, as part of the application for permit renewal.

The measures required herein are terms of this permit. These permit requirements do not prohibit the use of 319(h) funds for other related activities that go beyond the requirements of this permit, nor do they prohibit other sources of funding and/or other programs where legal or contractual requirements preclude direct use for stormwater permitting activities.

TABLE 2
Legal Authority for Selected Required Program Stormwater Elements

Required Program Application Element	Regulatory References
Adequate Legal Authority	40 C.F.R. § 122.26(d)(2)(I)(C)-(F)

Green technology stormwater management practices, which incorporate technologies and practices across District activities.	Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution)
Existing Structural and Source Controls	40 C.F.R. § 122.26(d)(2)(iv)(A)(1)
Roadways	40 C.F.R. § 122.26(d)(2)(iv)(A)(3)
Pesticides, Herbicides, and Fertilizers Application	40 C.F.R. § 122.26(d)(2)(iv)(A)(6)
Municipal Waste Sites	40 C.F.R. § 122.26(d)(2)(iv)(A)(5)
Spill Prevention and Response	40 C.F.R. § 122.26(d)(2)(iv)(B)(4)
Infiltration of Seepage	40 C.F.R. § 122.26(d)(2)(iv)(B)(7)
Stormwater Management Program for Commercial and Residential Areas	40 C.F.R. § 122.26(d)(2)(iv)(A)
Manage Critical Source Areas	40 C.F.R. § 122.26(d)(iii)(B)(6)
Stormwater Management for Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)
Industrial and High Risk Runoff	40 C.F.R. § 122.26(d)(2)(iv)(C), (iv)(A)(5)
Identify Priority Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)(1)
Illicit Discharges and Improper Disposal	40 C.F.R. § 122.26(d)(2)(iv)(B)(1)-(5), (iv)(B)(7)
Flood Control Projects	40 C.F.R. § 122.26(d)(2)(iv)(A)(4)
Public Education and Participation	40 C.F.R. § 122.26(d)(2)(iv)(A)(6), (iv)(B)(5), (iv)(B)(6)

Monitoring and Assessment and Reporting	40 C.F.R. § 122.26(d)(2)(iv)(D)(v)
Monitoring Program	40 C.F.R. § 122.26(d)(2)(iv)(B)(2), (iii), iv(A), (iv)(C)(2)
Characterization Data	40 C.F.R. § 122.26(d)(2)(iii)(B)-(D), 40 C.F.R. § 122.21(g)(7)
Reporting	40 C.F.R. § 122.41(l)

4. IMPLEMENTATION OF STORMWATER CONTROL MEASURES

4.1 Standard for Long-Term Stormwater Management

The permittee shall continue to develop, implement, and enforce a program in accordance with this permit and the permittee's updated SWMP Plan that integrates stormwater management practices at the site, neighborhood and watershed levels that shall be designed to mimic pre-development site hydrology through the use of on-site stormwater retention measures (e.g., harvest and use, infiltration and evapotranspiration), through policies, regulations, ordinances and incentive programs

4.1.1 Standard for Stormwater Discharges from Development

No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement one or more enforceable mechanism(s) that will adopt and implement the following performance standard for all projects undertaking development that disturbs land greater than or equal to 5,000 square feet:

Require the design, construction and maintenance of stormwater controls to achieve on-site retention of 1.2" of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting and use for all development greater than or equal to 5,000 square feet.

The permittee may allow a portion of the 1.2" volume to be compensated for in a program consistent with the terms and requirements of Part 4.1.3.

4.1.2 Code and Policy Consistency, Site Plan Review, Verification and Tracking

By the end of this permit term the permittee must review and revise, as applicable, stormwater, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the retention performance standard required in

Section 4.1.1. The permittee must also establish/update and maintain a formal process for site plan reviews and a post-construction verification process (e.g., inspections, submittal of as-builts) to ensure that standards are appropriately implemented. The permittee must also track the on-site retention performance of each project subject to this regulatory requirement.

4.1.3 Off-Site Mitigation and/or Fee-in Lieu for all Facilities

Within 18 months of the effective date of this permit the permittee shall develop, public notice, and submit to EPA for review and comment an off-site mitigation and/or fee-in-lieu program to be utilized when projects will not meet stormwater management performance standard as defined in Section 4.1.1. The permittee has the option of implementing an off-site mitigation program, a fee-in-lieu program, or both. Any allowance for adjustments to the retention standard shall be defined in the permittee's regulations. The program shall include at a minimum:

1. Establishment of baseline requirements for on-site retention and for mitigation projects. On-site volume plus off-site volume (or fee-in-lieu equivalent or other relevant credits) must equal no less than the relevant volume in Section 4.1.1;
2. Specific criteria for determining when compliance with the performance standard requirement for on-site retention cannot technically be met based on physical site constraints, or a rationale for why this is not necessary;
3. For a fee-in-lieu program, establishment of a system or process to assign monetary values at least equivalent to the cost of implementation of controls to account for the difference in the performance standard, and the alternative reduced value calculated; and
4. The necessary tracking and accounting systems to implement this section, including policies and mechanisms to ensure and verify that the required stormwater practices on the original site and appropriate required off-site practices stay in place and are adequately maintained.

The program may also include incentives for achieving other important environmental objectives such as ongoing measurable carbon sequestration, energy savings, air quality reductions in green house gases, or other environmental benefits for which the program can develop methods for quantifying and documenting those outcomes. Controls implemented to achieve those outcomes are subject to the same level of site plan review, inspection, and operation and maintenance requirements as stormwater controls.

District-owned transportation right-of-way projects are subject to a similarly stringent process for determining an alternate performance volume, but for the duration of this permit term need not conduct off-site mitigation or pay into a fee-in-lieu program to compensate for the difference.

4.1.4 Green Landscaping Incentives Program

No later than one year following permit issuance, the permittee shall develop an incentive program to increase the quantity and quality of planted areas in the District while allowing flexibility for developers and designers to meet development standards. The Incentive Program

shall use such methods as a scoring system to encourage green technology practices such as larger plants, permeable paving, green roofs, vegetated walls, preservation of existing trees, and layering of vegetation along streets and other areas visible to the public.

4.1.5 Retrofit Program for Existing Discharges

4.1.5.1 Within two years of the effective date of this permit the permittee shall develop, public notice, and submit to EPA for review and approval a program that establishes performance metrics for retrofit projects. The permittee shall fully implement the program upon EPA approval. The starting point for the performance metrics shall be the standard in Section 4.1.1. Performance metrics may be established generally for all retrofit projects, or for categories of projects, e.g., roads, sidewalks, parking lots, campuses. Specific site conditions may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1, and a similar calculator or algorithm process may be used in conjunction with a specific site analysis.

4.1.5.2 The permittee, with facilitation assistance from EPA Region III, will also work with major Federal landholders, such as the General Services Administration and the Department of Defense, with the objective of identifying retrofit opportunities, documenting federal commitments, and tracking pollutant reductions from relevant federal actions.

4.1.5.3 For each retrofit project estimate the potential pollutant load and volume reductions achieved through the DC Retrofit program by major waterbody (Rock Creek, Potomac, Anacostia) for the following pollutants: Bacteria (E. coli), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash. These estimates shall be included in the annual report following implementation of the project.

4.1.5.4 The DC Retrofit Program shall implement retrofits for stormwater discharges from a minimum of 18,000,000 square feet of impervious surfaces during the permit term. A minimum of 1,500,000 square feet of this objective must be in transportation rights-of-way.

4.1.5.5 No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement an enforceable mechanism that will adopt and implement stormwater retention requirements for properties where less than 5,000 square feet of soil is being disturbed but where the buildings or structures have a footprint that is greater than or equal to 5,000 square feet and are undergoing substantial improvement. Substantial improvement, as consistent with District regulations at 12J DCMR § 202, is any repair, alteration, addition, or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is started. The characteristics of these types of projects may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1.

4.1.5.6 The permittee shall ensure that every major renovation/rehabilitation project for District-owned properties within the inventory of DRES and OPEFM (e.g., schools and school administration buildings) includes on-site stormwater retention measures, including but not

limited to green roofs, stormwater harvest/reuse, and/or other practices that can achieve the retention performance standard.

4.1.6 Tree Canopy

4.1.6.1 No later than one year following issuance of this permit, the permittee shall develop and public notice a strategy to reduce the discharge of stormwater pollutants by expanding tree canopy throughout the city. The strategy shall identify locations throughout the District where tree plantings and expanded tree boxes are technically feasible and commit to specific schedules for implementation at locations throughout the District, with highest priority given to projects that offer the greatest stormwater retention potential. The strategy shall also include the necessary elements to achieve the requirements of Section 4.1.6.2.

4.1.6.2 The permittee shall achieve a minimum net annual tree planting rate of 4,150 plantings annually within the District MS4 area, with the objective of a District-wide urban tree canopy coverage of 40% by 2035. The annual total tree planting shall be calculated as a net increase, such that annual mortality is also included in the estimate. The permittee shall ensure that trees are planted and maintained, including requirements for adequately designed and sized tree boxes, to achieve optimal stormwater retention and tree survival rate. Trees shall be planted in accordance with the Planting Specifications issued by the International Society of Arboriculture as appropriate to the site conditions.

4.1.6.3 The permittee shall annually document the total trees planted and make an annual estimate of the volume of stormwater that is being removed from the MS4 (and combined system, as relevant) in a typical year of rainfall as a result of the maturing tree canopy over the life of the MS4 permit. Also report annually on the status of achieving 40% canopy District-wide.

4.1.7 Green Roof Projects

4.1.7.1 Complete a structural assessment of all District properties maintained by DRES and slated for redevelopment to determine current roof conditions and the feasibility for green roof installation. These assessments shall be performed on an ongoing basis for all properties as they are considered for redevelopment. Based on the structural assessment and other factors, identify all District-owned properties where green roof projects are technically feasible and commit to specific schedules for implementing these projects. Highest priority shall be given to projects that offer the greatest stormwater capture potential.

4.1.7.2 The permittee shall install at a minimum 350,000 square feet of green roofs on District properties during the term of the permit (including schools and school administration buildings).

4.1.7.3 Document the square footage of green roof coverage in the District, whether publicly or privately owned, report any incentive programs implemented during the permit term, and estimate the volume of stormwater that is being removed from the MS4 (and combined

system, as relevant) in a typical year of rainfall as a result of the combined total green roof facilities in the District.

4.2 Operation and Maintenance of Stormwater Capture Practices

4.2.1 District Owned and Operated Practices.

Within two years of the effective date of this permit, develop and implement operation and maintenance protocols and guidance for District-owned and operated on-site retention practices (development and retrofits) to include maintenance needs, inspection frequencies, estimated maintenance frequencies, and a tracking system to document relevant information. Provide training to all relevant municipal employees and contractors, with regular refreshers, as necessary.

4.2.2 Non-District Owned and Operated Practices.

In conjunction with updating of relevant ordinances and policies, develop accountability mechanisms to ensure maintenance of stormwater control measures on non-District property. Those mechanisms may include combinations of deed restrictions, ordinances, maintenance agreements, or other policies deemed appropriate by the permittee. The permittee must also include a long-term verification process of O&M, which may include municipal inspections, 3rd party inspections, owner/operator certification on a frequency deemed appropriate by the permittee, and/or other mechanisms. The permittee must continue to maintain an electronic inventory of practices on private property to include this information.

4.2.3 Stormwater Management Guidebook and Training

4.2.3.1 No later than 18 months from the permit issuance date, the permittee shall finalize a Stormwater Management Guidebook to be available for wide-spread use by land use planners and developers. The Stormwater Management Guidebook shall provide regular updates, as applicable, in a format that facilitates such regular updates, and shall include objectives and specifications for integration of stormwater management technologies, including on site retention practices, in the areas of:

- a. Site Assessment.
- b. Site Planning and Layout.
- c. Vegetative Protection, Revegetation, and Maintenance.
- d. Techniques to Minimize Land Disturbance.
- e. Techniques to Implement Measures at Various Scales.
- f. Integrated Water Resources Management Practices.
- g. Designing to meet the required performance standard(s).
- h. Flow Modeling Guidance.
- i. Hydrologic Analysis.
- j. Construction Considerations.
- k. Operation and Maintenance

4.2.3.2 The permittee shall continue to provide key industry, regulatory, and other stakeholders with information regarding objectives and specifications of green infrastructure practices contained in the Stormwater Management Guidebook through a training program. The Stormwater Management training program will include at a minimum the following:

- a. Stormwater management/green technology practices targeted sessions and materials for builders, design professionals, regulators, resource agencies, and stakeholders.
- b. Materials and data from stormwater management/green technology practices pilot projects and demonstration projects including case studies.
- c. Design and construction methods for integration of stormwater management/green technology practices measures at various project scales.
- d. Guidance on performance and cost of various types of stormwater management/green technology practices measures in the District.

4.3 Management of for District Government Areas

Procedures to reduce the discharge of pollutants in stormwater runoff shall include, but not be limited to:

4.3.1 Sanitary Sewage System Maintenance Overflow and Spill Prevention Response

The permittee shall implement an effective response protocol for overflows of the sanitary sewer system into the MS4. The response protocol shall clearly identify agencies responsible and telephone numbers and e-mail for any contact and shall contain at a minimum, procedures for:

1. Investigating any complaints received within 24 hours of the incident report.
2. Responding within two hours to overflows for containment.
3. Notifying appropriate sewer and public health agencies within 24 hours when the sanitary sewer overflows to the MS4.
4. Notifying the public in a timely and effective manner when SSO discharges to the MS4 may adversely affect public health.

This provision in no way authorizes sanitary sewer overflow discharges either directly or via the MS4.

4.3.2 Public Construction Activities Management

The permittee shall implement and comply with the Development and Redevelopment and the Construction requirements in Part 4.6 of this permit at all permittee-owned or operated public construction projects.

The permittee shall obtain discharge authorization under the applicable EPA Construction General permit for construction activities and comply with provisions therein.

4.3.3 Vehicle Maintenance/Material Storage Facilities/ Municipal Operations.

The permittee shall implement stormwater pollution prevention measures at all permittee-owned, leased facilities and job sites including but not limited to vehicle/ equipment maintenance facilities, and material storage facilities.

For vehicle and equipment wash areas and municipal facilities constructed, redeveloped, or replaced, the permittee shall eliminate discharges of wash waters from vehicle and equipment washing into the MS4 by implementing any of the following measures at existing facilities with vehicle or equipment wash areas:

1. Self-contain, and haul off-site for disposal;
2. Equip with a clarifier; or
3. Equip with an alternative pre-treatment device.

4.3.4 Landscape and Recreational Facilities Management, Pesticide, Herbicide, Fertilizer and Landscape Irrigation

4.3.4.1 The permittee shall further reduce pollutants and pollutant discharges associated with the storage and application of pesticides, fertilizers, herbicides, the use of other toxic substances and landscape irrigation according to an integrated pest management program (IPM). The IPM shall be an ecosystem based strategy that focuses on long-term prevention of pests or their damage through a combination of techniques such as biological control, habitat manipulation, modification of cultural practices, use of resistant varieties, and use of low or no chemical and irrigation input landscapes, in accordance with the provisions of this permit, procedures and practices described in the SWMP and regulations.

The permittee shall further utilize IPM controls to reduce pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied by employees or contractors, to public rights-of-way, parks, and other District property to ensure that:

- a. Pesticides are used only if monitoring indicates they are needed according to established guidelines;
- b. Fertilizers are used only when soil tests indicate that they are necessary, and only in minimum amounts and for needed purposes (e.g., seed germination).
- c. Treatments are made with the purpose of removing only the target organism;
- d. Pest controls are selected and applied in a manner that minimizes risks to human health, beneficial, non-target organisms, and the environment;
- e. No pesticides or fertilizers are applied to an area immediately prior to an expected rain event, or during or immediately following a rain event, or when water is flowing off the area;

- f. No banned or unregistered pesticides are stored or applied;
- g. All staff applying pesticides are certified or are under the direct supervision of a pesticide applicator certified in the appropriate category;
- h. Procedures are implemented to encourage the retention and planting of native and/or non-invasive, naturalized vegetation to reduce water, pesticide and fertilizer needs;
- i. Pesticides and fertilizers are stored indoors or under cover on paved surfaces or enclosed in secondary containment and storage areas inspected regularly to reduce the potential for spills; and
- j. Landscapes that maximize on-site retention of stormwater, while minimizing mowing, chemical inputs and irrigation are given preference for all new landscape installation.

4.3.4.2 The permittee shall coordinate internally among departments for the purpose of ensuring that pesticide and fertilizer use within its jurisdiction does not threaten water quality.

4.3.4.3 The permittee shall partner with other organizations to ensure that pesticide and fertilizer use within their jurisdiction does not threaten water quality.

4.3.4.4 The permittee shall continue to conduct education and outreach, as well as provide incentives, to curtail the use of turf-grass fertilizers for the purpose of reducing nitrogen and phosphorous discharges to surface waters. The program shall incentivize the use of vegetative landscapes other than turf grass and other measures to restrict the use of turf grass fertilizers.

4.3.4.5 The permittee shall use GIS layers of public land and sewersheds, as well as background data, to identify priority areas for a targeted strategy to reduce the sources of pesticides, herbicides, and fertilizers that contaminate the stormwater runoff, and report progress toward completing the screening characterization in the next Updated SWMP.

4.3.4.6 The permittee shall include in each Annual Report a report on the implementation of the above application procedures, a history of the improvements in the control of these materials, and an explanation on how these procedures will meet the requirements of this permit.

4.3.5 Storm Drain System Operation and Management and Solids and Floatables Reduction

4.3.5.1 Within 18 months of the effective date of this permit, the permittee shall complete, public notice and submit to EPA for review and approval a plan for optimal catch basin inspections, cleaning and repairs. The permittee shall fully implement the plan upon EPA approval.

4.3.5.2 Until such time as the catch basin maintenance study has been completed and approved, the permittee shall ensure that each catch basin within the DC MS4 Permit Area is cleaned at least once annually during the life of the permit. The permittee shall continue to use strategies for coordinated catch basin cleaning and street-sweeping that will optimize reduction of stormwater pollutants.

4.3.5.3 Within 18 months of the effective date of this permit, and consistent with the 2006 Outfall Survey, the permittee shall complete, public notice and submit to EPA for review and approval an outfall repair schedule to ensure that approximately 10% of all outfalls needing repair are repaired annually, with the overall objective of having all outfalls in good repair by 2022. This schedule may be combined with the catch basin maintenance study outlined in 4.3.5.1. The repair schedule shall be fully implemented upon EPA approval.

4.3.5.4 The permittee shall comply with the Anacostia River Trash TMDL implementation provisions in Part 4.10 of this permit and apply the technologies and other activities developed in the Anacostia River Watershed Trash TMDL throughout the entire MS4 Permit Area. The permittee shall continue to report the progress of trash reduction in the Consolidated Annual Report.

4.3.6 Streets, Alleys and Roadways

4.3.6.1 Street sweeping shall be conducted on no less than 641 acres of roadway in the MS4 area annually in accordance with the following schedule:

TABLE 3
Street Sweeping

Area/Street Classification	Frequency
Arterials-heavily developed commercial and central business districts with considerable vehicular and pedestrian traffic	At least nine (9) times per year
Industrial areas	At least six (6) times per year
Residential-residential areas with limited throughway and pedestrian traffic AND neighborhood streets which are used for local purposes only	At least four (4) times per year
Central Business District/Commercial-neighborhood business districts and main streets with moderate vehicular and pedestrian traffic	At least one (1) time every two weeks

Environmental hot spots in the Anacostia River Watershed	At least two (2) times per month March through October
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4.3.6.2 Standard road repair practices shall include limiting the amount of soil disturbance to the immediate area under repair. Stormwater conveyances which are denuded shall be resodded, reseeded and mulched, or otherwise stabilized for rapid revegetation, and these areas should have effective erosion control until stabilized.

4.3.6.3 The permittee shall continue to evaluate and update the use, application and removal of anti-icers, chemical deicers, salt, sand, and/or sand/deicer mixtures in an effort to minimize the impact of these materials on water quality. The permittee shall investigate and implement techniques available for reducing pollution from deicing salts in snowmelt runoff and runoff from salt storage facilities. The permittee shall evaluate and implement the use of porous/permeable surfaces that require less use of deicing materials and activities. This evaluation shall be made a part of an overall investigation of ways to meet the requirements of the Clean Water Act and reported in each Annual Report.

4.3.6.4 The permittee shall continue to implement and update a program to ensure that excessive quantities of snow and ice control materials do not enter the District’s water bodies. The permittee shall report its progress in implementing the program in each Annual Report. Except during a declared Snow Emergency when the permittee determines that the foremost concern of snow removal activities is public health and safety, it shall avoid snow dumping or storage in areas adjacent to water bodies, wetlands, and areas near public or private drinking water wells which would ultimately reenter the MS4.

4.3.7 Infrastructure Maintenance/Pollution Source Control Maintenance

The permittee shall continue to implement an operation and maintenance program that incorporates good housekeeping components at all municipal facilities located in the DC MS4 Permit Area, including but not limited to; municipal waste water treatment facility, potable drinking water facility, municipal fleet operations, maintenance garages, parks and recreation, street and infrastructure maintenance, and grounds maintenance operations, libraries and schools. The permittee shall document the program in the Annual Report, as required at Section 6.2 herein. The permittee shall, at a minimum:

1. Continue to implement maintenance standards at all municipal facilities that will protect the physical, chemical and biological integrity of receiving waters.
2. Continue to implement an inspection schedule in which to perform inspections to determine if maintenance standards are being met. Inspections shall be performed no less than once per calendar year and shall provide guidance in Stormwater Pollution Prevention Plan development and implementation, where needed.

3. Continue to implement procedures for record keeping and tracking inspections and maintenance at all municipal facilities.
4. Continue to implement an inspection and maintenance program for all permittee-owned management practices, including post-construction measures.
5. Continue to ensure proper operation of all treatment management practices and maintain them as necessary for proper operation, including all post-construction measures.
6. Ensure that any residual water following infrastructure maintenance shall be self-contained and disposed of legally in accordance with the Clean Water Act.

4.3.8 Public Industrial Activities Management/Municipal and Hazardous Facilities

For any municipal activity associated with industrial activity, as defined by 40 C.F.R. § 122.26, which discharges stormwater to, from and through the DC MS4, the permittee shall obtain separate coverage under either: (1) the EPA Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) (As modified May 27, 2009); or (2) an individual permit.

4.3.9 Emergency Procedures

The permittee may conduct repairs of essential public service systems and infrastructure in emergency situations. An emergency includes only those situations included as conditions necessary for demonstration of an upset at 40 C.F.R. 122.41(n). For each claimed emergency, the permittee shall submit to the Permitting Authority a statement of the occurrence of the emergency, an explanation of the circumstances, and the measures that were implemented to reduce the threat to water quality, no later than required by applicable Clean Water Act regulations.

4.3.10 Municipal Official Training

The permittee shall continue to implement an on-going training program for those employees specified below, and any other employees whose job functions may impact stormwater program implementation. The training program shall address the importance of protecting water quality, the requirements of this permit, design, performance, operation and maintenance standards, inspection procedures, selecting appropriate management practices, ways to perform their job activities to prevent or minimize impacts to receiving waters, and procedures for tracking, inspecting and reporting, including potential illicit discharges. The permittee shall provide follow-up and refresher training at a minimum of once every twelve months, and shall include any changes in procedures, techniques or requirements.

The training program shall include, but is not limited to, those employees who work in the following areas:

1. Municipal Planning
 2. Site plan review
 3. Design
 4. Construction
 5. Transportation planning and engineering
 6. Street/sewer and right-of-way construction and maintenance
 7. Water and sewer departments
 8. Parks and recreation department
 9. Municipal water treatment and waste water treatment
 10. Fleet maintenance
 11. Fire and police departments
 12. Building maintenance and janitorial
 13. Garage and mechanic crew
 14. Contractors and subcontractors who may be contracted to work in the above described
 15. areas
 16. Personnel responsible for answering questions about the permittee's stormwater program,
 17. including persons who may take phone calls about the program
 18. Any other department of the permittee that may impact stormwater runoff
- 4.4 Management of Commercial and Institutional Areas

The permittee shall establish and implement policies and procedures to reduce the discharge of pollutants in stormwater runoff from all commercial and institutional (including federal) areas covered by this permit.

The permittee shall ensure maintenance of all stormwater management controls in commercial and institutional land areas in accordance with the following provisions:

1. Tracking all controls;
2. Inspecting all controls on a regular basis, according to an inspection schedule;
3. Ensure compliance with the MS4 permit and municipal ordinances at commercial and institutional facilities.

4.4.1 Inventory of Critical Sources and Source Controls

4.4.1.1 The permittee shall continue to maintain a watershed-based inventory or database of all facilities within its jurisdiction that are critical sources of stormwater pollution. Critical sources to be tracked shall include the following:

- a. Automotive service facilities, *e.g.*, service, fueling and salvage facilities;
- b. Industrial activities, as defined at 40 C.F.R. §§ 122.26(b)(14); and
- c. Construction sites exceeding one acre, or sites under one acre that are part of a larger common plan of development.
- d. Dry cleaners

- e. Any other facility the permittee has identified as a Critical Source

4.4.1.2 The permittee shall include the following minimum fields of information for each industrial and commercial facility identified as a critical source:

- a. Name of facility and name of owner/ operator;
- b. Address of facility;
- c. Size of facility; and
- d. Activities conducted at the facility that could impact stormwater.
- e. Practices and/or measures to control pollutants.
- f. Inspection and maintenance schedules, dates and findings.

4.4.1.3 The permittee shall update its inventory of critical sources at least annually. The update may be accomplished through collection of new information obtained through field activities or through other readily available inter and intra-agency informational databases (*e.g.*, business licenses, pretreatment permits, sanitary sewer hook-up permits, and similar information).

4.4.2 Inspection of Critical Sources

The permittee shall continue to inspect all commercial facilities identified in Part 4.4.1. herein and any others found to be critical sources twice during the five-year term of the permit. A minimum interval of six months between the first and the second mandatory compliance inspection is required, unless a follow-up inspection to ensure compliance must occur sooner.

4.4.3 Compliance Assurance.

At each facility identified as a critical source, the permittee's inspector(s) shall verify that the operator is implementing a control strategy necessary to protect water quality. Where the permittee determines that existing measures are not adequate to protect water quality, the permittee shall require additional site-specific controls sufficient to protect water quality.

4.5 Management of Industrial Facilities and Spill Prevention

4.5.1 The permittee shall continue to implement a program to monitor and control pollutants in stormwater discharged from Industrial Facilities located within the MS4 Permit Area, as defined herein, pursuant to the requirements in 40 C.F.R. § 122.26(d)(2)(iv)(C). These facilities shall include, but are not limited to:

- a. Private Solid Waste Transfer Stations
- b. Hazardous Waste Treatment, Disposal, and/or Recovery Plants
- c. Industrial Facilities subject to SARA or EPCRA Title III
- d. Industrial Facilities with NPDES Permits
- e. Industrial facilities with a discharge to the MS4

4.5.2 The permittee shall continue to maintain and update the industrial facilities database.

4.5.3 The permittee shall continue to perform or provide on-site assistance/inspections and outreach focused on the development of stormwater pollution prevention plans and NPDES permit compliance.

4.5.4 The permittee shall continue to refine and implement procedures to govern the investigation of facilities suspected of contributing pollutants to the MS4, including at a minimum: (i) a review, if applicable, of monitoring data collected by the facility pursuant to its NPDES permit; and (ii) wet weather screening as required by Part 5.2.1 herein (including collecting data on discharges from industrial sites). These procedures shall be submitted as part of each Annual Report required by Part 6.2 herein.

4.5.5 The permittee shall continue to implement the prohibition against illicit discharges, control spills, and prohibit dumping. Continue to implement a program to prevent, contain, and respond to spills that may discharge to the MS4, and report on such implementation submitted in each Annual Report. The spill response program may include a combination of spill response actions by the permittee and/or another public or private entity.

4.5.6 The permittee shall report progress in developing and carrying out industrial-related programs in each Annual Report required by Section 6 herein. Provide an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act.

4.6 Stormwater Management for Construction Sites

4.6.1 Continue implementation of the Program that reduces the discharge of pollutants from construction sites. In each Annual Report, the permittee shall evaluate and report to determine if the existing practices meet the requirements of 40 C.F.R. § 122.26(d)(2)(iv)(A) and (D).

4.6.2 Continue the review and approval process of the sediment and erosion control plans under this program. Also, the permittee shall ensure that all construction projects impacting one acre or greater, or less than one acre when part of a larger common plan of development or sale equal to or larger than one acre, are not authorized until documentation is provided that they have received EPA NPDES Construction General Permit Coverage.

4.6.3 Continue to implement inspection and enforcement procedures, including but not limited to inspection of permitted construction sites that disturb more than 5,000 square feet of soil as follows:

1. First inspection prior to ground disturbing activities to review planned sediment and erosion control measures;
2. Second inspection to verify proper installation and maintenance of sediment and erosion control measures;

3. Third inspection to review planned installation and maintenance of stormwater management practices;
4. Fourth inspection to verify proper installation of stormwater management practices following final stabilization of the project site; and
5. Other inspections as necessary to ensure compliance with relevant standards and requirements.

4.6.4 When a violation of local erosion and sediment control ordinances occurs, the permittee shall follow existing enforcement procedures and practices using standardized reports as part of the inspection process to provide accurate record keeping of inspections of construction sites. The permittee shall use a listing of all violations and enforcement actions to assess the effectiveness of the Enforcement Program in each Annual Report.

4.6.5 Continue with educational measures for construction site operators (Section 4.9 of this permit) that consist, at a minimum, of providing guidance manuals and technical publications.

4.6.6 Report progress in developing and carrying out the above construction-related programs in each Annual Report required by Parts 6.2 herein, including: (i) an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act; (ii) an explanation as to how the implementation of these procedures, particularly with regard to District “waivers and exemptions”, will meet the requirements of the Clean Water Act; and (iii) discussion of progress toward meeting TMDL and the District Watershed Implementation Plan deadlines.

4.7 Illicit Discharges and Improper Disposal.

4.7.1 The permittee shall continue to implement an ongoing program to detect illicit discharges, pursuant to the SWMP, and Part 4 of this permit, and to prevent improper disposal into the storm sewer system, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). Such program shall include, at a minimum the following:

- a. An updated schedule of procedures and practices to prevent illicit discharges, as defined at 40 C.F.R. § 122.26(b)(2), and, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), to detect and remove illicit discharges as defined herein;
- b. An updated inventory (organized by watershed) of all outfalls that discharge through the MS4 including any changes to the identification and mapping of existing permitted outfalls. Such inventory shall include, but not be limited to, the name and address, and a description (such as SIC code) which best reflects the principal products or services provided by each facility which may discharge to the MS4;
- c. Continue to implement an illicit connection detection and enforcement program to perform dry weather flow inspections in target areas;

- d. Visual inspections of targeted areas;
- e. Issuance of fines, tracking and reporting illicit discharges, and reporting progress on stopping targeted illicit discharges, and in appropriate cases, chemical testing immediately after discovery of an illicit discharge;
- f. Enforcement procedures for illicit discharges set forth in Part 4 herein;
- g. All necessary inspection, surveillance, and monitoring procedures to remedy and prevent illicit discharges. The permittee shall submit an inspection schedule, inspection criteria, documentation regarding protocols and parameters of field screening, and allocation of resources as a part of each Annual Report.
- h. The permittee shall continue to implement procedures to prevent, contain, and respond to spills that may discharge into the MS4. The permittee shall provide for the training of appropriate personnel in spill prevention and response procedures.
- i. The permittee shall report the accomplishments of this program in each Annual Report.

4.7.2 The permittee shall continue to ensure the implementation of a program to further reduce the discharge of floatables (e.g. litter and other human-generated solid refuse). The floatables program shall include source controls and, where necessary, structural controls.

4.7.3 The permittee shall continue to implement the prohibition against the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal waste into separate storm sewers. The permittee shall ensure the implementation of programs to collect used motor vehicle fluids (at a minimum oil and anti-freeze) for recycle, reuse, and proper disposal and to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. The permittee shall ensure that such programs are readily available within the District, and that they are publicized and promoted on a regular basis, pursuant to Public Education provisions in this permit at Part 4.9 herein.

4.7.4 The permittee shall continue to work with members of the Metropolitan Police Department to enhance illegal dumping enforcement.

4.7.5 The permittee shall implement the District's ban on coal tar pavement products, including conducting outreach and enforcement activities.

4.7.6 The permittee shall implement the Anacostia Clean Up and Protection Act of 2009, to ban the use of disposable non-recyclable plastic carryout bags and restrict the use on disposable carryout bags in certain food establishments.

4.8 Flood Control Projects

4.8.1 The permittee shall update the impervious surface analysis of floodplains six months after the approval of the revised Flood Insurance Rate Maps by the Federal Emergency Management Agency.

4.8.2 The permittee shall assess potential impacts on the water quality and the ability of the receiving water to support beneficial uses for all flood management projects. Evaluate the feasibility of retrofitting existing flood control devices to provide additional pollutant and volume removal from stormwater. Report results of such assessment, mapping program, and feasibility studies in the Annual Report (Part 6.2 herein).

4.8.3 The permittee shall review all development proposed in flood plain areas to ensure that the impacts on the water quality of receiving water bodies have been properly addressed. Information regarding impervious surface area located in the flood plains shall be used (in conjunction with other environmental indicators) as a planning tool. The permittee shall collect data on the percentage of impervious surface area located in flood plain boundaries for all proposed development beginning six months after the effective date of this permit. The permittee shall collect similar data for existing development in flood plain areas, in accordance with the mapping program and other activities designed to improve water quality. Critical unmapped areas shall be prioritized by the permittee with an emphasis on developed and developing acreage. Reports of this work shall be summarized in the Annual Report.

4.9 Public Education and Public Participation

The permittee shall continue to implement a public education program including but not limited to an education program aimed at residents, businesses, industries, elected officials, policy makers, planning staff and other employees of the permittee. The purpose of education is to reduce or eliminate behaviors and practices that cause or contribute to adverse stormwater impacts. Education initiatives may be developed locally or regionally.

4.9.1 Education and Outreach.

4.9.1.1 The permittee shall continue to implement its education and outreach program for the area served by the MS4 that was established during the previous permit cycle. The outreach program shall be designed to achieve measurable improvements in the target audience's understanding of stormwater pollution and steps they can take to reduce their impacts.

4.9.1.2 The permittee shall assess current education and outreach efforts and identify areas where additional outreach and education are needed. Audiences and subject areas to be considered include:

a. General public

- 1) General impacts of stormwater flows into surface waters
- 2) Impacts from impervious surfaces
- 3) Source control practices and environmental stewardship actions and opportunities in the areas of pet waste, vehicle maintenance, landscaping, and rain water reuse.

- 4) A household hazardous waste educational and outreach program to control illicit discharges to the MS4 as required herein
 - 5) Information and education on proper management and disposal of used oil, other automotive fluids, and household chemicals
 - 6) Businesses, including home-based and mobile businesses
 - 7) Management practices for use and storage of automotive chemicals, hazardous cleaning supplies, carwash soaps and other hazardous materials
 - 8) Impacts of illicit discharges and how to report them including information for industries about stormwater permitting and pollution prevention plans and the requirement that they develop structural and non-structural control systems
- b. Homeowners, landscapers and property managers
- 1) Use of low or no phosphorus fertilizers, alternatives to fertilizers, alternative landscaping requiring no fertilizers
 - 2) Landscape designs to reduce runoff and pollutant loadings
 - 3) Car washing alternatives with the objective of eliminating phosphorus detergent discharges
 - 4) Yard care techniques that protect water quality
 - 5) Management practices for use and storage of pesticides and fertilizers
 - 6) Management practices for carpet cleaning and auto repair and maintenance
 - 7) Runoff Reduction techniques, including site design, on-site retention, pervious paving, retention of forests and mature trees
 - 8) Stormwater pond maintenance
- c. Engineers, contractors, developers, review staff and land use planners
- 1) Technical standards for construction site sediment and erosion control
 - 2) Runoff Reduction techniques, including site design, on-site reduction, pervious pavement, alternative parking lot design, retention of forests and mature trees
 - 3) Stormwater treatment and flow control controls
 - 4) Impacts of increased stormwater flows into receiving water bodies

4.9.2 Measurement of Impacts.

The permittee shall continue to measure the understanding and adoption of selected targeted behaviors among the targeted audiences. The resulting measurements shall be used to direct education and outreach resources most effectively, as well as to evaluate changes in adoption of the targeted behaviors.

4.9.3 Recordkeeping.

The permittee shall track and maintain records of public education and outreach activities.

4.9.4 Public Involvement and Participation.

The permittee shall continue to include ongoing opportunities for public involvement through advisory councils, watershed associations and/or committees, participation in developing updates to the stormwater fee system, stewardship programs, environmental activities or other similar activities. The permittee shall facilitate opportunities for direct action, educational, and volunteer programs such as riparian planting, volunteer monitoring programs, storm drain marking or stream clean up programs.

4.9.4.1 The permittee shall continue to create opportunities for the public to participate in the decision making processes involving the implementation and update of the permittee's SWMP. In particular, the permittee shall provide meaningful opportunity for the public to participate in the development of the permittee's Consolidated TMDL Implementation Plan. The permittee shall continue to implement its process for consideration of public comments on their SWMP.

4.9.4.2 The permittee shall continue to establish a method of routine communication to groups such as watershed associations and environmental organizations that are located in the same watershed(s) as the permittee, or organizations that conduct environmental stewardship projects located in the same watershed(s) or in close proximity to the permittee. This is to make these groups aware of opportunities for their direct involvement and assistance in stormwater activities that are in their watershed.

4.9.4.3 The permittee shall make all draft and approved MS4 documents required under this permit available to the public for comment. The current draft and approved SWMP and the MS4 annual reports deliverable documents required under this permit shall be posted on the permittee's website.

4.9.4.4 The permittee shall continue to develop public educational and participation materials in cooperation and coordination with other agencies and organizations in the District with similar responsibilities and objectives. Progress reports on public education shall be included in the Annual Report. An explanation shall be provided as to how this effort will reduce pollution loadings to meet the requirements of this permit.

4.9.4.5 The permittee shall periodically, and at least annually, update its website.

4.10 Total Maximum Daily Load (TMDL) Wasteload Allocation (WLA) Planning and Implementation

4.10.1 Anacostia River Watershed Trash TMDL Implementation

The permittee shall attain removal of 103,188 pounds of trash annually, as determined in the Anacostia River Watershed Trash TMDL, as a specific single-year measure by the fifth year of this permit term.

Reductions must be made through a combination of the following approaches:

1. Direct removal from waterbodies, e.g., stream clean-ups, skimmers
2. Direct removal from the MS4, e.g., catch basin clean-out, trash racks
3. Direct removal prior to entry to the MS4, e.g., street sweeping
4. Prevention through additional disposal alternatives, e.g., public trash/recycling collection
5. Prevention through waste reduction practices, regulations and/or incentives, e.g., bag fees

At the end of the first year the permittee must submit the trash reduction calculation methodology with Annual Report to EPA for review and approval. The methodology should accurately account for trash prevention/removal methods beyond those already established when the TMDL was approved, which may mean crediting a percentage of certain approaches. The calculation methodology must be consistent with assumptions for weights and other characteristics of trash, as described in the 2010 Anacostia River Watershed Trash TMDL.

Annual reports must include the trash prevention/removal approaches utilized, as well as the overall total weight (in pounds) of trash captured for each type of approach.

The requirements of this Section, and related elements as appropriate, shall be included in the Consolidated TMDL Implementation Plan (Section 4.10.3).

4.10.2 Hickey Run TMDL Implementation

The permittee shall implement and complete the proposed replacement/rehabilitation, inspection and enforcement, and public education aspects of the strategy for Hickey Run as described in the updated Plan to satisfy the requirements of the oil and grease wasteload allocations for Hickey Run. If monitoring or other assessment determine it to be necessary, the permittee shall install or implement appropriate controls to address oil & grease in Hickey Run no later than the end of this permit term. As appropriate, any requirement of this Section not completed prior to finalization of the Consolidated TMDL Implementation Plan (Section 4.10.3) shall be included in that Plan.

4.10.3 Consolidated TMDL Implementation Plan

For all TMDL wasteload allocations assigned to District MS4 discharges, the permittee shall develop, public notice and submit to EPA for review and approval a consolidated TMDL Implementation Plan within 30 months of the effective date of this permit provision. This Plan shall include, at a minimum, the following TMDLs and any subsequent updates:

1. TMDL for Biochemical Oxygen Demand (BOD) in the Upper and Lower Anacostia River (2001)
2. TMDL for Fecal Coliform Bacteria in the Upper and Lower Anacostia River (2003)
3. TMDL for Organics and Metals in the Anacostia River and Tributaries (2003)
4. TMDL for Fecal Coliform Bacteria in Kingman Lake (2003)
5. TMDL for Total Suspended Solids, Oil and Grease and Biochemical Oxygen Demand in Kingman Lake (2003)

6. TMDL for Fecal Coliform Bacteria in Rock Creek (2004)
7. TMDL for Organics and Metals in the Tributaries to Rock Creek (2004)
8. TMDL for Fecal Coliform Bacteria in the Upper, Middle and Lower Potomac River and Tributaries (2004)
9. TMDL for Organics, Metals and Bacteria in Oxon Run (2004)
10. TMDL for Organics in the Tidal Basin and Washington Ship Channel (2004)
11. TMDL for Sediment/Total Suspended Solids for the Anacostia River Basin in Maryland and the District (2007) [pending resolution of court vacature, Anacostia Riverkeeper, Inc. v. Jackson, No. 09-cv-97 (RCL)]
12. TMDL for PCBs for Tidal Portions of the Potomac and Anacostia Rivers in the District of Columbia, Maryland and Virginia (2007)
13. TMDL for Nutrients/Biochemical Oxygen Demand for the Anacostia River Basin in Maryland and the District (2008)
14. TMDL for Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia (2010)
15. TMDL for Nitrogen, Phosphorus and Sediment for the Chesapeake Bay Watershed (2010)

This Plan shall place particular emphasis on the pollutants in Table 4, but shall also evaluate other pollutants of concern for which relevant WLAs exist. EPA will incorporate elements of the Consolidate TMDL Implementation Plan as enforceable permit provisions, including milestones and final dates for attainment of applicable WLAs. The permittee shall fully implement the Plan upon EPA approval. This Plan shall preempt any existing TMDL implementation plans for the relevant WLAs. To account for any new or revised TMDL established or approved by EPA with wasteload allocations assigned to District MS4 discharges, the permittee shall submit an updated Consolidated TMDL Implementation Plan annually, as necessary. Such updates will account for any actions taken in the 12-month period preceding the date 6 months before the revision is due. If necessary, the first such update will be due 18 months after the submittal of the initial Plan, with subsequent updates due on the anniversary of the submittal date.

The Plan shall include:

1. A specified schedule for attainment of WLAs that includes final attainment dates and, where applicable, interim milestones and numeric benchmarks.
 - a. Numeric benchmarks will specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks.
 - b. Interim milestones will be included where final attainment of applicable WLAs requires more than five years. Milestone intervals will be as frequent as possible but will in no case be greater than five (5) years.
2. Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.
3. An associated narrative providing an explanation for the schedules and controls included in the Plan.

4. Unless and until an applicable TMDL is no longer in effect (e.g., withdrawn, reissued or the water delisted), the Plan must include the elements in 1-3 above for each TMDL as approved or established.
5. The current version of the Plan will be posted on the permittee's website.

4.10.4 Adjustments to TMDL Implementation Strategies

If evaluation data, as outlined in the monitoring strategy being developed per Part 5.1, indicate insufficient progress towards attaining any WLA covered in 4.10.1, 4.10.2 or 4.10.3, the permittee shall make the appropriate adjustments within six (6) months to address the insufficient progress and document those adjustments in the Consolidated TMDL Implementation Plan. The Plan modification shall include a reasonable assurance demonstration of the additional controls to achieve the incorporated milestones. Annual reports must include a description of progress as evaluated against all implementation objectives, milestones and benchmarks, as relevant, outlined in Part 4.10.

4.11 Additional Pollutant Sources

For any additional pollutant sources not addressed in sections 4.1 through 4.9, the permittee shall continue to compile pertinent information on known or potential pollution sources, including significant changes in:

1. land use activities,
2. population estimates,
3. runoff characteristics,
4. major structural controls,
5. landfills,
6. publicly owned lands, and
7. industries impacting the MS4.

For purposes of this section, “significant changes” are changes that have the potential to revise, enhance, modify or otherwise affect the physical, legal, institutional, or administrative characteristics of the above-listed potential pollution sources. This information shall be submitted in each of the Annual Reports submitted to EPA pursuant to the procedures in Part 6.2 herein. For the Stormwater Model, analysis of data for these pollution sources shall be reported according to Part 7 herein.

The permittee shall implement controls to minimize and prevent discharges of pollutants from additional pollutant sources, including but not limited to Bacteria (*E. coli*), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash, to receiving waters. Controls shall be designed to prevent and restrict priority pollutants from coming into contact with stormwater, e.g., restricting the use of lawn fertilizers rather than end-of-pipe treatment. These strategies shall include program priorities and a schedule of activities to address those priorities and an outline of which agencies will be responsible for implementing those strategies. The strategies used to reduce or eliminate these pollutants shall be documented in updates to the Stormwater Management Program Plan.

5. MONITORING AND ASSESSMENT OF CONTROLS

5.1 Revised monitoring program

5.1.1 Design of the Revised Monitoring Program

Within 30 months of the effective date of Part 4.10.3 of this permit the permittee shall develop, public notice and submit to EPA for review and approval a revised monitoring program. The permittee shall fully implement the program upon EPA approval. The revised monitoring program shall meet the following objectives:

1. Make wet weather loading estimates of the parameters in Table 4 from the MS4 to receiving waters. Number of samples, sampling frequencies and number and locations of sampling stations must be adequate to ensure data are statistically significant and interpretable.
2. Evaluate the health of the receiving waters, to include biological and physical indicators such as macroinvertebrates and geomorphologic factors. Number of samples, frequencies and locations must be adequate to ensure data are statistically significant and interpretable for long-term trend purposes (not variation among individual years or seasons).
3. Include any additional necessary monitoring for purposes of source identification and wasteload allocation tracking. This strategy must align with the Consolidated TMDL Implementation Plan required in Part 4.10.3 For all pollutants in Table 4 monitoring must be adequate to determine if relevant WLAs are being attained within specified timeframes in order to make modifications to relevant management programs, as necessary.

Table 4
Monitoring Parameters

Parameter
<i>E. coli</i>
Total nitrogen
Total phosphorus
Total Suspended Solids
Cadmium
Copper
Lead
Zinc
Trash

4. All chemical analyses shall be performed in accordance with analytical methods approved under 40 C.F.R. Part 136. When there is not an approved analytical method, the applicant may use any suitable method as described in Section 5.7 herein, but must provide a description of the method.

5.1.2 Utilization of the Revised Monitoring Program

The permittee must use the information to evaluate the quality of the stormwater program and the health of the receiving waters at a minimum to include:

1. The permittee shall estimate annual cumulative pollutant loadings for pollutants listed in Table 4. Pollutant loadings and, as appropriate, event mean concentrations, will be reported in DMRs and annual reports on TMDL implementation for pollutants listed in Table 4 in discharges from the monitoring stations in Table 5.
2. The permittee shall perform the following activities at least once during the permit term, but no later than the fourth year of this permit:
 - a. Identify and prioritize additional efforts needed to address water quality exceedances, and receiving stream impairments and threats;
 - b. Identify water quality improvements or degradation

Upon approval of the Revised Monitoring Program by EPA Region III, or 2 years from the effective date of this permit, whichever comes first, the permittee shall begin implementation of the Revised Monitoring Program.

5.2 Interim Monitoring

Until such time as EPA has approved the Revised Monitoring Program, the permittee shall implement the following monitoring program:

5.2.1 Wet Weather Discharge Monitoring

The permittee shall monitor for the parameters identified in Table 4 herein, at the locations listed in Table 5 herein. Monitoring frequency for chemical/physical parameters shall be taken by at least three times per year at a minimum. This does not include a geomorphologic assessment and/or physical habitat assessment. The permittee shall conduct sampling as provided in 40 C.F.R. § 122.21(g)(7).

The permittee shall monitor and provide an annual Discharge Monitoring Report for the period of interim monitoring.

TABLE 5
Monitoring Stations

A. Anacostia River Sub Watershed Monitoring Sites
1. Gallatin Street & 14 th Street N.E. across from the intersection of 14 th St. and Gallatin St. in an outfall (MS-2)
2. Anacostia High School/Anacostia Recreation Center – Corner of 17 th St and Minnesota Ave SE
B. Rock Creek Subwatershed Monitoring Sites
1. Walter Reed -- Fort Stevens Drive -- 16 th Street and Fort Stevens Road, N.W. at an outfall (MS-6)
2. Soapstone Creek -- Connecticut Avenue and Ablemarle Street N.W. at an outfall (MS-5)
C. Potomac River Subwatershed Monitoring Sites
1. Battery Kemble Creek-49th and Hawthorne Streets, N.W. at an outfall (MS-4)
2. Oxon Run-Mississippi Avenue and 15 th Street, S.E. into Oxon Run via an outfall (MS-1)

The permittee may revise this list of sites in accordance with its revised monitoring program in Section 5.1 herein. Otherwise, changes to the above MS4 monitoring stations and/or sites for any reason shall be considered a major modification to the permit subject to the reopener clause.

During the interim monitoring period for the pollutants listed in Table 4, demonstration of compliance will be calculated using the procedures identified in the SWMP, the approved Anacostia River TMDL Implementation Plan, and/or other appropriate modeling tools and data on management practices efficiencies. The annual report will provide all monitoring data, and a brief synthesis of whether the data indicate that relevant wasteload allocations and other relevant targets are being achieved.

5.2.2 Storm Event Data

In addition to the parameters listed above, the permittee shall continue to maintain records of the date and duration (in hours) of the storm events sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration (in hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and a calculated flow estimate of the total volume (in gallons) and nature of the discharge sampled.

5.2.3 Sample Type, Collection, and Analysis

The following requirements apply only to samples collected for Part 5.2.1, Representative Monitoring.

1. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one sample shall be taken for pollutants listed in Table 4 including temperature, DO, pH and specific conductivity. For all parameters, data shall be reported for the entire event of the discharge pursuant to 40 C.F.R. § 122.26(d)(2)(iii).
2. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge, with each aliquot being separated by a minimum period of fifteen minutes.
3. Analysis and collection of samples shall be done in accordance with the most recent EPA approved laboratory methods and procedures specified at 40 C.F.R. Part 136 and its subsequent amendments.

5.2.4 Sampling Waiver

When a discharger is unable to collect samples due to adverse climatic conditions, the discharger must submit in lieu of sampling data a description of why samples could not be collected, including available documentation of the event.

Adverse climatic conditions which may prohibit the collection of samples includes weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.).

5.3 Dry Weather Monitoring

5.3.1 Dry Weather Screening Program

The permittee shall continue with ongoing efforts to detect the presence of illicit connections and improper discharges to the MS4 pursuant to the District SWMP. The permittee shall perform the following: (1) continue to screen known problem sewersheds within the District based on past screening activities; (2) continue to inventory all MS4 outfalls in the District and inspect all outfalls by the end of the permit term; and (3) ensure that the dry weather screening program has addressed all watersheds within the permit term. The screening shall be

sufficient to estimate the frequency and volume of dry weather discharges and their environmental impact.

5.3.2 Screening Procedures

Screening may be developed and/or modified based on experience gained during actual field screening activities. The permittee shall establish a protocol which requires screening to ensure that such procedures are occurring, but such protocol need not conform to the procedures published at 40 C.F.R. § 122.26(d)(1)(iv)(D). The permittee shall describe the protocol actually used in each Annual Report with a justification for its use. The procedures described in the SWMP shall be used as guidance.

5.3.3 Follow-up on Dry Weather Screening Results

The permittee shall continue to implement its enforcement program for locating and ensuring elimination of all suspected sources of illicit connections and improper disposal identified during dry weather screening activities. The permittee shall report the results of such implementation in each Annual Report.

5.4. Area and/or Source Identification Program

The permittee shall continue to implement a program to identify, investigate, and address areas and/or sources within its jurisdiction that may be contributing excessive levels of pollutants to the MS4 and receiving waters, including but not limited to those pollutants identified in Table 4 herein.

5.5 Flow Measurements

The permittee shall continue to select and use appropriate flow measurement devices and methods consistent with accepted scientific practices to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated, and maintained to insure that the accuracy of the measurements is consistent with the accepted capability of that type of device.

5.6 Monitoring and Analysis Procedures

5.6.1 Monitoring must be conducted according to laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments, unless other test procedures have been specified in the permit.

5.6.2 The permittee is authorized to use a more current or sensitive (i.e., lower) detection method than the one identified in 40 C.F.R. Part 136 exists for a particular parameter, including but not limited to PCBs (Method 1668B) and mercury (Method 1631E). If used, the permittee shall report using the more current and/or more sensitive method for compliance reporting and monitoring purposes.

5.6.3 EPA reserves the right to modify the permit in order to require a more sensitive method for measuring compliance with any pollutant contamination levels, consistent with 40 CFR, Part 136, should it become necessary.

5.7 Reporting of Monitoring Results

The permittee shall continue to report monitoring results annually in a Discharge Monitoring Report. If NetDMR (<http://www.epa.gov/netdmr/>) is unavailable to any of the following then the original and one copy of the Report are to be submitted at the following addresses:

NPDES Permits Branch
U.S. EPA Region III (3WP41)
Water Protection Division
1650 Arch Street
Philadelphia, PA 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive
Gloucester, Massachusetts 01930-2276

Monitoring results obtained during the previous year shall be summarized and reported in the Annual Report.

5.8 Additional Monitoring by the Permittee

If the permittee monitors (for the purposes of this permit) any pollutant more frequently than required by this permit, using laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the annual Discharge Monitoring Report. Such frequency shall also be indicated.

5.9 Retention of Monitoring Information

The permittee shall continue to retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation for a period of at least five(5) years from the date of the sample, measurement or report. This period may be extended by request of EPA at any time.

5.10 Record Content

Records of monitoring information shall include:

1. The date, exact location, time and methods of sampling or measurements;
2. The individual(s) who performed the sampling or measurements;

3. The date(s) analyses were performed;
4. The individual(s) who performed the analyses;
5. The analytical techniques or methods used; and
6. The results of such analyses.

6. REPORTING REQUIREMENTS

The permittee shall comply with the reporting requirements identified in this section, including but not limited to the deliverables identified in Table 6 below.

TABLE 6
Reporting Requirements

Submittal	Deadline
Discharge Monitoring Report	Each year on the anniversary of the effective date of the permit (AEDOP)
Annual Report	Each year on the AEDOP.
MS4 Permit Application	Six months prior to the permit expiration date.

6.1 Discharge Monitoring Reports

The permittee shall provide discharge monitoring reports per Part 5.7 of this permit on the quality of stormwater discharges from the MS4 for all analytical chemical monitoring stipulated in Part 5 of this permit.

6.2 Annual Reporting

The permittee shall submit an Annual Report to EPA on or by the effective yearly date of the permit for the duration of the permitting cycle. At the same time the Annual Report it submitted to EPA it shall also be posted on the permittee’s website at an easily accessible location. If the annual report is subsequently modified per EPA approval (part 6.2.3 of this permit) the updated report shall be posted on the permittee’s website.

6.2.1 Annual Report.

The Annual Report shall follow the format of the permit as written, address each permit requirement, and also include the following elements:

- a. A review of the status of program implementation and compliance (or non-compliance) with all provisions and schedules of compliance contained in this

- permit, including documentation as to compliance with performance standards and other provisions and deliverables contained in Section 4 herein;
- b. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings, including TMDL WLAs and TMDL implementation activities;
 - c. An assessment of the effectiveness of controls established by the SWMP;
 - d. An assessment of the projected cost of SWMP implementation for the upcoming year (or longer) and a description of the permittee's budget for existing stormwater programs, including: (i) an overview of the permittee's financial resources and budget, (ii) overall indebtedness and assets, (iii) sources for funds for stormwater programs; and (iv) a demonstration of adequate fiscal capacity to meet the requirements of this permit, subject to the (a) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, (b) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001), (c) D.C. Official Code § 47-105 (2001), and (d) D.C. Official Code § 1-204.46 (2006 Supp.), as the foregoing statutes may be amended from time to time;
 - e. A summary describing the number and nature of enforcement actions, inspections, and public education programs and installation of control systems;
 - f. Identification of water quality improvements or degradation through application of a measurable performance standard as stated throughout this permit;
 - g. Results of storm and water quality modeling and its use in planning installation of control systems and maintenance and other activities;
 - h. An assessment of any SWMP modifications needed to meet the requirements of this permit;
 - i. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 C.F.R. § 122.26(d)(2)(iv) and (v);
 - j. Methodology to assess the effects of the Stormwater Management Program (SWMP);
 - k. Annual expenditures and budget for the year following each annual report;
 - l. A summary of commitments for the next year and evaluation of the commitments from the previous year;
 - m. A summary of the monitoring data for stormwater and ambient sampling that is collected in the previous year and the plan, including identification of monitoring locations, to collect additional data for the next year;
 - n. The amount of impervious cover within the District, and within the three major watersheds in the District (Anacostia, Potomac and Rock Creek);
 - o. The percentage of effective impervious cover reduced annually, including but not limited to the number and square footage of green roofs installed in the District, including the square footage of drainage managed by practices that meet the performance standard in 4.1.1; and
 - p. An analysis of the work to be performed in the next successive year, including performance measures for those tasks. In the following year, progress with those performance measures shall be part of the Annual Report. The basis for each of the performance standards, which will be used as tools for evaluating environmental results and determining the success of each MS4 activity, shall be described incorporating an integrated program approach that considers all programs and projects which have a direct as well as an indirect affect on

stormwater management quantity and quality within the District. The report shall also provide an update of the fiscal analysis for each year of the permit as required by 40 C.F.R. § 122.26(d)(2)(vi).

6.2.2 Annual Report Meeting

Within 12 months of the effective date of this permit the permittee shall convene an annual report meeting with EPA to present annual progress and plans for the following year. In conjunction with this meeting the annual written report may consist of presentation materials summarizing all required elements of the annual report rather than a lengthy written report, as long as all required elements are included. Following this first annual reporting meeting EPA and the permittee shall determine if the meeting and associated presentation materials constitute an effective reporting mechanism. With the agreement of both EPA and the permittee the annual reporting meeting and the use of summarized presentation materials in lieu of a lengthy written report may be extended for the remainder of the permit term.

6.2.3 Annual Report Revisions

Each Annual Report may be revised with written approval by EPA. The revised Report will become effective after its approval.

6.2.4 Signature and Certification

The permittee shall sign and certify the Annual Report in accordance with 40 C.F.R §122.22(b), and include a statement or resolution that the permittee's governing body or agency (or delegated representative) has reviewed or been appraised of the content of such submissions. The permittee shall provide a description of the procedure used to meet the above requirement.

6.2.5 EPA Approval

In reviewing any submittal identified in Table 1 or 6, EPA may approve or disapprove each submittal. If EPA disapproves any submittal, EPA shall provide comments to the permittee. The permittee shall address such comments in writing within thirty (30) days of receipt of the disapproval from EPA. If EPA determines that the permittee has not adequately addressed the disapproval/comments, EPA may revise that submittal or portions of that submittal. Such revision by EPA is effective thirty (30) days from receipt by the permittee. Once approved by EPA, or in the event of EPA disapproval, as revised by EPA, each submission shall be an enforceable element of this permit.

6.3 MS4 Permit Application

The permittee develop a permit Application based on the findings presented in each of the Annual SWMP Reports submitted during the permitting cycle to be submitted six months prior to the expiration date of the permit. The permit application shall define the next iterative set of objectives for the program and provide an analysis to demonstrate that these objectives will be achieved in the subsequent permit term.

7. **STORMWATER MODEL**

The permittee shall continue to update and report all progress made in developing a Stormwater Model and Geographical Information System (GIS) to EPA on an annual basis as an attachment to each Annual Report required herein.

On an annual basis, the permittee shall report on pollutant load reductions throughout the area covered by this permit using the statistical model developed by DDOE or other appropriate model. In the annual update, the permittee shall include, at a minimum, other applicable components which are not only limited to those activities identified in Section 6 herein, but which are necessary to demonstrate the effectiveness of the permittee's Stormwater Management Program toward implementing a sustainable strategy for reducing stormwater pollution runoff to the impaired waters of the District of Columbia.

Assess performance of stormwater on-site retention projects through monitoring, modeling and/or estimating storm retention capacity to determine the volume of stormwater removed from the MS4 in a typical year of rainfall as a result of implementing stormwater controls. This provision does not require all practices to be individually monitored, only that a reasonable evaluation strategy must provide estimates of overall volume reductions by sewershed.

8. **STANDARD PERMIT CONDITIONS FOR NPDES PERMITS**

8.1 Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and may result in an enforcement action; permit termination, revocation and reissuance, or modification; and denial of a permit renewal application.

8.2 Inspection and Entry

The permittee shall allow EPA, or an authorized representative, and/or the permittee's contractor(s)/subcontractor(s), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises at reasonable times where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be maintained under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), processes, or operations regulated or required under this permit; and
4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

8.3 Civil and Criminal Penalties for Violations of Permit Conditions

Nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

The Clean Water Act provides that any person who violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act, or any permit condition or limitation implementing such section, or any requirement imposed in an approved pretreatment program and any person who violates any Order issued by EPA under Section 301(a) of the Act, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation, Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, EPA has raised the statutory maximum penalty for such violations to \$37,500 per day for each such violation. 74 Fed. Reg. 626 (Jan. 7, 2009). The Clean Water Act also provides for an action for appropriate relief including a permanent or temporary injunction.

Any person who negligently violates Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, any permit condition or limitation implementing any such section, shall be punished by a criminal fine of not less than \$5,000 nor more than \$50,000 per day of such violation, or by imprisonment for not more than 3 years, or by both. Any person who knowingly violates any permit condition or limitation implementing Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000, or by imprisonment of not more than 15 years, or by both.

8.4 Duty to Mitigate

The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

In the event that the permittee or permitting authority determines that discharges are causing or contributing to a violation of applicable WQS, the permittee shall take corrective action to eliminate the WQS exceedance or correct the issues and/or problems by requiring the party or parties responsible for the alleged violation(s) comply with Part I.C.1 (Limitations to Coverage) of this permit. The methods used to correct the WQS exceedances shall be documented in subsequent annual reports and in revisions to the Stormwater Management Program Plan.

8.5 Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause including, but not limited to, the following:

1. Violation of any terms or conditions of this permit;
2. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;
3. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge;
4. Information newly acquired by the Agency, including but not limited to the results of the studies, planning, or monitoring described and/or required by this permit;
5. Material and substantial facility modifications, additions, and/or expansions;
6. Any anticipated change in the facility discharge, including any new significant industrial discharge or changes in the quantity or quality of existing industrial discharges that will result in new or increased discharges of pollutants; or
7. A determination that the permitted activity endangers human health or the environment and that it can only be regulated to acceptable levels by permit modification or termination.

The effluent limitations expressed in this permit are based on compliance with the District of Columbia's water quality standards in accordance with the Clean Water Act. In the event of a revision of the District of Columbia's water quality standards, this document may be modified by EPA to reflect this revision.

The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition. When a permit is modified, only conditions subject to modification are reopened.

8.6 Retention of Records

The permittee shall continue to retain records of all documents pertinent to this permit not otherwise required herein, including but not limited copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least five (5) years from the expiration date of this permit. This period may be extended by request of EPA at any time.

8.7 Signatory Requirements

All Discharge Monitoring Reports, plans, annual reports, certifications or information either submitted to EPA or that this permit requires be maintained by the permittee shall be signed by either a principal executive officer or ranking elected official, or a duly authorized representative of that person. A person is a duly authorized representative only if: (i) the authorization is made in writing by a person described above and submitted to EPA; and (ii) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for an agency. (A duly authorized representative may thus be either a named individual or any individual occupying a named position).

If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new notice satisfying the requirements of this paragraph must be submitted to EPA prior or together with any reports, information, or applications to be signed by an authorized representative.

8.8 Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act, 33 U.S.C. § 1321.

8.9 District Laws, Regulations and Ordinances

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable District law, regulation or ordinance identified in the SWMP. In the case of “exemptions and waivers” under District law, regulation or ordinance, Federal law and regulation shall be controlling.

8.10 Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

8.11 Severability

The provisions of this permit are severable, and if any provisions of this permit, or the application of any provision of this permit to any circumstances is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

8.12 Transfer of Permit

In the event of any change in ownership or control of facilities from which the authorized discharge emanates, the permit may be transferred to another person if:

1. The current permittee notifies the EPA, in writing of the proposed transfer at least 30 days in advance of the proposed transfer date;
2. The notice includes a written agreement between the existing and new permittee containing a specific date for transfer of permit responsibility, coverage, and liability between them; and
3. The EPA does not notify the current permittee and the new permittee of intent to modify, revoke and reissue, or terminate the permit and require that a new application be submitted.

8.13 Construction Authorization

This permit does not authorize or approve the construction of any onshore or offshore physical structures or facilities or the undertaking of any work in any navigable waters.

8.14 Historic Preservation

During the design stage of any project by the Government of the District of Columbia within the scope of this permit that may include ground disturbance, new and existing or retrofit construction, or demolition of a structure, the permittee shall notify the Historic Preservation liaison and provide the liaison planning documents for the proposed undertaking. The documents shall include project location; scope of work or conditions; photograph of the area/areas to be impacted and the methods and techniques for accomplishing the undertaking. Depending on the complexity of the undertaking, sketches, plans and specifications shall also be submitted for review. The documentation will enable the liaison to assess the applicability of compliance procedures associated with Section 106 of the National Historic Preservation Act. Among the steps in the process are included:

1. The determination of the presence or absence of significant historic properties (architectural, historic or prehistoric). This can include the evaluation of standing structures and the determination of the need for an archaeological survey of the project area.
2. The evaluation of these properties in terms of their eligibility for nomination to the National Register of Historic Places.
3. The determination of the effect that the proposed undertaking will have on these properties.
4. The development of mitigating measures in conjunction with any anticipated effects.

All such evaluations and determinations will be presented to the permittee for its concurrence.

If an alternate Historic Preservation procedure is approved by EPA in writing during the term of this permit, the alternate procedure will become effective after its approval.

8.15 Endangered Species

The U.S. Fish and Wildlife Service (FWS) has indicated that Hay's Spring Amphipod, a Federally listed endangered species, occurs at several locations in the District of Columbia. The National Oceanic and Atmospheric Administration National Marine Fisheries Service (NOAA Fisheries) has indicated that the endangered shortnose sturgeon occurs in the Potomac River drainage and may occur within the District of Columbia. The FWS and NOAA Fisheries indicate that at the present time there is no evidence that the ongoing stormwater discharges covered by this permit are adversely affecting these Federally-listed species. Stormwater discharges, construction, or any other activity that adversely affects a Federally-listed endangered or threatened species are not authorized under the terms and conditions of this permit.

The monitoring required by this permit will allow further evaluation of potential effects on these threatened and endangered species once monitoring data has been collected and analyzed. EPA requires that the permittee submit to NOAA Fisheries, at the same time it submits to EPA, the Annual Outfall Discharge Monitoring Report of the monitoring data which will be used by EPA and NOAA Fisheries to further assess effects on endangered or threatened species. If this data indicates that it is appropriate, requirements of this NPDES permit may be modified to prevent adverse impacts on habitats of endangered and threatened species.

The above-referenced Report of monitoring data is required under this permit to be sent on an annual basis to:

The United States Environmental Protection Agency
Region III (3WP41)
Water Protection Division
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive
Gloucester, Massachusetts 01930-2276

8.16 Toxic Pollutants

If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under section 307(a) of the Act, 33 U.S.C. § 1317(a), for a toxic pollutant which is present in the discharge and such standard or prohibition

is more stringent than any limitation for such pollutant in this permit, the permittee shall comply with such standard or prohibition even if the permit has not yet been modified to comply with the requirement.

8.17 Bypass

8.17.1 Bypass not exceeding limitations. In accordance with 40 C.F.R. § 122.41(m), the permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation.

8.17.2 Notice

1. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it must submit prior notice at least ten days before the date of the bypass. See 40 C.F.R. § 122.41(m)(3)(i).
2. Unanticipated bypass. The permittee must submit notice of an unanticipated bypass as required by 40 C.F.R. § 122.41(l)(6) (24-hour notice). See 40 C.F.R. § 122.41(m)(3)(ii).

8.17.3 Prohibition of bypass. See 40 C.F.R. § 122.41(m)(4).

1. Bypass is prohibited, and EPA may take enforcement action against the permittee for bypass, unless:
 - a. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage as defined herein;
 - b. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
 - c. The permittee submitted notices as required herein.
2. EPA may approve an anticipated bypass, after considering its adverse effects, if EPA determines that it will meet the three conditions listed above.

8.18 Upset

Effect of an upset: An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of 40 C.F.R. § 122.41(n) are met.

8.19 Reopener Clause for Permits

The permit shall be modified or revoked and reissued, including but not limited to, for any of the following reasons:

1. To incorporate any applicable effluent standard or limitation issued or approved under Sections 301, 304, or 307 of the Clean Water Act, and any other applicable provision, such as provided for in the Chesapeake Bay Agreements based on water quality considerations, and if the effluent standard or limitation so issued or approved:
 - a. Contains different conditions or is otherwise more stringent than any effluent limitation in the permit; or
 - b. Controls any pollutant not limited in the permit. The permit, as modified or reissued under this paragraph, shall also contain any other requirements of the Act then applicable; or
2. To incorporate additional controls that are necessary to ensure that the permit effluent limits are consistent with any applicable TMDL WLA allocated to the discharge of pollutants from the MS4 or to incorporate milestones and schedules of a TMDL Implementation Plan; or
3. As specified in 40 C.F.R. §§ 122.44(c), 122.62, 122.63, 122.64, and 124.5.

8.20 Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, it must apply for and obtain a new permit. The application shall be submitted at least 180 days before the expiration date of this permit. EPA may grant permission to submit an application less than 180 days in advance but no longer than the permit expiration date. In the event that a timely and complete reapplication has been submitted and EPA is unable through no fault of the permittee, to issue a new permit before the expiration date of this permit, the terms and conditions of this permit are automatically continued and remain fully effective and enforceable.

9. PERMIT DEFINITIONS

Terms that are not defined herein shall have the meaning accorded them under section 502 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, or its implementing regulations, 40 C.F.R. Part 122.

“Annual Report” refers to the consolidated Annual Report that the permittee is required to submit annually.

"Benchmark" as used in this permit is a quantifiable goal or target to be used to assess progress toward "milestones" (see separate definition) and WLAs, such as a numeric goal for BMP implementation. If a benchmark is not met, the permittee should take appropriate corrective action to improve progress toward meeting milestones or other objectives. Benchmarks are intended as an adaptive management aid and generally are not considered to be enforceable.

"Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. See 40 C.F.R. § 122.41(m)(1)(i).

"CWA" means Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. (6-483 and Pub. L. 97-117, 33 U.S.C. §§ 1251 *et seq.*

"Development" is the undertaking of any activity that disturbs a surface area greater than or equal to 5,000 square feet, including new development projects and redevelopment projects. For purposes of Parts 4.1.1 through 4.1.4 of the permit the requirements apply to discharges from sites for which design or construction commenced after 18 months from the effective date of this permit or as required by District of Columbia law, whichever is sooner. The permittee may exempt development projects receiving site plan approval prior to this date from these requirements.

"Director" means the Regional Administrator of USEPA Region 3 or an authorized representative.

"Discharge" for the purpose of this permit, unless indicated otherwise, refers to discharges from the Municipal Separate Storm Sewer System (MS4).

"Discharge Monitoring Report", "DMR" or "Outfall Discharge Monitoring Report" includes the monitoring and assessment of controls identified in Section 5 herein.

"EPA" means USEPA Region 3.

"Green Roof" is a low-maintenance roof system that stores rainwater where the water is taken up by plants and/or transpired into the air.

"Green Technology Practices" means stormwater management practices that are used to mimic pre-development site hydrology by using site design techniques that retain stormwater on-site through infiltration, evapotranspiration, harvest and use.

"Guidance" means assistance in achieving a particular outcome or objective.

"Illicit connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit discharge" means any discharge to a municipal separate storm sewer that is not composed entirely of stormwater except discharges pursuant to an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities, pursuant to 40 C.F.R. § 122.26(b)(2).

"Impaired Water" (or "Water Quality Impaired Water" or "Water Quality Limited Segment"): A water is impaired for purposes of this permit if it has been identified by the District or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards (these waters are called "water quality limited segments" under 40 C.F.R. 30.2(j)). Impaired waters include both waters with approved or established TMDLs, and those for which a TMDL has not yet been approved or established.

"Landfill" means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit (i.e., an area where wastes are applied onto or incorporated into the soil surface [excluding manure spreading operations] for treatment or disposal), surface impoundment, injection well, or waste pile.

"Large or Medium municipal separate storm sewer system" means all municipal separate storm sewers that are either: (1) located in an incorporated place (city) with a population of 100,000 or more as determined by the latest Decennial Census by the Bureau of Census (these cities are listed in Appendices F and G of 40 C.F.R. Part 122); or (2) located in the counties with unincorporated urbanized populations of 100,000 or more, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties (these counties are listed in Appendices H and I of 40 C.F.R. Part 122); or (3) owned or operated by a municipality other than those described in paragraph (i) or (ii) and that are designated by the Director as part of the large or medium municipal separate storm sewer system.

"Milestone" as used in this permit is an interim step toward attainment of a WLA that upon incorporation into the permit will become an enforceable limit or requirement to be achieved by a stated date. A milestone should be expressed in numeric terms, i.e. as a volume reduction, pollutant load, specified implementation action or set of actions or other objective metric, when possible and appropriate.

"MS4" refers to either a Large or Medium Municipal Separate Storm Sewer System.

"Municipal Separate Storm Sewer" means a conveyance, or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (1) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State Law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes; (2) Designed or used to collect or convey stormwater (including storm drains, pipes, ditches, etc.); (3) not a combined sewer; and (4) not part of a Publicly-Owned Treatment Works as defined at 40 C.F.R. § 122.2.

“Offset” means a unit of measurement, either used as monetary or non-monetary compensation, as a substitute or replacement for mitigation of a stormwater control practice that has been determined to be impracticable to implement.

“Performance measure” means for purposes of this permit, a minimum set of criteria for evaluating progress toward meeting a standard of performance.

“Performance standard” means for purposes of this permit, a cumulative measure or provision for attainment of an outcome or objective.

"Permittee" refers to the Government of the District of Columbia.

"Point Source" means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.

“Pollutant of concern” means a pollutant in an MS4 discharge that may cause or contribute to the violation of a water quality criterion for that pollutant downstream from the discharge.

“Pre-Development Condition” means the combination of runoff, infiltration and evapotranspiration rates, volumes, durations and temperatures that typically existed on the site with natural soils and vegetation before human-induced land disturbance occurred. In the context of requirements in this permit the environmental objective is a stable, natural hydrologic site condition that protects or restores to the degree relevant for that site, stable hydrology in the receiving water, which will not necessarily be the hydrologic regime of that receiving water prior to any human disturbance in the watershed.

“Retention” means the use of soils, vegetation, water harvesting and other mechanisms and practices to retain a target volume of stormwater on a given site through the functions of: pore space and surface ponding storage; infiltration; reuse, and/or evapotranspiration.

“Retrofit” means improvement in a previously developed area that results in reduced stormwater discharge volumes and pollutant loads and/or improvement in water quality over current conditions.

“Stormwater” means the flow of surface water which results from, and which occurs immediately following, a rainfall event, snow melt runoff, and surface runoff and drainage.

“Stormwater management” means (1) for quantitative control, a system of vegetative or structural measures, or both, which reduces the increased volume and rate of surface runoff caused by man-made changes to the land; and (2) for qualitative control, a system of vegetative, structural, and other measures which reduce or eliminate pollutants which might otherwise be carried by surface runoff.

“SWMP” is an acronym for Stormwater Management Program. For purposes of this permit, the term includes all stormwater activities described in the District’s SWMP Plan updated February 19, 2009, or any subsequent update, and all other strategies, plans, documents, reports, studies, agreements and related correspondences developed and used pursuant to the requirements of this permit.

“Severe property damage” means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production. See 40 C.F.R. § 122.41(m)(1)(ii).

“Total Maximum Daily Load (TMDL) Units” means for purposes of this permit, the sum of individual waste load allocations (WLAs) and natural background. Unless specifically permitted otherwise in an EPA-approved TMDL report covered under the permit, TMDLs are expressed in terms of mass per time, toxicity or other appropriate measure such as pollutant pounds of a total average annual load.

“TMDL Implementation Plan” means for purposes of this permit, a plan and subsequent revisions/updates to that plan that are designed to demonstrate how to achieve compliance with applicable waste load allocations as set forth in the permit requirements described in Section 4.10.3.

“Stormwater Management Program (SWMP)” is a modified and improved SWMP based on the existing SWMP and on information in each of the Annual Reports/Discharge Monitoring Reports. The purpose of the SWMP is to describe the list of activities that need to be done to meet the requirements of the Clean Water Act, an explanation as to why these activities will meet the Clean Water Act requirements, and a schedule for those activities.

“Upset” means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond reasonable control. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. See 40 C.F.R. § 122.41(n)(1).

“Waste pile” means any non-containerized accumulation of solid, nonflowing waste.

“Water quality standards” refers to the District of Columbia’s Surface and Ground Water Quality Standards codified at Code of District of Columbia Regulations §§ 21-1100 *et seq.*, which are effective on the date of issuance of the permit and any subsequent amendments which may be adopted during the life of this permit.

“Waters of the United States” is defined at 40 C.F.R. § 122.2.

Exhibit 5

Boston, MA – Boston Water and Sewer Commission MS4 Permit
(Permit No. MAS010001)

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AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the federal Clean Water Act, as amended, 33 U.S.C. §§1251 et seq., and the Massachusetts Clean Waters Act, as amended, Mass. Gen. Laws. ch. 21, §§26-53, the

Boston Water and Sewer Commission

is authorized to discharge from all of its new or existing separate storm sewers: 195 identified Separate Storm Sewer Outfalls and associated receiving waters are Listed in Attachment A to receiving waters named: Belle Island Inlet, Boston Harbor, Boston Inner Harbor, Brook Farm Brook, Bussey Brook, Canterbury Brook, Chandler's Pond, Charles River, Chelsea River, Cow Island Pond, Dorchester Bay, Fort Point Channel, Goldsmith Brook, Jamaica Pond, Little Mystic Channel, Mill Pond, Millers River, Mother Brook, Muddy River, Mystic River, Neponset River, Old Harbor, Patten's Cove, Reserved Channel, Sprague Pond, Stony Brook, Turtle Pond and unnamed wetlands, brooks and streams.

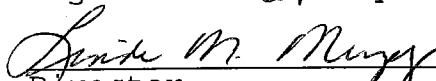
in accordance with effluent limitations, monitoring requirements and other conditions set forth herein.

This permit shall become effective 30 days from date of signature.


This permit and the authorization to discharge expire at midnight, five years from the effective date.

This permit consists of 20 pages and Attachment A in Part I including monitoring requirements, etc., and 35 pages in Part II including General Conditions and Definitions.

Signed this 29 day of September, 1999



Director
Office of Ecosystem Protection
Environmental Protection Agency
Region I
Boston, MA



Director, Division of
Watershed Management
Department of Environmental
Protection
Commonwealth of Massachusetts
Boston, MA

PART I. MUNICIPAL SEPARATE STORM SEWER SYSTEM

A. DISCHARGES THROUGH THE MUNICIPAL SEPARATE STORM SEWER SYSTEM AUTHORIZED UNDER THIS PERMIT

1. Permit Area. This permit covers all areas within the corporate boundary of the City of Boston or otherwise contributing to new or existing separate storm sewers owned or operated by the Boston Water and Sewer Commission, the "permittee".
2. Authorized Discharges. This permit authorizes all storm water discharges to waters of the United States from all existing or new separate storm sewer outfalls owned or operated by the permittee (existing outfalls are identified in Attachment A). This permit also authorizes the discharge of storm water commingled with flows contributed by wastewater or storm water associated with industrial activity provided such discharges are authorized under separate NPDES permits and are in compliance with applicable Federal, State and Boston Water and Sewer Commission regulations (Regulations Regarding the Use of Sanitary and Combined Sewers and Storm Drains of the Boston Water and Sewer Commission). The permittee shall provide a notification to EPA and MA DEP of all new separate storm sewer outfalls as they are activated and of all existing outfalls which are de-activated. The annual report (Part I.E.) will reflect all of the changes to the number of outfalls throughout the year.
3. Limitations on Coverage. Discharges of non-storm water or storm water associated with industrial activity through outfalls listed at Attachment A are not authorized under this permit except where such discharges are:
 - a. authorized by a separate NPDES permit; or
 - b. identified by and in compliance with Part I.B.2.g.2 of this permit.

B. STORM WATER POLLUTION PREVENTION & MANAGEMENT PROGRAMS

The permittee is required to develop and implement a storm water pollution prevention and management program designed to reduce, to the maximum extent practicable the discharge of pollutants from the Municipal Separate Storm Sewer System. The permittee may implement Storm Water Management Program (SWMP) elements through participation with other public agencies or private entities in cooperative efforts satisfying the requirements of this permit in lieu of creating duplicate program elements. Either cumulatively, or separately, the permittee's storm water pollution prevention and management programs shall satisfy the requirements of Part I.B.1-7. below for all portions of the Municipal Separate Storm Sewer System (MS4) authorized to discharge under this permit and shall reduce the discharge of pollutants to the maximum extent practicable. The storm water pollution prevention and management program requirements of this Part shall be implemented through the SWMP submitted as part of the permit application and revised as necessary.

1. POLLUTION PREVENTION REQUIREMENTS The permittee shall develop and implement the following pollution prevention measures as they relate to discharges to the separate storm sewer:
 - a. Development The permittee shall assist and coordinate with the appropriate municipal agencies with jurisdiction over land use to ensure that municipal approval of all new development and significant redevelopment projects within the City of Boston which discharge to the MS4 is conditioned on due consideration of water quality impacts. The permittee shall cooperate with appropriate municipal agencies to ensure that development activities conform to applicable state and local regulations, guidance and policies relative to storm water discharges to separate storm sewers. Such requirements shall limit increases in the discharge of pollutants in storm water as a result of new development, and reduce the discharge of pollutants in storm water as a result of redevelopment.
 - b. Used Motor Vehicle Fluids The permittee shall coordinate with appropriate municipal agencies or private entities to assist in the implementation of a program to collect used motor vehicle fluids (including, at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal. Such program shall be readily available to all residents of the City of Boston and publicized and promoted at least annually.

c. Household Hazardous Waste (HHW) The permittee shall coordinate with appropriate municipal agencies or private entities to assist in the implementation of a program to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal and promote proper handling and disposal. Such program shall be readily available to all private residents. This program shall be publicized and promoted at least annually.

2. STORM WATER MANAGEMENT PROGRAM REQUIREMENTS: The permittee shall continue to implement the Storm Water Management Program (SWMP) which it described in its May 17, 1993 storm water permit application and updated June 1995 and June 1998 in accordance with Section 402(p)(3)(B) of the Clean Water Act (CWA or "the Act"). This SWMP outlined in the permit application, including all updates, is approvable upon issuance of this permit.

In accordance with Part I.E. Annual Report, no later than **March 1, 2000** the permittee shall describe all the updates which it has conducted and all additional measures it will take to satisfy the requirements of this permit and the goals of the storm water management program. The Controls and activities identified in the SWMP shall clearly identify goals, a description of the controls or activities, and a description of the roles and responsibilities of other entities' areas of applicability on a system, jurisdiction, or specific area basis. The permittee will specifically address its roles and activities as they relate to portions of the SWMP which are not under its direct control (e.g. street sweeping, HHW collection, development, redevelopment). The permit may be modified to designate the agencies that administer these programs as co-permittees or require a separate permit. These entities would then be responsible for applicable permit conditions and requirements. The SWMP, and all approved updates, are hereby incorporated by reference and shall be implemented in a manner consistent with the following requirements:

a. Statutory Requirements: The SWMP shall include controls necessary to reduce the discharge of pollutants from the Municipal Separate Storm Sewer System to the Maximum Extent Practicable (MEP). Controls may consist of a combination of best management practices, control techniques, system design and engineering methods, and such other provisions as the permittee, Director or the State determines appropriate. The various components of the SWMP, taken as a whole (rather than individually), shall be sufficient to meet this standard. The SWMP shall be updated as necessary to ensure conformance with the requirements of CWA § 402(p)(3)(B). The permittee shall select measures or controls to satisfy the following water quality prohibitions:

No discharge of toxics in toxic amounts.

No discharge of pollutants in quantities that would cause a violation of State water quality standards.

No discharge of either a visible oil sheen, foam, or floating solids, in other than trace amounts.

b. Structural Controls: The permittee shall operate and maintain all storm water structural controls which it owns or operates in a manner so as to reduce the discharge of pollutants to the MEP.

c. Areas of New Development and Significant Redevelopment: The permittee shall continue to implement its site plan review process and ensure compliance with its existing regulations. The permittee shall also coordinate with appropriate municipal agencies to assist in the development, implementation, and enforcement of controls to minimize the discharge of pollutants to the separate storm sewer system from areas of new development and significant re-development during and after construction. The permittee shall assist appropriate municipal agencies to ensure that development activities conform to applicable state and local regulations, guidance and policies relative to storm water discharges to separate storm sewers.

d. Roadways: The permittee shall coordinate with appropriate agencies to assist in the implementation of measures to ensure that roadways and highways are operated and maintained in a manner so as to minimize the discharge of pollutants to the separate storm sewer system (including those related to deicing or sanding activities).

e. Flood Control Projects: The permittee shall ensure that any flood management projects within its direct control are completed after consideration of impacts on the water quality of receiving waters. The permittee shall also evaluate the feasibility of retro-fitting existing structural flood control devices it owns or operates to provide additional pollutant removal from storm water.

f. Pesticide, Herbicide, and Fertilizer Application: The permittee shall cooperate with appropriate municipal agencies to evaluate existing measures to reduce the discharge of pollutants related to the application of pesticides, herbicides, and fertilizers applied by municipal or public agency employees or contractors to public right of ways, parks, and other municipal facilities. The permittee shall evaluate the necessity to implement controls to reduce discharge of pollutants related to the application and distribution of pesticides, herbicides, and fertilizers by commercial and wholesale distributors and applicators. The permittee shall require controls, within its authority, as necessary.

g. Illicit Discharges and Improper Disposal: The permittee shall continue to implement its program to detect and remove illicit discharges (or require the discharger to the MS4 to remove or obtain a separate NPDES permit for the discharge) and improper disposal into the separate storm sewer.

1. The permittee shall effectively prohibit non-storm water discharges to the Municipal Separate Storm Sewer System, other than those authorized under this permit or a separate NPDES permit.

2. Unless identified by either the permittee, the Director, or the State as significant sources of pollutants to waters of the United States, the following non-storm water discharges are authorized to enter the MS4. As necessary, the permittee may incorporate appropriate control measures in the SWMP to ensure these discharges are not significant sources of pollutants to waters of the United States.

- (a) water line flushing;
- (b) landscape irrigation;
- (c) diverted stream flows;
- (d) rising ground waters;
- (e) uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers;

- (f) uncontaminated pumped ground water;
- (g) discharges from potable water sources;
- (h) foundation drains;
- (i) uncontaminated air conditioning or compressor condensate;
- (j) irrigation water;
- (k) uncontaminated springs;
- (l) water from crawl space pumps;
- (m) footing drains;
- (n) lawn watering;
- (o) non-commercial car washing;
- (p) flows from riparian habitats and wetlands;
- (q) swimming pool discharges which have been dechlorinated;
- (r) street wash waters;
- (s) discharges or flows from emergency fire fighting activities;
- (t) fire hydrant flushing; and
- (u) building washdown water which does not contain detergents.

3. The permittee shall prevent unpermitted discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall implement a program to identify and limit the infiltration of seepage from sanitary sewers into the MS4.

4. The permittee shall prohibit the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into separate storm sewers. The permittee must demonstrate that the prohibition is publicized at least annually, and that the information is available for non-English speaking residents of the City.

5. The permittee shall require the elimination of illicit connections as expeditiously as possible and the immediate cessation of improper disposal practices upon identification of responsible parties. The permittee shall describe its procedure for identification and elimination of illicit discharges. This information shall be included in the annual report required under Part I.E. below. Where elimination of an illicit connection within sixty (60) days is not possible, the permittee shall establish a schedule for the expeditious removal of the discharge. In the interim, the permittee shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

h. Spill Prevention and Response: The permittee shall cooperate with appropriate federal, state, and municipal agencies in the development and implementation of a program to prevent, contain, and respond to spills that may discharge into or through the MS4. The spill response program may include a combination of spill response actions by the permittee (and/or other public or private entities), and requirements for private entities through the permittee's sewer use regulations. Except as explicitly authorized, materials from spills may not be discharged to Waters of the United States.

i. Industrial & High Risk Runoff: In cooperation with the DEP and EPA, the permittee shall implement a program to identify, monitor, and control pollutants in storm water discharges to the MS4 from municipal landfills; hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee determines is contributing a substantial pollutant loading to the MS4. The program shall include:

1. priorities and procedures for inspections and establishing and implementing control measures for such discharges;

2. a monitoring (or self-monitoring) program for facilities identified under this section, including the collection of quantitative data on the following constituents:

- (a) any pollutants for which the discharger may monitor or which are limited in an existing NPDES permit for an identified facility;
- (b) any information on discharges required under 40 CFR 122.21(g) (7) (iii) and (iv);
- (c) any pollutant the permittee has a reasonable expectation is discharged in substantial quantity from the facility to the separate storm sewer system.

Data collected by the industrial facility to satisfy the monitoring requirements of an NPDES or State discharge permit may be used to satisfy this requirement. The permittee may require the industrial facility to conduct self-monitoring to satisfy this requirement.

j. Construction Site Runoff: The permittee shall continue to implement its site plan review process and ensure compliance with its existing regulations. The permittee shall also cooperate with appropriate municipal agencies in the development and implementation of a program to reduce the discharge of pollutants from construction sites to the MS4, including:

1. requirements for the use and maintenance of appropriate structural and non-structural best management practices to reduce pollutants discharged to the MS4 during the time construction is underway;
2. procedures for site planning which incorporate considerations for potential short term and long term water quality impacts and measures to minimize these impacts;
3. prioritized inspection of construction sites and enforcement of control measures as required by the permittee;
4. providing assistance to appropriate municipal agencies in the development of education and training measures for construction site operators; and
5. providing assistance to appropriate municipal agencies in the development of a notification to appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff.

k. Public Education: The permittee, in coordination with other appropriate municipal agencies, shall implement a public education program including, but not limited to:

1. A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4 (e.g. curb inlet stenciling, citizen "streamwatch" groups, "hotlines" for reporting dumping, outreach materials included in billings, advertising on public access/government cable channels, etc.);

2. a program to promote, publicize, and facilitate the proper management and disposal of used oil, vehicle fluids and lubricants, and household hazardous wastes;

3. a program to promote, publicize, and facilitate the proper use, application, and disposal of pesticides, herbicides, and fertilizers;

4. where applicable and feasible, the permittee should publicize those best management practices (including but not limited to the use of reformulated or redesigned products, substitution of less toxic materials, and improvements in housekeeping) developed by municipal agencies or environmental organizations that facilitate better use, application, and/or disposal of materials identified in k.1 - k.3 of this section.

3. DEADLINES FOR PROGRAM COMPLIANCE: Except as provided in PART II, and Part I.B.7. the permittee shall continue to implement its Storm Water Management Program.
4. ROLES AND RESPONSIBILITIES OF PERMITTEE: The Storm Water Management Program shall clearly identify the roles and responsibilities of the permittee and appropriate municipal agencies impacting its efforts to comply with this permit.
5. LEGAL AUTHORITY: The permittee has demonstrated and shall maintain legal authority to control discharges to and from those portions of the MS4 which it owns or operates. This legal authority may be a combination of statute, regulation, permit, contract, or an order to:
- a. Control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;
 - b. Prohibit illicit discharges to the MS4;
 - c. As necessary, control the discharge of spills and the dumping or disposal of materials other than storm water (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;
 - d. Control through interagency or inter-jurisdictional agreements the contribution of pollutants from one portion of the MS4 to another;

e. Require compliance with conditions in regulations, permits, contracts or orders; and

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

6. STORM WATER MANAGEMENT PROGRAM RESOURCES The permittee shall provide adequate finances, staff, equipment, and support capabilities to implement its SWMP.

7. STORM WATER MANAGEMENT PROGRAM REVIEW AND MODIFICATION

a. Demonstration Project: Within 180 days of the effective date of the permit, the permittee shall submit a plan to assess the effectiveness of existing non-structural BMPs. This plan shall identify a drainage area or sub-area which has undergone an investigation for illicit connections and is believed to be reasonably free of sanitary sewer influence. The plan shall clearly specify activities to be conducted, responsible parties and method of assessment. The project shall commence within one year of the effective date of the permit and continue for at least one year. Within 90 days of project completion the permittee shall submit a report which identifies measures undertaken and effectiveness of those measures.

b. Program Review: The permittee shall participate in an annual review of its current SWMP in conjunction with preparation of the annual report required under Part I.E. This annual review shall include:

1. A review of the status of program implementation and compliance with program elements and other permit conditions as necessary;
2. An assessment of the effectiveness of controls established by the SWMP;
3. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings;
4. An assessment of any SWMP modifications needed to comply with the CWA §402(p)(3)(B)(iii) requirement to reduce the discharge of pollutants to the maximum extent practicable (MEP).
5. An assessment of staff and funding levels adequate to comply with the permit conditions.

c. Program Modification: The permittee may modify the SWMP in accordance with the following procedures:

1. The approved SWMP shall not be modified by the permittee(s) without the prior approval of the Director, unless in accordance with items c.2. or c.3. below.

2. Modifications adding (but not subtracting or replacing) components, controls, or requirements to the approved SWMP may be made by the permittee at any time upon written notification to the Director.

3. Modifications replacing or eliminating an ineffective or infeasible BMP specifically identified in the SWMP with an alternative BMP may be requested at any time. Unless the Director comments on or denies the request within 60 days from submittal, the permittee shall implement the modification and proposed schedule. Such requests must include the following:

(a) an analysis of why the BMP is ineffective or infeasible (including cost considerations),

(b) expectations on the effectiveness of the replacement BMP and proposed schedule for implementation, and

(c) an analysis of why the replacement of the BMP is expected to achieve the goals of the BMP to be replaced,

(d) in the case of an elimination of the BMP, an analysis of why the elimination is not expected to cause or contribute to a water quality impact.

4. Modification requests and/or notifications must be made in writing and signed in accordance with Part II.D.2.

d. Modifications required by the Permitting Authority:
The Director or the State may require the permittee to modify the SWMP as needed to:

1. Address impacts on receiving water quality caused, or contributed to, by discharges from the MS4;
2. Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements; or
3. Include such other conditions deemed necessary by the Director to comply with the goals and requirements of the Clean Water Act.

Modifications required by the Director shall be made in writing and set forth a time schedule for the permittee to develop the modification(s).

C. WET WEATHER MONITORING AND REPORTING REQUIREMENTS

1. Storm Event Discharges. The permittee shall implement a wet-weather monitoring program for the MS4 to provide data necessary to assess the effectiveness and adequacy of control measures implemented under the SWMP; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from all outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation. Improvement in the quality of discharges from the MS4 will be assessed based on the monitoring information required by this section, along with any additional pertinent information. **There have been no numeric effluent limits established for this permit.** Further monitoring or effluent limits may be established to ensure compliance with the goals of the Clean Water Act, appropriate Water Quality Standards, or applicable technology based requirements.

a. Representative Monitoring: Within 90 days after the effective date of this permit, the permittee shall submit a proposed sampling plan. The permittee shall monitor a minimum of five (5) representative drainage areas to characterize the quality of storm water discharges from the MS4. The proposed sampling plan shall consider monitoring each site three (3) times a year for a period of at least two years. All five sites shall be completed within the five year permit term and may be done partially or consecutively. The permittee shall choose locations representing the different land uses or is representative of drainage areas served by the MS4. The permittee may submit an alternative plan for sampling frequency only subject to the approval of EPA and DEP. At a minimum, the monitoring program shall analyze for the following parameters: pH, Temperature, Dissolved Oxygen, Total Suspended Solids, BOD5, COD, Fecal Coliform, Total Nitrogen, Nitrate/Nitrite, Ammonia (as N), Total Phosphorous, Ortho-Phosphate, Oil and Grease, Total Petroleum Hydrocarbons, Surfactants, Fluoride, Copper, and Zinc. Unless commented on or denied by the Director within 60 days after its submittal, the proposed sampling plan shall be deemed approved. This monitoring program shall commence no later than 180 days from the effective date of the permit unless otherwise specified by EPA and DEP. Subsequent monitoring locations and parameters for the remainder of the permit term shall be determined based upon the results of these sampling locations and other water quality information available to EPA, DEP and the permittee.

b. Receiving Water Quality Monitoring. The permittee shall monitor a minimum of four (4) receiving waters three (3) times a year throughout the permit term to characterize the water quality impacts of storm water discharges from the MS4. Sampling shall be conducted during a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (0.1 inch) storm event. Within 90 days after the effective date of this permit, the permittee shall submit its proposed sampling plan. At a minimum, the monitoring program shall analyze for the following parameters: pH, Temperature, Dissolved Oxygen, Total Suspended Solids, BOD5, COD, Fecal Coliform, Total Nitrogen, Nitrate/Nitrite, Ammonia (as N), Total Phosphorous, Ortho-Phosphate, Oil and Grease, Total Petroleum Hydrocarbons, Surfactants, Fluoride, Copper, and Zinc. Unless commented on or denied by the Director within 60 days after its submittal, the proposed sampling plan shall be deemed approved. This monitoring program shall commence no later than six months after the effective date of the permit.

- c. Alternate Representative Monitoring: Monitoring locations may be substituted for just cause during the term of the permit. Requests for alternate monitoring locations by the permittee shall be made to the Director in writing and include the rationale for the requested monitoring station relocation. Unless commented on or denied by the Director, use of an alternate monitoring location may commence sixty (60) days from the date of the request.
2. Storm Event Data: For Part I.C.1.a Data shall be collected to estimate pollutant loadings and event mean concentrations for each parameter sampled. The permittee shall maintain records of the date and duration (hours) of the storm event sampled; rainfall measurements or estimates (inches) of the storm event which generated the sampled runoff; the duration (hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and the total estimated volume (in gallons) of the discharge sampled. If manual sampling is employed, the permittee shall record physical observations of the discharge such as color and smell; and visible water quality impacts such as floatables, oil sheen, or evidence of sedimentation in the vicinity of the outfall (e.g. sandbars).
3. Sample Type, Collection, and Analysis: The following requirements apply to samples collected pursuant to Part I.C.1.a.
- a. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one grab sample may be taken.
- b. Grab samples shall be used for the analysis of pH, temperature, cyanide, total phenols, residual chlorine, oil & grease, fecal coliform, and fecal streptococcus. For all other parameters, data shall be reported for flow weighted composite samples of the entire event or, at a minimum, the first three hours of discharge.

c. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Composite samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes.

d. Analysis and collection of samples shall be conducted in accordance with the methods specified at 40 CFR Part 136. Where an approved Part 136 method does not exist, any available method may be used.

4. Sampling Waiver. When the permittee is unable to collect samples required by Part I.C.1.a due to adverse climatic conditions, the discharger must submit, in lieu of sampling data, a description of why samples could not be collected, including available documentation of the event. Adverse climatic conditions which may prohibit the collection of samples include weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.) or otherwise make the collection of a sample impracticable (drought, extended frozen conditions, etc.).
5. Sampling Results. The permittee shall record the results of sampling and assessment of the data in a report and submit results with its Annual Report.
6. Wet Weather Screening: The permittee shall develop and implement a program to identify, investigate, and address areas within their jurisdiction that may be contributing excessive levels of pollutants to the MS4 as a result of rainfall or snow melt. Screening shall be conducted at anytime precipitation causes a flow from the storm sewer. At a minimum the wet weather screening program:
 - a. shall screen all major outfalls at least once during the permit term;
 - b. shall record the structural integrity of the outfall (if visible); physical observations of the discharge (if visible) such as color and smell; and visible water quality impacts such as floatables, oil sheen, or evidence of sedimentation in the vicinity of the outfall (e.g. sandbars).

c. shall summarize the results of the program in its Annual Report.

d. The permittee may submit an alternate wet weather screening pilot program on a watershed or sub-watershed basis. The pilot project concept must be submitted to EPA and DEP within 90 days of the effective date of the permit. The permittee shall identify reasons it believes that a system wide screening program would not be effective. The pilot project may be conducted in conjunction with Receiving Water Quality Monitoring (C.1.b.), but not Representative Monitoring (C.1.a.)

D. DRY WEATHER DISCHARGES

1. Dry Weather Screening Program: At least once during the permit term, the permittee shall inspect all major outfalls, or nearest upstream location not subject to tidal influence or backflow, during dry weather to identify those outfalls with dry weather flow. Dry weather screening shall be conducted when there has been no greater than 0.10 inches of precipitation in the 72 hours prior to screening. The permittee shall record the structural integrity of the outfall (if visible). If flow is observed, the permittee shall record physical observations such as color, visible sheen, turbidity, floatables, smell, and an estimate of flow. If sewage is suspected, the permittee shall develop a schedule for follow-up activities to eliminate the source as soon as is practicable. The permittee shall summarize the results in its Annual Report
2. Screening Procedures: Screening methodology need not conform to the protocol at 40 CFR §122.26(d)(1)(iv)(D) or sample and collection methods of 40 CFR §136.
3. Follow-up on Dry Weather Screening Results: Follow-up activities shall be prioritized on the basis of:
 - a. magnitude and nature of the suspected discharge;
 - b. sensitivity of the receiving water; and
 - c. other factors the permittee deems appropriate.
4. The permittee shall summarize the results of dry weather screening and submit with its Annual Report.

E. ANNUAL REPORT:

The permittee shall prepare and submit an annual report to be submitted by no later than **March 1, 2000** and annually thereafter. The report shall include the following separate sections, with an overview for the entire MS4:

1. The status of implementing the storm water management program(s);
2. Proposed changes to the storm water management program(s);
3. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (d)(2)(v);
4. A summary of the data, including monitoring or screening data, that is accumulated throughout the reporting year;
5. A revised list of all current separate storm sewer outfalls and their locations, reflecting changes of the previous year.
6. Annual expenditures for the reporting period, with a breakdown of the major elements of the storm water management program, and the budget for the year following each annual report as well as an assessment of adequacy of staffing and equipment;
7. A summary describing the number and nature of enforcement actions, inspections, and public education programs;
8. Identification of water quality improvements or degradation attributable to the permittee;
9. An analysis of the effectiveness and removal efficiencies of structural controls owned or operated by the permittee (such as the off-line particle separator in Fenwood Road); and,

10. An update on the illicit connection program to include the total number of identified connections with an estimate of flow for each, total number of connections found in the reporting period to include how they were found (i.e. citizen complaint, routine inspection), number of connections corrected in the reporting period to include total estimated flow, and the costs of such repairs to include how the repairs were financed (i.e. by the permittee, costs provided to the permittee by the responsible party, repairs effected and financed by the responsible party). As an attachment to the report, the permittee should submit any existing tracking system information.

F. CERTIFICATION AND SIGNATURE OF REPORTS

All reports required by the permit and other information requested by the Director shall be signed and certified in accordance with the General Conditions-Part II of this permit.

G. REPORT SUBMISSION

1. Original signed copies of all notifications and reports required herein, shall be submitted to the Director at the following address:

U.S. Environmental Protection Agency
NPDES PROGRAMS (SPA)
P.O. Box 8127
Boston, MA 02114

2. Signed copies of all notifications and reports shall be submitted to the State at:

Massachusetts Department of Environmental Protection
1 Winter Street
Boston, MA 02108
Attn: Mr. Steve Lipman

and

Massachusetts Department of Environmental Protection
Metro Boston/Northeast Regional Office
205A Lowell Street
Wilmington, MA 01887
Attn: Mr. Sabin Lord

H. RETENTION OF RECORDS

The permittee shall retain all records of all monitoring information, copies of all reports required by this permit and records of all other data required by or used to demonstrate compliance with this permit, until at least three years after coverage under this permit terminates. This period may be modified by alternative provisions of this permit or extended by request of the Director at any time. The permittee shall retain the latest approved version of the SWMP developed in accordance with Part I of this permit until at least three years after coverage under this permit terminates.

I. STATE PERMIT CONDITIONS

1. This Discharge Permit is issued jointly by the U. S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection under Federal and State law, respectively. As such, all the terms and conditions of this permit are hereby incorporated into and constitute a discharge permit issued by the Commissioner of the Massachusetts DEP pursuant to M.G.L. Chap. 21, §43.
2. Each Agency shall have the independent right to enforce the terms and conditions of this Permit. Any modification, suspension or revocation of this Permit shall be effective only with respect to the Agency taking such action, and shall not affect the validity or status of this Permit as issued by the other Agency, unless and until each Agency has concurred in writing with such modification, suspension or revocation. In the event any portion of this Permit is declared, invalid, illegal or otherwise issued in violation of State law such permit shall remain in full force and effect under Federal law as an NPDES Permit issued by the U.S. Environmental Protection Agency. In the event this Permit is declared invalid, illegal or otherwise issued in violation of Federal law, this Permit shall remain in full force and effect under State law as a Permit issued by the Commonwealth of Massachusetts.

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

OUTFALL NUMBER	OUTFALL TYPE	LOCATION	NEIGHBORHOOD	SIZE (INCHES)	TIDEGATES No. OF GATES / NUMBER	RECEIVING WATER
08B066	MAJOR	EASEMENT/VFW PARKWAY	WEST ROXBURY	18		CHARLES RIVER
08B122	MAJOR	EASEMENT/NORTH OF SPRING STREET	WEST ROXBURY	30		CHARLES RIVER
08B126	MINOR	SPRING STREET EXTENDED	WEST ROXBURY	24		CHARLES RIVER
09B049	MAJOR	EASEMENT/RIVERMOOR STREET	WEST ROXBURY	30		COW ISLAND POND/ CHARLES RIVER
10B015	MAJOR	EASEMENT/CHARLES PARK ROAD	WEST ROXBURY	21		COW ISLAND POND/ CHARLES RIVER
11B123	MAJOR	EASEMENT/EAST OF BAKER ST. EXT.	WEST ROXBURY	72		BROOK FARM BROOK
12B010	MINOR	BAKER STREET	WEST ROXBURY	15		BROOK FARM BROOK
12B014	MINOR	BAKER STREET	WEST ROXBURY	12		BROOK FARM BROOK
12B031	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B033	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B124	MAJOR	EASEMENT/LaGRANGE STREET	WEST ROXBURY	120x102		BROOK FARM BROOK
13B002	MINOR	LaGRANGE STREET	WEST ROXBURY	15		UNNAMED STREAM
13B011	MINOR	LaGRANGE STREET	WEST ROXBURY	12		UNNAMED STREAM
06C110	MAJOR	EASEMENT/PLEASANTDALE ST. EXT.	WEST ROXBURY	60		NONE SHOWN
07C006	MAJOR	EASEMENT/VFW PARKWAY/BELLE AVENUE	WEST ROXBURY	126x126		CHARLES RIVER
08C318	MAJOR	WEDGEMERE ROAD	WEST ROXBURY	24		NONE SHOWN
08C319	MINOR	WEDGEMERE ROAD	WEST ROXBURY	24		UNNAMED STREAM
14C009	MAJOR	EASEMENT/WESTGATE ROAD	WEST ROXBURY	36		UNNAMED WETLANDS
21C212	MINOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	30		CHANDLERS POND
22C384	MAJOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	36		CHANDLERS POND
24C174	MINOR	EASEMENT/NEWTON STREET	ALLSTON/BRIGHTON	9x20		CHARLES RIVER
24C031	MAJOR	PARSONS STREET	ALLSTON/BRIGHTON	60X60		CHARLES RIVER
06D057	MINOR	CEDAR CREST CIRCLE	WEST ROXBURY	21		NEPONSET RIVER
06D083	MINOR	MARGARETTA DRIVE	WEST ROXBURY	15		WETLANDS/CHARLES RIVER
06D084	MINOR	EASEMENT/MARGARETTA DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D085	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D086	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D091	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D184	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	18		WETLANDS/CHARLES RIVER
06D187	MAJOR	EASEMENT/GROVE STREET	WEST ROXBURY	36		BROOK GROVE STREET CEMETERY
13D077/078	MAJOR	WEST ROXBURY PARKWAY/VFW PARKWAY	WEST ROXBURY	2-60		BUSSEY BROOK
24D032	MAJOR	NORTH BEACON STREET, ABOUT 800' EAST OF PARSONS STREET	ALLSTON/BRIGHTON	119X130	1 / 24D032-18	CHARLES RIVER
24D150	MAJOR	SOLDIERS FIELD PLACE	ALLSTON/BRIGHTON	36		CHARLES RIVER
25D033	MAJOR	ABOUT 390' NORTH OF INTERSECTION OF SOLDIERS FIELD ROAD & WESTERN AVENUE	ALLSTON/BRIGHTON	36		CHARLES RIVER
01B024	MAJOR	EASEMENT/LAKESIDE	HYDE PARK	15		SPRAGUE POND/NEPONSET RIVER
03E185	MAJOR	NORTON STREET	HYDE PARK	2-18		WETLANDS/NEPONSET RIVER
03E186	MINOR	RIVER STREET	HYDE PARK	24		MILL POND/MOTHER BROOK
03E207	MINOR	RIVER STREET	HYDE PARK			MILL POND/MOTHER BROOK

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04E064	MINOR	ALVARADO AVE./RIVER STREET BRIDGE	HYDE PARK	12		MILL POND/MOTHER BROOK
04E069	MAJOR	KNIGHT STREET DAM	HYDE PARK	36		MOTHER BROOK
05E180	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E181	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E182	MINOR	DEDHAM STREET	HYDE PARK	21		UNNAMED STREAM/CHARLES RIVER
05E183	MINOR	GEORGETOWN PLACE/DEDHAM PARKWAY	HYDE PARK	12		UNNAMED STREAM
08E031	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	18		TURTLE POND
08E033	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	UNKNOWN		TURTLE POND
08E035	MINOR	WASHINGTON STREET	WEST ROXBURY	15		TURTLE POND
09E229	MINOR	GRANDVIEW STREET	WEST ROXBURY	12		NONE SHOWN
09E243	MAJOR	BLUE LEDGE TR./EASEMENT	WEST ROXBURY	30		UNNAMED STREAM
13E174	MINOR	EASEMENT/VFW PARKWAY	ROSLINDALE	24		BUSSEY BROOK
13E175	MAJOR	EASEMENT/VFW PARKWAY	ROSLINDALE	108X86		BUSSEY BROOK
13E176	MAJOR	EASEMENT/WELD STREET	ROXBURY	15		NONE SHOWN
25E037	MAJOR	EASEMENT/TELFORD STREET EXTENDED	ALLSTON/BRIGHTON	66		CHARLES RIVER
01F031	MAJOR	EASEMENT/MILLSTONE ROAD	HYDE PARK	48x24		NEPONSET RIVER
02F085	MINOR	LAWTON STREET	HYDE PARK	12		NEPONSET RIVER RESERVATION
02F093	MAJOR	EASEMENT/SIERRA ROAD	HYDE PARK	15		NEPONSET RIVER
02F120	MAJOR	EASEMENT/WOLCOTT CT./HYDE PARK AVE. EXT.	HYDE PARK	54		NEPONSET RIVER
04F016	MAJOR	EASEMENT RIVER STREET	HYDE PARK	30		MOTHER BROOK/NEPONSET RIVER
04F118	MINOR	MASON STREET EXT.	HYDE PARK	18		NEPONSET RIVER
04F119	MAJOR	EASEMENT/HYDE PARK AVE./RESERVATION RD.	HYDE PARK	24		NEPONSET RIVER
04F189	MAJOR	RESERVATION ROAD	HYDE PARK	36		MOTHER BROOK/NEPONSET RIVER
04F191	MINOR	FARADAY STREET	HYDE PARK	24		NONE SHOWN/NEPONSET RIVER
04F203	MINOR	GLENWOOD AVE	HYDE PARK	28		NEPONSET RIVER
04F204	MAJOR	TRUMAN HWY./CHITTICK STREET	HYDE PARK	36		NEPONSET RIVER
05F117	MAJOR	EASEMENT/TRUMAN HWY./WILLIAMS AVE.	HYDE PARK	33		NEPONSET RIVER
05F244	MINOR	HYDE PARK AVENUE BRIDGE	HYDE PARK	20		MOTHER BROOK/NEPONSET RIVER
05F245	MINOR	HYDE PARK AVENUE	HYDE PARK	33		MOTHER BROOK/NEPONSET RIVER
05F253	MAJOR	EASEMENT/BUSINESS ST., NEAR BUSINESS TERRACE	HYDE PARK	48x24		MOTHER BROOK/NEPONSET RIVER
05F254	MINOR	DANA AVENUE	HYDE PARK	12		NEPONSET RIVER
05F265	MAJOR	BEHIND L.E. MASON CO.	HYDE PARK	15		MOTHER BROOK/NEPONSET RIVER
06F233	MINOR	MOUNT ASH ROAD	HYDE PARK	UNK		WETLAND - STONY BROOK RESERVATION
12F322	MINOR	EASEMENT/WALTER STREET	ROSLINDALE	18		NONE SHOWN
13F095	MINOR	EASEMENT/BUSSEY STREET	ROSLINDALE	12		BUSSEY BROOK
14F181	MAJOR	CENTER STREET EXTENSION	ROSLINDALE	38X86		GOLDSMITH BROOK
14F185	MINOR	ALLANDALE STREET	ROSLINDALE	12		BUSSEY BROOK
15F288	MAJOR	ARNOLD ARBORETUM/MURRAY CIRCLE	JAMAICA PLAIN	54		GOLDSMITH BROOK
15F307	MAJOR	ARNOLD ARBORETUM, 100' EAST OF ARBORWAY & SAINT JOSEPH STREET	JAMAICA PLAIN	36X36		GOLDSMITH BROOK
17F012	MINOR	FRANCIS PARKMAN DRIVE	JAMAICA PLAIN	15		JAMAICA POND

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26F038	MAJOR	HARVARD STREET EXT.	ALLSTON/BRIGHTON	36		CHARLES RIVER
05G112	MAJOR	EASEMENT/RR ROW/WATER ST. EXT.	HYDE PARK	30		NEPONSET RIVER
05G115	MINOR	FAIRMOUNT AVENUE BRIDGE (NORTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116	MINOR	FAIRMOUNT AVE, BRIDGE (SOUTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116A	MINOR	WARREN AVENUE	HYDE PARK	24		NEPONSET RIVER
06G108	MAJOR	EASEMENT/WEST OF WOOD AVE. EXT.	HYDE PARK	69		NEPONSET RIVER
06G109	MAJOR	RIVER TERRACE EXT. NEAR ROSA STREET	HYDE PARK	48		NEPONSET RIVER
06G110	MAJOR	EASEMENT/WEST STREET EXT.	HYDE PARK	30		NEPONSET RIVER
06G111	MINOR	EASEMENT/VOSE STREET EXT., TRUMAN HWY.	HYDE PARK	24		NEPONSET RIVER
06G165	MINOR	TRUMAN HIGHWAY/METROPOLITAN AVE	HYDE PARK	10		NEPONSET RIVER
06G166	MAJOR	ABOUT 30 FEET FROM GUARDRAIL NORTHERLY SIDE OF TRUMAN HIGHWAY NEAR MILTON LINE.	HYDE PARK	36x36		NEPONSET RIVER
11G318	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	24		CANTERBURY BROOK
11G319	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	18		CANTERBURY BROOK
11G344	MAJOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	162X78		CANTERBURY BROOK
18G233	MINOR	WILLOW POND ROAD	JAMAICA PLAIN	15		MUDDY RIVER
19G043	MAJOR	HUNTINGTON AVENUE	ROXBURY/MISSION HALL	45x45		MUDDY RIVER
19G194	MINOR	HUNTINGTON AVENUE	ROXBURY/MISSION HILL	24		MUDDY RIVER
19G199	MINOR	JAMAICA WAY	ROXBURY/MISSION HILL	10		MUDDY RIVER
20G161	MAJOR	EASEMENT/BROOKLINE AVENUE	ROXBURY/MISSION HILL	36		MUDDY RIVER
20G163	MINOR	EASEMENT/RIVERWAY	ROXBURY/MISSION HILL	20		MUDDY RIVER
23G132	MAJOR	EASEMENT/MASS TURNPIKE/WEST OF B. U. BRIDGE	ALLSTON/BRIGHTON	60		CHARLES RIVER
24G034	MAJOR	SOLDIER'S FIELD ROAD, SOUTH OF CAMBRIDGE STREET	ALLSTON/BRIGHTON	36	1 / 24G034-1	CHARLES RIVER
24G035	MAJOR	SOLDIERS FIELD ROAD/BABCOCK STREET	ALLSTON/BRIGHTON	90x84		CHARLES RIVER
25G005	MINOR	FROM WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	12		CHARLES RIVER
25G041	MINOR	SOLDIERS FIELD ROAD/NORTH OF WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	24		CHARLES RIVER
06H106	MINOR	OSCEOLA STREET	HYDE PARK	24		NEPONSET RIVER
06H107	MAJOR	EASEMENT/BELNEL ROAD	HYDE PARK	24		NEPONSET RIVER
07H105	MAJOR	EASEMENT/EDGEWATER/SOUTH RIVER STREET	NEPONSET/MATTAPAN	102x72		NEPONSET RIVER
07H285	MAJOR	BLUE HILL AVENUE	NEPONSET/MATTAPAN	106x63		NEPONSET RIVER
07H287	MINOR	RIVER STREET/EDGEWATER DRIVE	NEPONSET/MATTAPAN	12		NEPONSET RIVER
07H346	MINOR	EDGEWATER DRIVE/HOLMFIELD AVENUE	HYDE PARK	18		NEPONSET RIVER
07H347	MINOR	EDGEWATER DRIVE/BURMAH ROAD	NEPONSET/MATTAPAN	21		NEPONSET RIVER
07H348	MINOR	EDGEWATER DRIVE/TOPALIAN STREET	NEPONSET/MATTAPAN	24		NEPONSET RIVER
12H085	MINOR	MORTON STREET	ROSLINDALE	15		CANTERBURY BROOK
	MAJOR	AMERICAN LEGION HIGHWAY	WEST ROXBURY	24		CANTERBURY BROOK
21H047	MINOR	PALACE ROAD EXT.	BOSTON PROPER	24		MUDDY RIVER

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21H048	MINOR	EASEMENT/FENWAY/EVANS WAY	BOSTON PROPER	15		MUDDY RIVER
21H201	MINOR	PALACE ROAD EXT.	BOSTON PROPER	6		MUDDY RIVER
23H040	MINOR	RALEIGH STREET EXT.	BOSTON PROPER	24		CHARLES RIVER
23H042	MAJOR	DEERFIELD STREET	BOSTON PROPER	116x120		CHARLES RIVER
08I153	MINOR	DUXBURY ROAD	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I154	MINOR	EASEMENT/RIVER STREET/GLADSIDE AVE	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I155	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I156	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I158	MINOR	EASEMENT/RIVER STREET/FREMONT ST.	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I207	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I209	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	12		NEPONSET RIVER
11I577	MAJOR	HARVARD STREET	NEPONSET/MATTAPAN	102x102		CANTERBURY BROOK
08J041	MINOR	RIVER STREET	DORCHESTER	18		NEPONSET RIVER
08J102	MINOR	ADAMS STREET	DORCHESTER	15x15		NEPONSET RIVER
08J103	MAJOR	EASEMENT/CENTRAL AVENUE BRIDGE	DORCHESTER	30		NEPONSET RIVER
08J49/50	MAJOR	DESMOND ROAD	DORCHESTER	2-18&24		NEPONSET RIVER
26J052	MINOR	MONSIGNOR O'BRIEN HIGHWAY	BOSTON PROPER	12		CHARLES RIVER
26J055	MINOR	LEVERETT CIRCLE	BOSTON PROPER	12	1 / NOT MAPPED	CHARLES RIVER
27J001	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	72		MILLERS RIVER
27J044	MAJOR	PRISON POINT BRIDGE	CHARLESTOWN	15		MILLERS RIVER
27J096	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	54		MILLERS RIVER
29J029	MINOR	ALFORD STREET/RYAN PLGD. EXT.	CHARLESTOWN	15		MYSTIC RIVER
29J129	MINOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
29J212	MAJOR	EASEMENT/MEDFORD STREET (ALSO OF017)	CHARLESTOWN	72		MYSTIC RIVER
30J006	MAJOR	EASEMENT/ALFORD STREET	CHARLESTOWN	18		MYSTIC RIVER
30J019	MAJOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
30J030	MAJOR	EASEMENT/ARLINGTON AVENUE	CHARLESTOWN	42	1 / NOT MAPPED	MYSTIC RIVER
08K049	MINOR	BEARSE AVENUE	DORCHESTER	12		NEPONSET RIVER
09K016	MINOR	EASEMENT/BEARSE AVENUE EXT.	DORCHESTER	15		NEPONSET RIVER
09K100	MAJOR	EASEMENT/MELLISH ROAD	DORCHESTER	34x24		NEPONSET RIVER
09K101	MINOR	EASEMENT/HUNTOON STREET EXT.	DORCHESTER	24		NEPONSET RIVER
21K069	MAJOR	EAST BERKELEY STREET	BOSTON PROPER	48	1 / 21K069-1	FORT POINT CHANNEL
26K099	MAJOR	CHELSEA STREET EXT.	CHARLESTOWN	84		CHARLES RIVER

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

26K245	MINOR	EASEMENT	CHARLESTOWN	15		CHARLES RIVER
28K018	MAJOR	OLD LANDING WAY EXT.	CHARLESTOWN	42	1 / 28K058	LITTLE MYSTIC CHANNEL
28K061	MAJOR	EASEMENT/MEDFORD STREET	CHARLESTOWN	42	1 / 28K062	LITTLE MYSTIC CHANNEL
28K386	MAJOR	EASEMENT/TERMINAL STREET	CHARLESTOWN	30	1 / 28K385	LITTLE MYSTIC CHANNEL
10L094	MAJOR	EASEMENT/GALLIVAN BOULEVARD	DORCHESTER	74x93		NEPONSET RIVER VIA DAVENPORT BROOK
10L096	MAJOR	HILLTOP AND LENOXDALE STREETS	DORCHESTER	36		NEPONSET RIVER
12L092	MAJOR	PINE NECK CREEK STORM DRAIN TENEAN STREET WEST OF LAWLEY	DORCHESTER	72	2 / 12L294	NEPONSET RIVER
16L097	MAJOR	EASEMENT/OFF SAVIN HILL AVENUE	DORCHESTER	24		PATTEN'S COVE
20L081	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
20L083	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
21L077	MAJOR	CLAPLIN STREET EXT./EAST STREET EXT.	SOUTH BOSTON	24	1 / NOT MAPPED	RESERVED CHANNEL
23L016	MINOR	NORTHERN AVENUE	SOUTH BOSTON	2-15&16		BOSTON INNER HARBOR
23L074	MINOR	SUMMER STREET BRIDGE	SOUTH BOSTON	15		FORT POINT CHANNEL
23L075	MAJOR	CONGRESS STREET BRIDGE	SOUTH BOSTON	54		FORT POINT CHANNEL
23L140	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L145	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L164	MAJOR	CONGRESS STREET BRIDGE	BOSTON PROPER	48	1 / 23L164 IN CHANNEL WALL	FORT POINT CHANNEL
23L195	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
23L196	MAJOR	NEW NORTHERN AVENUE BRIDGE	SOUTH BOSTON	36		FORT POINT CHANNEL
23L202	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
24L057	MINOR	STATE STREET EXT.	BOSTON PROPER	18x18		BOSTON INNER HARBOR
24L233	MAJOR	ROWE'S WHARF/ATLANTIC AVENUE	BOSTON PROPER	42		BOSTON HARBOR
25L058	MAJOR	CHRISTOPHER COLUMBUS PARK - WATERFRONT	BOSTON PROPER	84		BOSTON INNER HARBOR
25L144	MINOR	CLARK STREET	BOSTON PROPER	12		BOSTON INNER HARBOR
26L055	MAJOR	NEAR BATTERY WHARF	BOSTON PROPER	24X24		BOSTON INNER HARBOR
26L070	MAJOR	HANOVER STREET EXT.	BOSTON PROPER	36		BOSTON INNER HARBOR
26L84	MINOR	LEWIS STREET	EAST BOSTON	18		BOSTON INNER HARBOR
27L020	MAJOR	PIER NO. 4 EASEMENT - NAVY YARD	CHARLESTOWN	2-20&24	1 / 27K020-1	BOSTON INNER HARBOR
28L073	MINOR	EASEMENT/4TH STREET - NAVY YARD	CHARLESTOWN	6		LITTLE MYSTIC CHANNEL
28L074/075/ 076	MAJOR	16TH STREET/4TH AVENUE - NAVY YARD	CHARLESTOWN	3-30		LITTLE MYSTIC CHANNEL
28L077	MINOR	EASEMENT/4TH AVENUE - NAVY YARD	CHARLESTOWN	10		LITTLE MYSTIC CHANNEL
11M093	MAJOR	NEPONSET AVENUE AT NORTHWEST END OF NEPONSET AVENUE BRIDGE	DORCHESTER	48		NEPONSET RIVER
12M091	MAJOR	ERICSSON/WALNUT ST.	NEPONSET/MATTAPAN	36		NEPONSET RIVER
17M033	MAJOR	HARBOR POINT PARK (RELOCATED MT. VERNON ST. DRAIN)	DORCHESTER	72		DORCHESTER BAY
21M005	MAJOR	SUMMER STREET	SOUTH BOSTON	18		RESERVED CHANNEL

ATTACHMENT A
 BOSTON WATER AND SEWER COMMISSION
 STORMWATER OUTFALLS

29M032	MINOR	CONDOR STREET	EAST BOSTON	30		CHELSEA RIVER
29M041	MAJOR	EASEMENT/CONDOR STREET	EAST BOSTON	36x30		CHELSEA RIVER
29M049	MINOR	CONDOR STREET	EAST BOSTON	24		CHELSEA RIVER
29N135	MAJOR	ADDISON STREET	EAST BOSTON	30x30		CHELSEA RIVER
28N156	MINOR	COLERIDGE STREET EXT.	EAST BOSTON	12		BOSTON HARBOR
29O001	MAJOR	BENNINGTON STREET	EAST BOSTON	66	1 / 290062	BOSTON HARBOR NEAR CONSTITUTION BEACH
31O004	MINOR	EASEMENT/WALDEMAR AVENUE	EAST BOSTON	15		CHELSEA RIVER
28P001	MINOR	EASEMENT	EAST BOSTON	12		BOSTON HARBOR NEAR CONSTITUTION BEACH
29P015	MINOR	EASEMENT/BARNES AVENUE	EAST BOSTON	12		BELLE ISLE INLET
29P044	MINOR	SHAWSHEEN STREET	EAST BOSTON	12		BOSTON HARBOR
30P062	MINOR	PALERMO AVENUE EXTENSION	EAST BOSTON	12		WETLANDS
31P084	MINOR	EASEMENT/BENNINGTON STREET	EAST BOSTON	30		BELLE ISLE INLET, REVERE

Major* : 93

Minor : 102

Total: 195

* Major outfall means : An outfall that discharges from a single pipe of 36" or larger in diameter or a non-circular pipe which is associated with drainage area of more than 50 acres; or an outfall that discharges from a single pipe of 12" or larger in diameter serving lands zoned for industrial activity or a non-circular pipe which is associated with drainage area of 2 acres or more.

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

OUTFALL NUMBER	OUTFALL TYPE	LOCATION	NEIGHBORHOOD	SIZE (INCHES)	TIDEGATES No. OF GATES / NUMBER	RECEIVING WATER
08B066	MAJOR	EASEMENT/VFW PARKWAY	WEST ROXBURY	18		CHARLES RIVER
08B122	MAJOR	EASEMENT/NORTH OF SPRING STREET	WEST ROXBURY	30		CHARLES RIVER
08B126	MINOR	SPRING STREET EXTENDED	WEST ROXBURY	24		CHARLES RIVER
09B049	MAJOR	EASEMENT/RIVERMOOR STREET	WEST ROXBURY	30		COW ISLAND POND/ CHARLES RIVER
10B015	MAJOR	EASEMENT/CHARLES PARK ROAD	WEST ROXBURY	21		COW ISLAND POND/ CHARLES RIVER
11B123	MAJOR	EASEMENT/EAST OF BAKER ST. EXT.	WEST ROXBURY	72		BROOK FARM BROOK
12B010	MINOR	BAKER STREET	WEST ROXBURY	15		BROOK FARM BROOK
12B014	MINOR	BAKER STREET	WEST ROXBURY	12		BROOK FARM BROOK
12B031	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B033	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B124	MAJOR	EASEMENT/LaGRANGE STREET	WEST ROXBURY	120x102		BROOK FARM BROOK
13B002	MINOR	LaGRANGE STREET	WEST ROXBURY	15		UNNAMED STREAM
13B011	MINOR	LaGRANGE STREET	WEST ROXBURY	12		UNNAMED STREAM
06C110	MAJOR	EASEMENT/PLEASANTDALE ST. EXT.	WEST ROXBURY	60		NONE SHOWN
07C006	MAJOR	EASEMENT/VFW PARKWAY/BELLE AVENUE	WEST ROXBURY	126x126		CHARLES RIVER
08C318	MAJOR	WEDGEMERE ROAD	WEST ROXBURY	24		NONE SHOWN
08C319	MINOR	WEDGEMERE ROAD	WEST ROXBURY	24		UNNAMED STREAM
14C009	MAJOR	EASEMENT/WESTGATE ROAD	WEST ROXBURY	36		UNNAMED WETLANDS
21C212	MINOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	30		CHANDLERS POND
22C384	MAJOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	36		CHANDLERS POND
24C174	MINOR	EASEMENT/NEWTON STREET	ALLSTON/BRIGHTON	9x20		CHARLES RIVER
24C031	MAJOR	PARSONS STREET	ALLSTON/BRIGHTON	60x60		CHARLES RIVER
06D057	MINOR	CEDAR CREST CIRCLE	WEST ROXBURY	21		NEPONSET RIVER WETLANDS/CHARLES RIVER
06D083	MINOR	MARGARETTA DRIVE	WEST ROXBURY	15		WETLANDS/CHARLES RIVER
06D084	MINOR	EASEMENT/MARGARETTA DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D085	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D086	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D091	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D184	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	18		WETLANDS/CHARLES RIVER
06D187	MAJOR	EASEMENT/GROVE STREET	WEST ROXBURY	36		BROOK GROVE STREET CEMETERY
13D077/078	MAJOR	WEST ROXBURY PARKWAY/VFW PARKWAY	WEST ROXBURY	2-60		BUSSEY BROOK
24D032	MAJOR	NORTH BEACON STREET, ABOUT 800' EAST OF PARSONS STREET	ALLSTON/BRIGHTON	119X130	1 / 24D032-18	CHARLES RIVER
24D150	MAJOR	SOLDIERS FIELD PLACE	ALLSTON/BRIGHTON	36		CHARLES RIVER
25D033	MAJOR	ABOUT 390' NORTH OF INTERSECTION OF SOLDIERS FIELD ROAD & WESTERN AVENUE	ALLSTON/BRIGHTON	36		CHARLES RIVER
01B024	MAJOR	EASEMENT/LAKESIDE	HYDE PARK	15		SPRAGUE POND/NEPONSET RIVER
03E185	MAJOR	NORTON STREET	HYDE PARK	2-18		WETLANDS/NEPONSET RIVER
03E186	MINOR	RIVER STREET	HYDE PARK	24		MILL POND/MOTHER BROOK
03E207	MINOR	RIVER STREET	HYDE PARK			MILL POND/MOTHER BROOK

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

04E064	MINOR	ALVARADO AVE./RIVER STREET BRIDGE	HYDE PARK	12		MILL POND/MOTHER BROOK
04E069	MAJOR	KNIGHT STREET DAM	HYDE PARK	36		MOTHER BROOK
05E180	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E181	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E182	MINOR	DEDHAM STREET	HYDE PARK	21		UNNAMED STREAM/CHARLES RIVER
05E183	MINOR	GEORGETOWN PLACE/DEDHAM PARKWAY	HYDE PARK	12		UNNAMED STREAM
08E031	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	18		TURTLE POND
08E033	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	UNKNOWN		TURTLE POND
08E035	MINOR	WASHINGTON STREET	WEST ROXBURY	15		TURTLE POND
09E229	MINOR	GRANDVIEW STREET	WEST ROXBURY	12		NONE SHOWN
09E243	MAJOR	BLUE LEDGE TR./EASEMENT	WEST ROXBURY	30		UNNAMED STREAM
13E174	MINOR	EASEMENT/VFW PARKWAY	ROSLINDALE	24		BUSSEY BROOK
13E175	MAJOR	EASEMENT/VFW PARKWAY	ROSLINDALE	108X86		BUSSEY BROOK
13E176	MAJOR	EASEMENT/WELD STREET	ROXBURY	15		NONE SHOWN
25E037	MAJOR	EASEMENT/TELFORD STREET EXTENDED	ALLSTON/BRIGHTON	66		CHARLES RIVER
01F031	MAJOR	EASEMENT/MILLSTONE ROAD	HYDE PARK	48x24		NEPONSET RIVER
02F085	MINOR	LAWTON STREET	HYDE PARK	12		NEPONSET RIVER RESERVATION
02F093	MAJOR	EASEMENT/SIERRA ROAD	HYDE PARK	15		NEPONSET RIVER
02F120	MAJOR	EASEMENT/WOLCOTT CT./HYDE PARK AVE. EXT.	HYDE PARK	54		NEPONSET RIVER
04F016	MAJOR	EASEMENT RIVER STREET	HYDE PARK	30		MOTHER BROOK/NEPONSET RIVER
04F118	MINOR	MASON STREET EXT.	HYDE PARK	18		NEPONSET RIVER
04F119	MAJOR	EASEMENT/HYDE PARK AVE./RESERVATION RD.	HYDE PARK	24		NEPONSET RIVER
04F189	MAJOR	RESERVATION ROAD	HYDE PARK	36		MOTHER BROOK/NEPONSET RIVER
04F191	MINOR	FARADAY STREET	HYDE PARK	24		NONE SHOWN/NEPONSET RIVER
04F203	MINOR	GLENWOOD AVE	HYDE PARK	28		NEPONSET RIVER
04F204	MAJOR	TRUMAN HWY./CHITTICK STREET	HYDE PARK	36		NEPONSET RIVER
05F117	MAJOR	EASEMENT/TRUMAN HWY./WILLIAMS AVE.	HYDE PARK	33		NEPONSET RIVER
05F244	MINOR	HYDE PARK AVENUE BRIDGE	HYDE PARK	20		MOTHER BROOK/NEPONSET RIVER
05F245	MINOR	HYDE PARK AVENUE	HYDE PARK	33		MOTHER BROOK/NEPONSET RIVER
05F253	MAJOR	EASEMENT/BUSINESS ST., NEAR BUSINESS TERRACE	HYDE PARK	48x24		MOTHER BROOK/NEPONSET RIVER
05F254	MINOR	DANA AVENUE	HYDE PARK	12		NEPONSET RIVER
05F265	MAJOR	BEHIND L.E. MASON CO.	HYDE PARK	15		MOTHER BROOK/NEPONSET RIVER
06F233	MINOR	MOUNT ASH ROAD	HYDE PARK	UNK		WETLAND - STONY BROOK RESERVATION
12F322	MINOR	EASEMENT/WALTER STREET	ROSLINDALE	18		NONE SHOWN
13F095	MINOR	EASEMENT/BUSSEY STREET	ROSLINDALE	12		BUSSEY BROOK
14F181	MAJOR	CENTER STREET EXTENSION	ROSLINDALE	38X86		GOLDSMITH BROOK
14F185	MINOR	ALLANDALE STREET	ROSLINDALE	12		BUSSEY BROOK
15F288	MAJOR	ARNOLD ARBORETUM/MURRAY CIRCLE	JAMAICA PLAIN	54		GOLDSMITH BROOK
15F307	MAJOR	ARNOLD ARBORETUM, 100' EAST OF ARBORWAY & SAINT JOSEPH STREET	JAMAICA PLAIN	36X36		GOLDSMITH BROOK
17F012	MINOR	FRANCIS PARKMAN DRIVE	JAMAICA PLAIN	15		JAMAICA POND

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

26F038	MAJOR	HARVARD STREET EXT.	ALLSTON/BRIGHTON	36		CHARLES RIVER
05G112	MAJOR	EASEMENT/RR ROW/WATER ST. EXT.	HYDE PARK	30		NEPONSET RIVER
05G115	MINOR	FAIRMOUNT AVENUE BRIDGE (NORTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116	MINOR	FAIRMOUNT AVE, BRIDGE (SOUTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116A	MINOR	WARREN AVENUE	HYDE PARK	24		NEPONSET RIVER
06G108	MAJOR	EASEMENT/WEST OF WOOD AVE. EXT.	HYDE PARK	69		NEPONSET RIVER
06G109	MAJOR	RIVER TERRACE EXT. NEAR ROSA STREET	HYDE PARK	48		NEPONSET RIVER
06G110	MAJOR	EASEMENT/WEST STREET EXT.	HYDE PARK	30		NEPONSET RIVER
06G111	MINOR	EASEMENT/VOSE STREET EXT., TRUMAN HWY.	HYDE PARK	24		NEPONSET RIVER
06G165	MINOR	TRUMAN HIGHWAY/METROPOLITAN AVE	HYDE PARK	10		NEPONSET RIVER
06G166	MAJOR	ABOUT 30 FEET FROM GUARDRAIL NORTHERLY SIDE OF TRUMAN HIGHWAY NEAR MILTON LINE.	HYDE PARK	36x36		NEPONSET RIVER
11G318	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	24		CANTERBURY BROOK
11G319	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	18		CANTERBURY BROOK
11G344	MAJOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	162X78		CANTERBURY BROOK
18G233	MINOR	WILLOW POND ROAD	JAMAICA PLAIN	15		MUDDY RIVER
19G043	MAJOR	HUNTINGTON AVENUE	ROXBURY/MISSION HALL	45x45		MUDDY RIVER
19G194	MINOR	HUNTINGTON AVENUE	ROXBURY/MISSION HILL	24		MUDDY RIVER
19G199	MINOR	JAMAICA WAY	ROXBURY/MISSION HILL	10		MUDDY RIVER
20G161	MAJOR	EASEMENT/BROOKLINE AVENUE	ROXBURY/MISSION HILL	36		MUDDY RIVER
20G163	MINOR	EASEMENT/RIVERWAY	ROXBURY/MISSION HILL	20		MUDDY RIVER
23G132	MAJOR	EASEMENT/MASS TURNPIKE/WEST OF B. U. BRIDGE	ALLSTON/BRIGHTON	60		CHARLES RIVER
24G034	MAJOR	SOLDIER'S FIELD ROAD, SOUTH OF CAMBRIDGE STREET	ALLSTON/BRIGHTON	36	1 / 24G034-1	CHARLES RIVER
24G035	MAJOR	SOLDIERS FIELD ROAD/BABCOCK STREET	ALLSTON/BRIGHTON	90x84		CHARLES RIVER
25G005	MINOR	FROM WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	12		CHARLES RIVER
25G041	MINOR	SOLDIERS FIELD ROAD/NORTH OF WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	24		CHARLES RIVER
06H106	MINOR	OSCEOLA STREET	HYDE PARK	24		NEPONSET RIVER
06H107	MAJOR	EASEMENT/BELNEL ROAD	HYDE PARK	24		NEPONSET RIVER
07H105	MAJOR	EASEMENT/EDGEWATER/SOUTH RIVER STREET	NEPONSET/MATTAPAN	102x72		NEPONSET RIVER
07H285	MAJOR	BLUE HILL AVENUE	NEPONSET/MATTAPAN	106x63		NEPONSET RIVER
07H287	MINOR	RIVER STREET/EDGEWATER DRIVE	NEPONSET/MATTAPAN	12		NEPONSET RIVER
07H346	MINOR	EDGEWATER DRIVE/HOLMFIELD AVENUE	HYDE PARK	18		NEPONSET RIVER
07H347	MINOR	EDGEWATER DRIVE/BURMAH ROAD	NEPONSET/MATTAPAN	21		NEPONSET RIVER
07H348	MINOR	EDGEWATER DRIVE/TOPALIAN STREET	NEPONSET/MATTAPAN	24		NEPONSET RIVER
12H085	MINOR	MORTON STREET	ROSLINDALE	15		CANTERBURY BROOK
	MAJOR	AMERICAN LEGION HIGHWAY	WEST ROXBURY	24		CANTERBURY BROOK
21H047	MINOR	PALACE ROAD EXT.	BOSTON PROPER	24		MUDDY RIVER

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

21H048	MINOR	EASEMENT/FENWAY/EVANS WAY	BOSTON PROPER	15		MUDDY RIVER
21H201	MINOR	PALACE ROAD EXT.	BOSTON PROPER	6		MUDDY RIVER
23H040	MINOR	RALEIGH STREET EXT.	BOSTON PROPER	24		CHARLES RIVER
23H042	MAJOR	DEERFIELD STREET	BOSTON PROPER	116x120		CHARLES RIVER
08I153	MINOR	DUXBURY ROAD	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I154	MINOR	EASEMENT/RIVER STREET/GLADSIDE AVE	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I155	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I156	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I158	MINOR	EASEMENT/RIVER STREET/FREMONT ST.	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I207	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I209	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	12		NEPONSET RIVER
11I577	MAJOR	HARVARD STREET	NEPONSET/MATTAPAN	102x102		CANTERBURY BROOK
08J041	MINOR	RIVER STREET	DORCHESTER	18		NEPONSET RIVER
08J102	MINOR	ADAMS STREET	DORCHESTER	15x15		NEPONSET RIVER
08J103	MAJOR	EASEMENT/CENTRAL AVENUE BRIDGE	DORCHESTER	30		NEPONSET RIVER
08J49/50	MAJOR	DESMOND ROAD	DORCHESTER	2-18&24		NEPONSET RIVER
26J052	MINOR	MONSIGNOR O'BRIEN HIGHWAY	BOSTON PROPER	12		CHARLES RIVER
26J055	MINOR	LEVERETT CIRCLE	BOSTON PROPER	12	1 / NOT MAPPED	CHARLES RIVER
27J001	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	72		MILLERS RIVER
27J044	MAJOR	PRISON POINT BRIDGE	CHARLESTOWN	15		MILLERS RIVER
27J096	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	54		MILLERS RIVER
29J029	MINOR	ALFORD STREET/RYAN PLGD. EXT.	CHARLESTOWN	15		MYSTIC RIVER
29J129	MINOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
29J212	MAJOR	EASEMENT/MEDFORD STREET (ALSO OF017)	CHARLESTOWN	72		MYSTIC RIVER
30J006	MAJOR	EASEMENT/ALFORD STREET	CHARLESTOWN	18		MYSTIC RIVER
30J019	MAJOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
30J030	MAJOR	EASEMENT/ARLINGTON AVENUE	CHARLESTOWN	42	1 / NOT MAPPED	MYSTIC RIVER
08K049	MINOR	BEARSE AVENUE	DORCHESTER	12		NEPONSET RIVER
09K016	MINOR	EASEMENT/BEARSE AVENUE EXT.	DORCHESTER	15		NEPONSET RIVER
09K100	MAJOR	EASEMENT/MELLISH ROAD	DORCHESTER	34X24		NEPONSET RIVER
09K101	MINOR	EASEMENT/HUNTOON STREET EXT.	DORCHESTER	24		NEPONSET RIVER
21K069	MAJOR	EAST BERKELEY STREET	BOSTON PROPER	48	1 / 21K069-1	FORT POINT CHANNEL
26K099	MAJOR	CHELSEA STREET EXT.	CHARLESTOWN	84		CHARLES RIVER

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

26K245	MINOR	EASEMENT	CHARLESTOWN	15		CHARLES RIVER
28K018	MAJOR	OLD LANDING WAY EXT.	CHARLESTOWN	42	1 / 28K058	LITTLE MYSTIC CHANNEL
28K061	MAJOR	EASEMENT/MEDFORD STREET	CHARLESTOWN	42	1 / 28K062	LITTLE MYSTIC CHANNEL
28K386	MAJOR	EASEMENT/TERMINAL STREET	CHARLESTOWN	30	1 / 28K385	LITTLE MYSTIC CHANNEL
10L094	MAJOR	EASEMENT/GALLIVAN BOULEVARD	DORCHESTER	74x93		NEPONSET RIVER VIA DAVENPORT BROOK
10L096	MAJOR	HILLTOP AND LENOXDALE STREETS	DORCHESTER	36		NEPONSET RIVER
12L092	MAJOR	PINE NECK CREEK STORM DRAIN TENEAN STREET WEST OF LAWLEY	DORCHESTER	72	2 / 12L294	NEPONSET RIVER
16L097	MAJOR	EASEMENT/OFF SAVIN HILL AVENUE	DORCHESTER	24		PATTEN'S COVE
20L081	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
20L083	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
21L077	MAJOR	CLAFLIN STREET EXT./EAST STREET EXT.	SOUTH BOSTON	24	1 / NOT MAPPED	RESERVED CHANNEL
23L016	MINOR	NORTHERN AVENUE	SOUTH BOSTON	2-15&16		BOSTON INNER HARBOR
23L074	MINOR	SUMMER STREET BRIDGE	SOUTH BOSTON	15		FORT POINT CHANNEL
23L075	MAJOR	CONGRESS STREET BRIDGE	SOUTH BOSTON	54		FORT POINT CHANNEL
23L140	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L145	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L164	MAJOR	CONGRESS STREET BRIDGE	BOSTON PROPER	48	1 / 23L164 IN CHANNEL WALL	FORT POINT CHANNEL
23L195	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
23L196	MAJOR	NEW NORTHERN AVENUE BRIDGE	SOUTH BOSTON	36		FORT POINT CHANNEL
23L202	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
24L057	MINOR	STATE STREET EXT.	BOSTON PROPER	18x18		BOSTON INNER HARBOR
24L233	MAJOR	ROWE'S WHARF/ATLANTIC AVENUE	BOSTON PROPER	42		BOSTON HARBOR
25L058	MAJOR	CHRISTOPHER COLUMBUS PARK - WATERFRONT	BOSTON PROPER	84		BOSTON INNER HARBOR
25L144	MINOR	CLARK STREET	BOSTON PROPER	12		BOSTON INNER HARBOR
26L055	MAJOR	NEAR BATTERY WHARF	BOSTON PROPER	24X24		BOSTON INNER HARBOR
26L070	MAJOR	HANOVER STREET EXT.	BOSTON PROPER	36		BOSTON INNER HARBOR
26L84	MINOR	LEWIS STREET	EAST BOSTON	18		BOSTON INNER HARBOR
27L020	MAJOR	PIER NO. 4 EASEMENT - NAVY YARD	CHARLESTOWN	2-20&24	1 / 27K020-1	BOSTON INNER HARBOR
28L073	MINOR	EASEMENT/4TH STREET - NAVY YARD	CHARLESTOWN	6		LITTLE MYSTIC CHANNEL
28L074/075/ 076	MAJOR	16TH STREET/4TH AVENUE - NAVY YARD	CHARLESTOWN	3-30		LITTLE MYSTIC CHANNEL
28L077	MINOR	EASEMENT/4TH AVENUE - NAVY YARD	CHARLESTOWN	10		LITTLE MYSTIC CHANNEL
11M093	MAJOR	NEPONSET AVENUE AT NROTHWEST END OF NEPONSET AVENUE BRIDGE	DORCHESTER	48		NEPONSET RIVER
12M091	MAJOR	ERICSSON/WALNUT ST.	NEPONSET/MATTAPAN	36		NEPONSET RIVER
17M033	MAJOR	HARBOR POINT PARK (RELOCATED MT. VERNON ST. DRAIN)	DORCHESTER	72		DORCHESTER BAY
21M005	MAJOR	SUMMER STREET	SOUTH BOSTON	18		RESERVED CHANNEL

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

29M032	MINOR	CONDOR STREET	EAST BOSTON	30		CHELSEA RIVER
29M041	MAJOR	EASEMENT/CONDOR STREET	EAST BOSTON	36x30		CHELSEA RIVER
29M049	MINOR	CONDOR STREET	EAST BOSTON	24		CHELSEA RIVER
29N135	MAJOR	ADDISON STREET	EAST BOSTON	30x30		CHELSEA RIVER
28N156	MINOR	COLERIDGE STREET EXT.	EAST BOSTON	12		BOSTON HARBOR
29O001	MAJOR	BENNINGTON STREET	EAST BOSTON	66	1 / 290062	BOSTON HARBOR NEAR CONSTITUTION BEACH
31O004	MINOR	EASEMENT/WALDEMAR AVENUE	EAST BOSTON	15		CHELSEA RIVER
28P001	MINOR	EASEMENT	EAST BOSTON	12		BOSTON HARBOR NEAR CONSTITUTION BEACH
29P015	MINOR	EASEMENT/BARNES AVENUE	EAST BOSTON	12		BELLE ISLE INLET
29P044	MINOR	SHAWSHEEN STREET	EAST BOSTON	12		BOSTON HARBOR
30P062	MINOR	PALERMO AVENUE EXTENSION	EAST BOSTON	12		WETLANDS
31P084	MINOR	EASEMENT/BENNINGTON STREET	EAST BOSTON	30		BELLE ISLE INLET, REVERE

Major : 93

Minor : 102

Total: 195

* Major outfall means : An outfall that discharges from a single pipe of 36" or larger in diameter or a non-circular pipe which is associated with drainage area of more than 50 acres; or an outfall that discharges from a single pipe of 12" or larger in diameter serving lands zoned for industrial activity or a non-circular pipe which is associated with drainage area of 2 acres or more.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203

FACT SHEET

DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
PERMIT TO DISCHARGE TO WATERS OF THE UNITED STATES.

NPDES PERMIT NO.: MAS010001

NAME AND ADDRESS OF APPLICANT:

**Boston Water and Sewer Commission
425 Summer Street
Boston, Massachusetts 02210**

NAME AND ADDRESS OF FACILITIES WHERE DISCHARGES OCCUR:

195 Storm water Outfalls listed in Permit Attachment A

RECEIVING WATERS:

Belle Isle Inlet, Boston Harbor, Boston Inner Harbor, Brook Farm Brook, Bussey Brook, Canterbury Brook, Chandler Pond, Charles River, Chelsea River, Dorchester Bay, Fort Point Channel, Goldsmith Brook, Jamaica Pond, Little Mystic Channel, Mill Pond, Millers River, Mother Brook, Muddy River, Mystic River, Neponset River, Old Harbor, Patten's Cove, Reserved Channel, Sprague Pond, Stony Brook, Turtle Pond, and unnamed wetlands, brooks and streams .

CLASSIFICATION: **Class SB and B**

I. Proposed Action, Type of Facility and Discharge Location.

The Boston Water and Sewer Commission (BWSC), the permittee, is empowered to promulgate rules and regulations regarding the use of its common sewers, including its sanitary sewers, combined sewers and storm drains. BWSC applied for its Municipal Separate Storm Sewer System (MS4) permit, which will discharge storm water from 195 identified separate storm sewer outfalls to receiving waters listed in Attachment A.

1. Discharge Characteristics

At the time of this draft, BWSC operates 195 identified separate storm sewer outfalls. Locations, size, and receiving waters for these outfalls are identified in Attachment A. Storm water discharge sampling results from five representative outfalls are shown on Table 3-21 of the permit application (Part II) dated May 17, 1993 and are included as Attachment B. A discussion of the results of sampling can be found in Part II Chapter 3 of the application.

2. Limitations and Conditions.

Permit conditions and all other requirements described herein may be found in Part I of the draft permit. **No numeric effluent limitations have been established for this draft permit.**

3. Permit Basis and Explanation of Permit Conditions.

As authorized by Section 402(p) of the Act, this permit is being proposed on a system-wide basis. This permit covers all areas under the jurisdiction of BWSC or otherwise contributing to discharges from municipal separate storm sewers owned or operated by the permittee.

a. Statutory basis for permit conditions. **The conditions established by this permit are based on Section §402(p) (3) (B) of the Act which mandates that a permit for discharges from MS4s must: effectively prohibit the discharge of non-storm water to the MS4 and require controls to reduce pollutants in discharges from the MS4 to the maximum extent practicable including best management practices, control techniques, and system design and engineering methods, and such other provisions determined to be appropriate. MS4s are required to achieve compliance with Water Quality Standards. Section 301(b) (1) (C) of the Act, requires that NPDES permits include limitations, including those necessary to meet water quality standards. The intent of the permit conditions is to meet the statutory mandate of the Act.**

EPA has determined that under the provisions of 40 CFR 122.44(k) the permit will include Best Management Practices (BMPs). A comprehensive Storm Water Management Program (SWMP) includes BMPs to demonstrate compliance with the maximum extent practicable standard. Section 402(p) (3) (B) (iii) of the Act clearly includes structural controls as a component of the maximum extent practicable requirement as necessary to achieve compliance with Water Quality Standards.

EPA encourages the permittee to explore opportunities for pollution prevention measures, while reserving the more costly structural controls for higher priority watersheds, or where pollution prevention measures prove unfeasible or ineffective in achieving water quality goals and standards.

b. Regulatory basis for permit conditions. As a result of the statutory requirements of the Act the EPA promulgated the MS4 Permit application regulations, 40 CFR 122.26(d). These regulations describe in detail the permit application requirements for operators of MS4s. The information in the application (Parts 1 and 2) and supplemental information provided in June 1995 and June 1998 was used to develop the draft permit conditions.

4. Discharges Authorized By This Permit.

a. Storm water. This permit authorizes all existing or new storm water point source discharges to waters of the United States from the MS4.

b. Non-storm water. This permit authorizes the discharge of storm water commingled with flows contributed by wastewater, or Storm Water Associated with Industrial Activity, provided such discharges are authorized by separate NPDES permits and in compliance with the permittee's regulations regarding the use of storm drains. Nothing in this draft permit conveys a right to discharge to the permittee's system without the permittee's authorization. In addition, certain types of non-storm waters identified in the draft permit at Part I.B.2.g. are authorized if appropriately addressed in the permittee's Storm Water Management Program.

The following demonstrates the difference between the Act's statutory requirements for discharges from municipal storm sewers and industrial sites:

i. Section 402(p)(3)(B) of the Act requires an effective prohibition on non-storm water discharges to a MS4 and controls to reduce the discharge of pollutants from the MS4 to the Maximum Extent Practicable (MEP).

ii. Section 402(p)(3)(A) of the Act requires compliance with treatment technology (BAT/BCT) and Section 301 water quality requirements on discharges of Storm Water Associated with Industrial Activity.

The Act requires Storm Water Associated with Industrial Activity discharging to the MS4 to be covered by a separate NPDES permit. However, the permittee is responsible for the quality of the ultimate discharge, and has a vested interest in locating uncontrolled and unpermitted discharges to the system.

c. Spills. This permit does not authorize discharges of material resulting from a spill. If discharges from a spill are unavoidable to prevent imminent threat to human life, personal injury, or severe property damage, the permittee has the responsibility to take (or insure the party responsible for the spill takes) reasonable and prudent measures to minimize the impact of discharges on human health and the environment.

5. Receiving Stream Segments and Discharge Locations.

The permittee discharges to the receiving waters listed in Attachment A, which are classified according to the Massachusetts Surface Water Quality Standards as Class B, B_{CSO}, SB, and SB_{CSO} water bodies. Despite variance conditions and CSO designation, storm water discharges shall achieve compliance with Class B and SB standards. Class B and SB waters shall be of such quality that they are suitable for the designated uses of protection and propagation of fish, other aquatic life and wildlife; and for primary and secondary contact recreation. Notwithstanding specific conditions of this permit, the discharges must not lower the quality of any classified water body below such classification, or lower the existing quality of any water body if the existing quality is higher than the classification, except in accordance with Massachusetts' Antidegradation Statutes and Regulations.

6. SWMP.

The following prohibitions apply to discharges from MS4s and were considered in review of the current management programs which the permittee is operating. In implementing the SWMP, the permittee is required to select measures or activities intended to achieve the following prohibitions.

No discharge of toxics in toxic amounts. The discharge of toxics in toxic amounts is prohibited (Section 101(a)(3) of the Act).

No discharge of pollutants in quantities that would cause a violation of State water quality standards. Section 301(b)(1)(C) of the Act and 40 CFR 122.44(d) require that NPDES permits include "...any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to State law or regulations..." Implementation of the SWMP is reasonably expected to provide for protection of State water quality standards.

No discharge of non-storm water from the municipal separate storm sewer system, except in accordance with Part II.B.2. Permits issued to MS4s are specifically required by Section 402(p)(3)(B) of the Act to "...include a requirement to effectively prohibit non-storm water discharges into the storm sewers..." The regulations (40 CFR 122.26(d)(2)(iv)(B)(1)) allow the permittee to accept certain non-storm water discharges where they have not been identified as significant sources of pollutants. Any discharge allowed by the permittee and authorized by a separate NPDES permit is not subject to the prohibition on non-storm water discharges.

No numeric effluent limitations are proposed in the draft permit. In accordance with 40 CFR §122.44(k), the EPA has required a series of Best Management Practices, in the form of a comprehensive SWMP, in lieu of numeric limitations.

7. Storm Water Management Program.

BWSC provided updates to its SWMP in June 1995 and June 1998. The current SWMP addresses all required elements. Some of the elements of the SWMP are wholly or in part the responsibility of the City of Boston rather than BWSC. The permit requires the permittee to cooperate with appropriate municipal agencies to assure that the goals of the SWMP are achieved by building upon existing programs and procedures which address activities impacting storm water discharges to the MS4.

EPA has requested permit application information from the City of Boston. This information will be used to develop permit conditions for the City to implement the SWMP measures which are under its control. This will be effected through a permit modification identifying the City as a co-permittee and specifying its responsibilities or through the issuance of a separate permit to the City.

Table A identifies the required elements of the SWMP, the regulatory cite, and the relevant draft permit condition.

Table A - Storm Water Management Program Elements

Required Program Element	Permit Parts	Regulatory References (40 CFR 122.26...)
Structural Controls	I.B.2.b	(d) (2) (iv) (A) (1)
Areas of new development & significant redevelopment	I.B.2.c	(d) (2) (iv) (A) (2)
Roadways	I.B.2.d	(d) (2) (iv) (A) (3)
Flood Control Projects	I.B.2.e	(d) (2) (iv) (A) (4)
Pesticides, Herbicides, & Fertilizers Application	I.B.2.f	(d) (2) (iv) (A) (6)
Illicit Discharges and Improper Disposal	I.B.2.g	(d) (2) (iv) (B) (1) - (3), (iv) (B) (7)
Spill Prevention and Response	I.B.2.h	(d) (2) (iv) (B) (4)
Industrial and High Risk Runoff	I.B.2.i	(d) (2) (iv) (C), (iv) (A) (5)
Construction Site Runoff	I.B.2.j	(d) (2) (iv) (D)
Public Education	I.B.2.k	(d) (2) (iv) (A) (6), (iv) (B) (5), (iv) (B) (6)
Monitoring Program	I.C	(d) (2) (iv) (B) (2), (iii), (iv) (A), (iv) (C) (2)

Attachment C provides a discussion of the permit condition and the permittee's existing SWMP.

8. Legal Authority. BWSC has demonstrated its authority to promulgate regulations regarding the use of its common sewers, including its sanitary sewers, combined sewers and storm drains. Regulations Governing the Use of Sanitary and Combined Sewers and Storm Drains of the Boston Water and Sewer Commission were adopted January 15, 1998 and effective February 27, 1998.

9. **Resources.** Part I.B.6 of the permit requires the permittee to provide adequate support capabilities to implement its activities under the SWMP. Compliance with this requirement will be demonstrated by the permittee's ability to fully implement the SWMP, monitoring programs, and other permit requirements. The permit does not require specific funding or staffing levels, thus providing the permittee with the ability, and incentive, to adopt the most efficient and cost effective methods to comply with the permit requirements. The draft permit also requires an Annual Report (Part I.E.) which includes an evaluation of resources to implement the plan.

10. **Monitoring and Reporting.**

a. Monitoring. The BWSC sampled five locations which were selected to provide representative data on the quality and quantity of discharges from the MS4 as a whole. Parameters sampled included conventional, non-conventional, organic toxics, and other toxic pollutants. The EPA reviewed this information during the permitting process. Monitoring data is intended to be used by the BWSC to assist in its determination of appropriate storm water management practices. EPA used the data to identify the minimum parameters for sampling under Part I.C of the permit.

The BWSC is required (40 CFR §122.26(d)((2)(iii)(C) and (D)) to monitor the MS4 to provide data necessary to assess the effectiveness and adequacy of SWMP control measures; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from major outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation. The BWSC is responsible for conducting any additional monitoring necessary to accurately characterize the quality and quantity of pollutants discharged from the MS4.

EPA will make future permitting decisions based on the monitoring data collected during the permit term and available water quality information. Where the required permit term monitoring proves insufficient to show pollutant reductions, the EPA may require more stringent Best Management Practices, or where necessary to protect water quality, establish numeric effluent limitations.

1. Representative monitoring: The monitoring of the discharge of representative outfalls during actual storm events will provide information on the quality of runoff from the MS4, a basis for estimating annual pollutant loadings, and a mechanism to evaluate reductions in pollutants discharged from the MS4. Results from the monitoring program will be submitted annually with the annual report.

2. Requirements: The BWSC shall monitor representative discharges to characterize the quality of storm water discharges from the MS4. Within 90 days after the effective date of this permit, the BWSC will submit its proposed sampling plan. The BWSC shall choose five locations representing the different land uses or drainage areas representative of the system, with a focus on what it considers priority areas, such as an outfall in the vicinity of a public beach or a shellfish bed. This submittal shall also include any related monitoring which the BWSC has done since its MS4 permit application was submitted. Unless commented on or denied by the Director within 60 days after its submittal, the proposed sampling plan shall be deemed approved.

3. Parameters: The EPA established minimum permit parameter monitoring requirements based on the information available regarding storm water discharges and potential impacts of these discharges. The basic parameter list allows satisfaction of the regulatory requirement [40 CFR §122.26(d)(2)(iii)] to provide estimates of pollutant loadings for each major outfall.

4. Frequency: The frequency of annual monitoring is based on monitoring at least one representative storm event three times a year. The plan should consider sampling events in the spring, summer, and fall (excluding January to March). Monitoring frequency is based on permit year, not a calendar year. The first complete calendar year monitoring could be less than the stated frequency.

5. Receiving Water Quality Monitoring: The draft permit is conditioned to include four sampling stations to assess the impact of storm water discharges from the MS4 to receiving waters. The permittee shall submit a plan to sample four locations three times a year for the permit term within 90 days of the effective date of the permit. The minimum parameters for analysis are consistent with the representative monitoring requirements.

b. Screening. The draft permit requires two screening programs. Part I.C.6 requires the permittee to develop a Wet Weather Screening Program. This screening shall record physical observations of wet weather flows from all major outfalls at least once during the permit term. The program will identify discharges which may be contributing to water quality impairments short of analytical monitoring. Part I.D. requires a dry weather screening program.

c. Reporting. The permittee is required (40 CFR §122.42(c) (1)) to contribute to the preparation of an annual system-wide report including the status of implementing the SWMP; proposed changes to the SWMP; revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application; a summary of the data, including monitoring data, that is accumulated throughout the reporting year; annual expenditures and the budget for the year following each annual report; a summary describing the number and nature of enforcement actions, inspections, and public education programs; and identification of water quality improvements or degradation. Part I.E. of the draft permit requires the permittee to do annual evaluations on the effectiveness of the SWMP, and institute or propose modifications necessary to meet the overall permit standard of reducing the discharge of pollutants to the maximum extent practicable. In order to allow the orderly collection of budgetary and monitoring data it was determined to establish the annual report due date relative to the permittee's annual fiscal year. BWSC's fiscal year ends on **December 31** and the annual report is due on **March 1** each year commencing March 1, 1999.

11. Permit Modifications.

a. Reopener Clause. The EPA may reopen and require modifications to the permit (including the SWMP) based on the following factors: changes in the State's Water Quality Management Plan and State or Federal requirements; adding co-permittee(s); SWMP changes impacting compliance with permit requirements; other modifications deemed necessary by the EPA to adhere to the requirements of the Clean Water Act. Co-permittees may be incorporated into this permit or separate permits may be required as necessary to achieve the goals of the SWMP. Implementation of the SWMP is expected to result in the protection of water quality. **The draft permit contains a reopener clause should new information indicate that the discharges from the MS4 are causing, or are significantly contributing to, a violation of the State's water quality standards.**

b. SWMP Changes. The SWMP is intended to be a tool to achieve the maximum extent practicable and water quality standards. Therefore, minor changes and adjustments to the various SWMP elements are expected and encouraged where necessary. Changes may be necessary to more successfully adhere to the goals of the permit. Part I.B.7.c of the draft permit describes the allowable procedure for the permittee to make changes to the SWMP. Any changes requested by a permittee shall be reviewed by the EPA and DEP. The EPA and DEP have 60 days to respond to the permittee and inform the permittee if the suggested changes will impact or change the SWMP's compliance with a permit requirement.

c. Additions. The EPA intends to allow the permittee to annex lands, activate new outfalls, deactivate existing outfalls, and accept the transfer of operational authority over portions of the MS4 without mandating a permit modification. Implementation of appropriate SWMP elements for these additions (annexed land or transferred authority) is required. Upon notification of the additions in the Annual Report, the EPA shall review the information to determine if a modification to the permit is necessary based on changed circumstances.

The remaining conditions of the permit are based on the NPDES regulations, 40 CFR Parts 122 through 125, and consist primarily of management requirements common to all permits.

II. State Certification Requirements.

EPA may not issue a permit unless the State Water Pollution Control Agency with jurisdiction over the receiving waters certifies that the effluent limitations contained in the permit are stringent enough to assure that the discharge will not cause the receiving water to violate State Water Quality Standards. The staff of the Massachusetts Department of Environmental Protection has reviewed the draft permit and advised EPA that the limitations are adequate to protect water quality. EPA has requested permit certification by the State and expects that the draft permit will be certified.

III. Comment Period, Hearing Requests and Procedures for Final Decisions.

All persons, including applicants, who believe any condition of the draft permit is inappropriate must raise all issues and submit all available arguments and all supporting material for their arguments in full by the close of the public comment period, to the U.S. EPA, Planning and Administration (SPA), P.O. Box 8127, Boston, MA 02114. Any person, prior to such date, may submit a request in writing for a public hearing to consider the draft permit to EPA and the State Agency. Such requests shall state the nature of the issues proposed to be raised in the hearing. A public hearing may be held after at least thirty days public notice whenever the Regional Administrator finds that response to this notice indicates significant public interest. In reaching a final decision on the draft permit the Regional Administrator will respond to all significant comments and make those responses available to the public at EPA's Boston Office.

Following the close of the comment period, and after a public hearing, if such hearing is held, the Regional Administrator will issue a final permit decision and forward a copy of the final decision to the applicant and to each person who has submitted written comments or requested notice. Within 30 days following the notice of the final permit decision any interested person may submit a request for a formal hearing to reconsider or contest the final decision. Requests for formal hearings must satisfy the requirements of 40 CFR §124.74, 48 Fed. Reg. 14279-14280 (April 1, 1983).

IV. EPA Contact

Additional information concerning the draft permit may be obtained between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, excluding holidays from:

Jay Brolin
U.S. Environmental Protection Agency
John F. Kennedy Federal Building
Office of Ecosystem Protection (CMA)
Boston, MA 02203-0001
Telephone: (617) 565-9453 Fax: (617) 565-4940

September 2, 1998
Date

Linda M. Murphy, Director
Office of Ecosystem Protection
U.S. Environmental Protection Agency

Attachment C

Structural Controls: The permittee shall operate the separate storm sewer system and any storm water structural controls in a manner to reduce the discharge of pollutants to the Maximum Extent Practicable. The permittee's existing SWMP includes operation and maintenance procedures to include an inspection schedule of storm water structural controls adequate to satisfy the permit condition.

Areas of New Development and Significant Redevelopment: The permittee has no authority over land use issues. The draft permit is conditioned to require the permittee to coordinate with the appropriate municipal agencies as it relates to discharges to the MS4. The permittee has its own site plan review process relating to new or modified connections for water, sewer, and drains and has the authority to require controls on discharges to the storm drain system during and after construction.

Roadways: The permittee has no authority to ensure that public streets, roads, and highways are operated and maintained in a manner to minimize discharge of pollutants, including those pollutants related to deicing or sanding activities. The draft permit is conditioned to require the permittee to coordinate with appropriate municipal agencies as it relates to discharge to the MS4.

Pesticide, Herbicide, and Fertilizer Application: The permittee shall coordinate with appropriate municipal agencies to evaluate existing measures to reduce the discharge of pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied to public property.

Non-Storm Water discharges: Non-storm water discharges shall be effectively prohibited. However, the permittee may allow certain non-storm water discharges as listed in 122.26(d)(2)(iv)(B)(1) and Part I.B.2 of the draft permit. The permittee has identified allowable non-storm water discharges in its regulations.

The permittee shall implement controls to prevent discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall also control the infiltration of seepage from sanitary sewers into the MS4. This is presently accomplished through the permittee's illicit connection program and it's Inflow/Infiltration program.

The discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into the MS4 is prohibited in accordance with the permittee's regulations. The permittee shall coordinate with appropriate

regulations. The permittee shall coordinate with appropriate public and private agencies to ensure continued implementation of programs to collect used motor vehicle fluids (at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal and to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. The City of Boston has an existing program.

Illicit Discharges and Improper Disposal: The BWSC shall continue to implement its program to locate and eliminate illicit discharges and improper disposal into the MS4. This program shall include dry weather screening activities to locate portions of the MS4 with suspected illicit discharges and improper disposal. Follow-up activities to eliminate illicit discharges and improper disposal may be prioritized on the basis of magnitude and nature of the suspected discharge; sensitivity of the receiving water; and/or other relevant factors. This program shall establish priorities and schedules for screening the entire MS4 at least once every five years. At present the permittee has on-going programs in Brighton (BOS 032) discharges to the Charles River, discharges to Brookline's Village and Tannery Brook drainage systems, and discharges through Dedham to Mother Brook. Facility inspections may be carried out in conjunction with other programs (e.g. pretreatment inspections of industrial users, health inspections, fire inspections, etc.).

The BWSC shall eliminate illicit discharges as expeditiously as possible and require the immediate termination of improper disposal practices upon identification of responsible parties. Where elimination of an illicit discharge within sixty (60) days is not possible, the BWSC shall establish an expeditious schedule for removal of the discharge. In the interim, the BWSC shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

Spill Prevention and Response: The permittee shall coordinate with appropriate municipal agencies to implement a program to prevent, contain, and respond to spills that may discharge into the MS4. The existing spill response program in the City includes a combination of spill response actions by the permittee, municipal agencies and private entities. The permittee's regulations include legal requirements for public and private entities within the permittee's jurisdiction.

Industrial & High Risk Runoff: The permittee shall coordinate with EPA and DEP to develop a program to identify and control pollutants in storm water discharges to the MS4 from municipal landfills; other treatment, storage, or disposal facilities for municipal waste (e.g. transfer stations, incinerators, etc.);

hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge which the permittee determine is contributing a substantial pollutant loading to the MS4 shall be implemented. The program shall include inspections, a monitoring program and a list of industrial storm water sources discharging to the MS4 which shall be maintained and updated as necessary. This requirement is not meant to cover all such discharges, but is intended to prioritize those discharges from this group which are believed to be contributing pollutants to the MS4 and to identify those dischargers which may require NPDES permit coverage or are not in compliance with existing permits.

Construction Site Runoff: The permittee shall coordinate with appropriate municipal agencies to implement a program to reduce the discharge of pollutants from construction sites to the separate storm sewer. This program shall include: requirements for the use and maintenance of appropriate structural and non-structural control measures to reduce pollutants discharged to the MS4 from construction sites; inspection of construction sites and enforcement of control measure requirements required by the permittee; appropriate education and training measures for construction site operators; and notification of appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff and any post-construction permitting.

Public Education: The permittee shall coordinate with appropriate municipal agencies to implement a public education program with the following elements: (a) a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials into the MS4; (b) a program to promote, publicize, and facilitate the proper management and disposal of used oil and household hazardous wastes; and (c) a program to promote, publicize, and facilitate the proper use, application, and disposal of pesticides, herbicides, and fertilizers.

Exhibit **6**

Worcester, MA – Department of Public Works MS4 Permit
(Permit No. MAS010002)

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AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the federal Clean Water Act, as amended, 33 U.S.C. §§1251 et seq., and the Massachusetts Clean Waters Act, as amended, Mass. Gen. Laws. ch. 21, §§26-53, the

City of Worcester
Department of Public Works

and is authorized to discharge from all new or existing separate storm sewers: **existing Separate Storm Sewer Outfalls which are listed in Attachment A (93 major outfalls) and all other known outfalls (170 minor outfalls)**

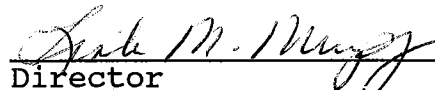
to receiving waters (in the BLACKSTONE RIVER BASIN) named: **Beaver Brook, Blackstone River, Broad Meadow Brook, Coal Mine Brook, Coes Pond, Curtis Pond, Fitzgerald Brook, Indian Lake, Kendrick Brook, Kettle Brook, Lake Quinsigamond, Leesville Pond, Middle River, Mill Brook, Mill Brook Tributary, Tatnuck Brook, Patch Reservoir, Poor Farm Brook, Smiths Pond, Weasel Brook and Williams Millpond** in accordance with effluent limitations, monitoring requirements and other conditions set forth herein.

This permit shall become effective thirty (30) days after the date of signature.


This permit and the authorization to discharge expire at midnight, five years from the effective date.

This permit consists of **21** pages and **Attachment A** in Part I including wet and dry weather monitoring requirements, etc., and 35 pages in Part II including General Conditions and Definitions.

Signed this *30* day of *September, 1998*



Director
Office of Ecosystem Protection
Environmental Protection Agency
Region I
Boston, MA



Director, Division of
Watershed Management
Department of Environmental
Protection
Commonwealth of Massachusetts
Boston, MA

PART I. MUNICIPAL SEPARATE STORM SEWER SYSTEM

A. DISCHARGES THROUGH THE MUNICIPAL SEPARATE STORM SEWER SYSTEM AUTHORIZED UNDER THIS PERMIT

1. Permit Area. This permit covers all areas within the corporate boundary of the City of Worcester served by, or otherwise contributing to discharges from new or existing separate storm sewers owned or operated by the Department of Public Works, the "permittee".
2. Authorized Discharges. This permit authorizes all storm water discharges to waters of the United States from all existing or new outfalls owned or operated by the permittee (existing outfalls are identified in Attachment A). This permit also authorizes the discharge of storm water commingled with flows contributed by process wastewater, non-process wastewater, or storm water associated with industrial activity provided such discharges are authorized under separate NPDES permits and in compliance with applicable Federal, State and local regulations.

Storm water discharges related to industrial activity which are not under the jurisdiction of the storm water program are authorized. The permittee shall provide in the annual report (Part I.E.) to EPA and MA DEP a review of all new separate storm sewer outfalls that are activated and of all existing outfalls which are de-activated.

3. Limitations on Coverage. The following discharges are not authorized by this permit:
 - a. Discharges of non-storm water or storm water associated with industrial activity through outfalls listed in Attachment A are not authorized under this permit except where such discharges are:
 - I. authorized by a separate NPDES permit; or
 - ii. identified by and in compliance with Part B.2.g of this permit.

B. STORM WATER POLLUTION PREVENTION & MANAGEMENT PROGRAMS

The permittee is required to continue to develop, implement and revise as necessary, a storm water pollution prevention and management program designed to reduce, to the maximum extent practicable, the discharge of pollutants from the Municipal Separate Storm Sewer System (MS4). The permittee may implement Storm Water Management Program (SWMP) elements through participation with other public agencies or private entities in cooperative efforts satisfying the requirements of this permit in lieu of creating duplicate program elements. Either cumulatively, or separately, the permittee's storm water pollution prevention and management programs shall satisfy the requirements of Part I.B.1-7. below for all portions of the MS4.

1. POLLUTION PREVENTION REQUIREMENTS The permittee shall develop and implement the following pollution prevention measures:

a. Development The permittee, in cooperation with the agency with jurisdiction over land use, shall include requirements to consider water quality impacts of new development and significant re-development. The permittee shall ensure that development activities conform to applicable state and local regulations, guidance and policies relative to the discharge of storm water into the MS4. The goals of these requirements shall be to limit increases in the discharge of pollutants into the MS4 from new development and to reduce the discharge of pollutants into the MS4 from existing sources due to re-development.

b. Used Motor Vehicle Fluids The permittee shall describe educational activities, public information activities and other appropriate activities to facilitate the proper management, including recycling, reuse and disposal, of used motor vehicle fluids. The permittee shall coordinate with appropriate public agencies or private agencies where necessary. Such activities shall be readily available to all private residents and be publicized and promoted on a regular basis (at least annually).

c. Household Hazardous Waste (HHW) The permittee shall coordinate with the appropriate public agency or private entities to ensure the implementation of a program to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. Such program shall be readily

available to all private residents and be publicized and promoted on a regular basis (at least annually).

2. STORM WATER MANAGEMENT PROGRAM REQUIREMENTS: The permittee shall continue to implement the current elements of its' Storm Water Management Program (SWMP) which was described in the May 11, 1993 Part II application in accordance with Section 402(p)(3)(B) of the Clean Water Act (CWA or "the Act"), including any updates.

The current SWMP does not adequately address all the required elements described on Pages 5-11 below. The EPA sent a letter to the City of Worcester on June 6, 1997 specifying which portions of the current SWMP needed more description, effort, or clarification. The items included were the illicit connection program, a discussion of the City's indebtedness and funding for storm water programs, geographic mapping, reevaluation of wet weather sampling locations, construction area oversight, and public education. The City submitted a letter addressing these concerns on March 25, 1998. Although most issues were discussed, there is still some detail and proposed effort that is insufficient.

In particular, the sampling plan proposes grab samples at five different outfalls, three times per year. In order to get a sense of any trend and how parameter concentrations change over time during storm events, the permittee must conduct composite sampling or a series of grab samples for the summer sampling event at each of the five outfalls, as described later. In Section C. below, this permit includes minimum expectations for outfall monitoring and instream monitoring during wet weather. Instream monitoring could provide information on both the pollutant concentration peaks as well as the pollutant loading increases that occur as a result of storm events.

More detail and effort is needed for the catch basin cleaning and inspection program, as shown on Page 6. This last issue was not raised in the letter of June 6, 1997, but this program was found to be deficient upon further review.

Within 120 days after the effective date of this permit, the permittee shall submit a written description of all additional measures it will take, relative to items mentioned above, to satisfy the requirements of this permit and the goals of the proposed SWMP. **This submittal will include the entire SWMP effort, including all the original items as included in Worcester's Part II application.** This

shall be submitted to the EPA the MA DEP at the addresses in Section G. Unless disapproved by EPA or the MA DEP within 60 days after its submittal, the SWMP shall be deemed approved. The permittee shall respond to all written comments by EPA and the MA DEP and shall make all changes to the SWMP required for its approval. As noted later, compliance with the SWMP shall occur no later than 180 days after the effective date of the permit or no later than EPA and DEP's approval of the SWMP. This SWMP shall be displayed at a convenient location accessible to the public.

The Controls and activities identified in the SWMP shall clearly identify goals, a description of the controls or activities, and a description of the roles and responsibilities of other entities' areas of applicability on a system, jurisdiction, or specific area basis.

The permittee will specifically address how it will have input on any portions of the SWMP which may not be under its direct control (i.e. Mass Highway Department's maintenance of interstate highway) and how it will cooperate with such entities to achieve the goals of the SWMP.

If, during the life of this permit, EPA and the DEP determine that the permittee cannot substantively operate these programs to effectively reduce pollutants to the MS4, then the permit may be modified to designate one or more agencies that administer these programs as co-permittees. These entities would then be responsible for applicable permit conditions and requirements. Alternatively, one or more entities may be required to apply for and obtain an individual storm water permit for their discharges. The SWMP, and all approved updates, are hereby incorporated by reference and shall be implemented in a manner consistent with the following requirements:

a. **Statutory Requirements:** SWMPs shall include controls necessary to reduce the discharge of pollutants from the MS4 to the Maximum Extent Practicable, "MEP". Controls may consist of a combination of best management practices, control techniques, system design and engineering methods, and such other provisions as the permittee, the Director or the State determines appropriate. The various components of the SWMP, taken as a whole (rather than individually), shall be sufficient to meet this "MEP" standard. The SWMPs shall be updated as necessary to ensure conformance with the requirements of CWA § 402(p)(3)(B). In implementing the SWMP, the permittee

is required to select measures or activities intended to meet these requirements:

No discharge of toxics in toxic amounts.

No discharge of pollutants in quantities that would cause a violation of State water quality standards.

No discharge of either a visible oil sheen, foam, or floating solids, in other than trace amounts, at any time.

No discharge of suspended or settleable solids in concentrations or combinations that would impair the uses of the class of receiving waters.

b. Structural Controls: The permittee shall operate and maintain any storm water structural controls, for which it is the owner or operator, in a manner so as to reduce the discharge of pollutants to the MEP. Each catch basin shall be cleaned at least every other year as described in the SWMP.

The cleaning program must include the recording and inputting of all activities in an automated database for all catch basins, including the date of cleaning, the location of each catch basin, and an estimate of how full the catch basin was when it was cleaned. For those catch basins which are found to be more than approximately 50% full, a follow up inspection will be conducted within 3 - 6 months and cleaning schedules modified as appropriate.

During the life of this permit, the permittee shall conduct a structural control demonstration. Within 180 days after the effective date of the permit, the permittee shall submit a demonstration proposal and schedule to the EPA and MA DEP. Unless disapproved by the EPA or the MA DEP within 30 days after its submittal, the proposed demonstration project shall be deemed approved.

The permittee can reference the MA DEP document titled, Stormwater Management, Volume 1: Stormwater Policy Handbook and Stormwater Management, Volume II: Stormwater BMP Handbook. This provides an overview of storm water controls, including ranges of removal for typical storm water pollutants. This proposal shall measure the removal efficiency of a particular structural control in the MS4 area for several pollutants with influent and effluent sampling during the life of this permit.

c. Areas of New Development and Significant Redevelopment: The permittee and/or cooperating agencies shall develop, implement, and enforce controls to minimize the discharge of pollutants to the separate storm sewer system from areas of new development and significant re-development during and after construction. The permittee and/or cooperating agencies shall ensure development activities conform to applicable state and local regulations, guidance and policies. The permittee and/or cooperating agencies shall consider water quantity and water quality impacts related to development and significant redevelopment. The permittee and/or cooperating agencies shall conform to the policy of the MA DEP titled **Performance Standards and Guidelines for Stormwater Management in Massachusetts.**

d. Roadways: The permittee shall coordinate with appropriate agencies to implement measures to ensure that roadways and highways are operated and maintained in a manner so as to minimize the discharge of pollutants to the separate storm sewer system (including discharges related to deicing and sanding activities and snow removal and disposal).

The permittee shall conduct an investigation of the drainage from roadways that are owned or operated by other entities, primarily the Massachusetts Highway Department. Within 180 days after the effective date of the permit, the permittee shall report to the EPA and the MA DEP, which of these roadway drainage systems are connected to the MS4. The SWMP will also include a description of how the permittee will coordinate with such entities to assure that discharges to the MS4 through such drainage meets the requirements of the permit.

e. Flood Control Projects: The permittee shall ensure any flood management projects consider impacts on the water quality of receiving waters. The permittee shall also evaluate the feasibility of retro-fitting existing structural flood control devices to provide additional pollutant removal from storm water.

f. Pesticide, Herbicide, and Fertilizer Application: The permittee shall implement measures to reduce the discharge of pollutants to the MS4 related to the application and storage of pesticides, herbicides, and fertilizers applied by municipal or public agency employees or contractors to public right of ways, parks, and other municipal facilities. The permittee, in cooperation with the entity with jurisdiction over land use (e.g. Parks Department), shall implement

controls to reduce discharge of pollutants to the MS4 related to the application and distribution of pesticides, herbicides, and fertilizers by commercial and wholesale distributors and applicators and its own employees.

g. Authorized Non-Storm Water Discharges: Unless identified by either the permittee, the EPA, or the State as significant sources of pollutants to waters of the United States, the following non-storm water discharges are authorized to enter the MS4. As necessary, the permittee shall incorporate appropriate control measures in the SWMP to insure that these discharges are not significant sources of pollutants to waters of the United States.

- (a) water line flushing;
- (b) landscape irrigation;
- (c) diverted stream flows;
- (d) rising ground waters;
- (e) uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers;
- (f) uncontaminated pumped ground water;
- (g) discharges from potable water sources;
- (h) foundation drains;
- (I) uncontaminated air conditioning or compressor condensate;
- (j) irrigation water;
- (k) uncontaminated springs;
- (l) water from crawl space pumps;
- (m) footing drains;
- (n) lawn watering;
- (o) non-commercial car washing;
- (p) flows from riparian habitats and wetlands;
- (q) swimming pool discharges which have been dechlorinated;
- (r) street wash waters; and
- (s) discharges or flows from emergency fire fighting activities.
- (t) fire hydrant flushing
- (u) building washdown water which does not contain detergents

h. Illicit Discharges and Improper Disposal: The permittee shall continue to implement its ongoing program to detect and remove (or require the discharger to the MS4 to remove or obtain a separate NPDES permit for) illicit discharges and improper disposal into the separate storm sewer.

1. The permittee shall effectively prohibit unpermitted, industrial storm water discharges which are required to have a federal storm water permit, to the MS4.

2. The permittee shall prohibit unpermitted discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall identify and limit the infiltration of seepage from sanitary sewers into the MS4.

3. The permittee shall prohibit the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into separate storm sewers. Public education programs for proper disposal of these materials shall be included in the SWMP and publicized at least annually and shall include material for non-English speaking residents.

4. The permittee shall require the elimination of illicit connections as expeditiously as possible and the immediate cessation of improper disposal practices upon identification of responsible parties. The permittee shall describe its procedure for the identification, costing and elimination of illicit discharges. This information shall be included in the annual report required under Part I.E. below. Where elimination of an illicit connection within thirty (30) days is not possible, the permittee shall establish a schedule for the expeditious removal of the discharge. In the interim, the permittee shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

i. Spill Prevention and Response: The permittee shall implement procedures to prevent, contain, and respond to spills that may discharge into the MS4. The spill response procedures may include a combination of spill response actions by the permittee (and/or other public or private entities), and requirements for private entities through the permittee's sewer use ordinances. The discharges of materials resulting from spills is prohibited.

j. Industrial & High Risk Runoff: The permittee shall implement a program to identify, monitor, and control pollutants in storm water discharges to the MS4 from municipal landfills; hazardous waste treatment,

storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee determines is contributing a substantial pollutant loading to the MS4. A list of these facilities which discharge to the MS4 shall be

maintained and updated as necessary. This shall include industrial activities which are listed at 40 CFR §122.26(b)(14), which are required to obtain federal storm water permit coverage. The program shall include:

1. priorities and procedures for inspections and establishing and implementing control measures for such discharges;
2. a monitoring (or self-monitoring) program for facilities identified under this section, including the collection of quantitative data on the following constituents:
 - (a) any pollutants which the discharger may monitor for or are limited to in an existing NPDES permit for an identified facility;
 - (b) any information on discharges required under 40 CFR 122.21(g)(7)(iii) and (iv).
 - (c) any pollutant the permittee has a reasonable expectation is discharged in substantial quantity from the facility to the separate storm sewer system

Data collected by the industrial facility to satisfy the monitoring requirements of an NPDES or State discharge permit may be used to satisfy this requirement. The permittee may require the industrial facility to conduct self-monitoring to satisfy this requirement.

3. Alternative Certification: In lieu of monitoring, the permittee may accept a certification from a facility stating that raw and waste materials, final and intermediate products, by-products, material handling equipment or activities, and/or loading/unloading operations are not expected to be exposed to storm water for the certification period. The permittee shall still reserve the right to conduct and shall consider conducting site inspections for these facilities during the life of this permit.

k. Construction Site Runoff: The permittee shall implement a program to reduce the discharge of pollutants from construction sites into the MS4, including:

1. requirements for the use and maintenance of appropriate structural and non-structural best management practices to reduce pollutants discharged to the MS4 during the time construction is underway;
2. procedures for site planning which incorporate considerations for potential short term and long term water quality impacts to the MS4 and minimizes these impacts;
3. prioritized inspections of construction sites and enforcement of control measures;
4. appropriate education and training measures for construction site operators;
5. notification to appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff.

l. Public Education: The permittee shall implement a public education program including, but not limited to the following items. Cooperation should be sought with city and state agencies where necessary. This program shall also include material for non-English speaking residents.

1. A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials (e.g. floatables, industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4 (e.g. curb inlet stenciling, citizen "streamwatch" groups, "hotlines" for reporting dumping, outreach materials included in billings, public access/government cable channels, etc.);
2. a program to promote, publicize, and facilitate the proper management and disposal of used oil and household hazardous wastes;
3. a program to promote, publicize, and facilitate the proper use, application, and disposal of

pesticides, herbicides, and fertilizers by the public and commercial and private applicators and distributors;

4. where applicable and feasible, the permittee should publicize those best management practices (including but not limited to the use of reformulated or redesigned products, substitution of less toxic materials, and improvements in housekeeping) used by the permittee that facilitate better use, application, and/or disposal of materials identified in 1.1 and 1.2 above.

2. Deadlines for Program Compliance. Except as provided in PART II, and Part I.B.7. compliance with the storm water management program shall be required within **180** days from the effective date of the permit.
3. Roles and Responsibilities of Permittee: The Storm Water Management Program shall clearly identify the roles and responsibilities of the permittee and any party impacting its efforts to comply with this permit.
4. Legal Authority: The permittee and/or cooperating agencies shall ensure that they have and maintain legal authority to control discharges to and from those portions of the MS4 which it owns or operates. This legal authority may be a combination of statute, ordinance, permit, contract, or an order to:
 - a. Control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;
 - b. Prohibit illicit discharges to the MS4;
 - c. Control the discharge of spills and the dumping or disposal of materials other than storm water (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;
 - d. Control through interagency or inter-jurisdictional agreements the contribution of pollutants from one portion of the MS4 to another;
 - e. Require compliance with conditions in ordinances, permits, contracts or orders; and
 - f. Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance with permit conditions.

5. Storm Water Management Program Resources The permittee shall provide adequate finances, staff, equipment, and support capabilities to implement its SWMP.

6. Storm Water Management Program Review and Modification

a. Program Review: The permittee shall participate in an annual review of its current or modified SWMP in conjunction with preparation of the annual report required under Part I.E. This annual review shall include:

1. A review of the status of program implementation and compliance with program elements and other permit conditions as necessary;
2. An assessment of the effectiveness of controls established by the SWMP;
3. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings;
4. An assessment of any SWMP modifications needed to comply with the CWA §402(p)(3)(B)(iii) requirement to reduce the discharge of pollutants to the maximum extent practicable (MEP).
5. An annual public informational meeting held within two months of submittal of the Annual report.

b. Program Modification: The permittee may modify the SWMP in accordance with the following procedures:

1. The approved SWMP shall not be modified by the permittee(s) without the prior approval of the Director, unless in accordance with items 2. or 3. below.
2. Modifications adding (but not subtracting or replacing) components, controls, or requirements to the approved SWMP may be made by the permittee at any time upon written notification to the Director.
3. Modifications replacing an ineffective or unfeasible BMP specifically identified in the SWMP with an alternative BMP may be requested at any time. Unless denied by the Director, the modification shall be deemed approved and shall be implemented by the permittee 60 days from submittal of the request. Such requests must include the following:

(a) an analysis of why the BMP is ineffective or infeasible (including cost prohibitive),

(b) expectations on the effectiveness of the replacement BMP, and

(c) an analysis of why the replacement BMP is expected to achieve the goals of the BMP to be replaced.

4. Modification requests and/or notifications must be made in writing and signed in accordance with Part I.F.

c. Modifications required by the Permitting Authority: The permitting authority may require the permittee to modify the SWMP as needed to:

1. Address impacts on receiving water quality caused or contributed to by discharges from the MS4;

2. Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements; or

3. Include such other conditions deemed necessary by the Director to comply with the goals and requirements of the Clean Water Act.

Modifications requested by the Director shall be made in writing and set forth a time schedule for the permittee to develop the modification(s).

C. WET WEATHER MONITORING AND REPORTING REQUIREMENTS

1. Storm Event Discharges. The permittee shall implement a wet weather monitoring program for the MS4 to provide data necessary to assess the effectiveness and adequacy of control measures implemented under the SWMP; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal, pollutants in discharges from all major outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation.

The permittee is responsible for conducting any additional monitoring necessary to accurately characterize the quality and quantity of pollutants discharged from the MS4. Improvement in the quality of discharges from the MS4 will be assessed based on the

necessary monitoring information required by this section, along with any additional monitoring which is made available. There have been no effluent limits established for this draft permit. Numeric effluent limits may be established in the next permit to control impacts on water quality, to improve aesthetics, or for other reasons as necessary.

a. Representative Monitoring: The permittee shall monitor representative outfalls, internal sampling stations, and/or instream monitoring locations to characterize the quality of storm water discharges from the MS4. Within 90 days after the effective date of this permit, the permittee will submit its proposed sampling plan to the EPA and MA DEP for review. The permittee shall choose locations representing different land uses, with a focus on what it considers priority areas, such as an outfall in the vicinity of a public beach. The plan shall outline the parameters to be sampled, the frequency of sampling and reporting of results. This submittal shall also include any related monitoring which the permittee has done since its MS4 permit application was originally submitted. Unless disapproved by the EPA or MA DEP within 30 days after its submittal, the proposed sampling plan shall be deemed approved.

The sampling locations which the permittee submitted in its letter of March 25, 1998 to EPA appear to be adequate. These locations shall be monitored at least three times per year (spring, summer and fall) for all the parameters suggested, including cadmium and replacing oil & grease with Total Petroleum Hydrocarbons (TPH). The summer sampling event shall consist of composite samples, which shall be composed of, at a minimum, samples taken at hours 0 (pre-runoff), 4, 8, 12, 16 and 20. These samples shall be flow composited.

Instream sampling: This sampling is required as a supplement to the outfall monitoring as follows:

- 1) The mouth of the Mill Brook Conduit shall be grab sampled for fecal coliform during the spring and summer sampling seasons;
- 2) the high zinc load that was found during the Blackstone River Initiative (BRI) sampling from the Mill Brook conduit shall be investigated. Findings shall be reported in the annual report;

- 3) the two instream locations to be sampled are:
- a. Sampling station 00 from the BRI study; and
 - b. A station downstream of where Beaver Brook and Tatnuck Brook completely mix, but above the Kettle Brook confluence

These two stations will be monitored during the spring and summer sampling events. The sampling parameters will be identical to those of the outfall sampling, with the addition of flow at station 00. Similar to the outfall monitoring, the summer sampling event shall

be conducted with composite samples. At station 00, flow can be determined from measuring the distance from a fixed point on the bridge to the water surface. The EPA will provide information on the relationship between this stage measurement and stream flows. The second sampling station can be flow composited using flow data derived from Station 00. For all instream sampling events, sampling shall be conducted during wet weather.

b. Alternate representative monitoring locations may be substituted for just cause during the term of the permit. Requests for approval of alternate monitoring locations shall be made to the Director in writing and include the rationale for the requested monitoring station relocation. Unless disapproved by the Director, use of an alternate monitoring location may commence thirty (30) days from the date of the request.

2. Storm Event Data: For Part I.C.1.a - Representative Monitoring only - quantitative data shall be collected to estimate pollutant loadings and event mean concentrations for each parameter sampled. In addition to the parameters which are to be sampled for in the sampling plan to be submitted, the permittee shall maintain records of the date and duration (in hours) of the storm event(s) sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration (in hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; an estimate of the total volume (in gallons) of the discharge sampled and a description of the presence and extent of floatable debris, oils, scum, foam, solids or grease in any storm water discharges or in the receiving waters.

3. Sample Type, Collection, and Analysis: The following requirements apply only to samples collected for Part C.1.a - Representative Monitoring.
 - a. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one grab sample may be taken.
 - b. Grab samples taken during the first two hours of discharge shall be used for the analysis of pH, temperature, Total Petroleum Hydrocarbons (TPH), fecal coliform and residual chlorine. For all other parameters, data shall be reported for flow weighted composite samples as described on Page 15.
 - c. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.25 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Composite samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes.
 - d. Analysis and collection of samples shall be conducted in accordance with the methods specified at 40 CFR Part 136. Where an approved Part 136 method does not exist, any available method may be used.

4. Sampling Waiver. When a discharger is unable to collect samples required by Part I.C.1.a (Representative Monitoring) due to adverse climatic conditions, the discharger must submit in lieu of sampling data a description of why samples could not be collected, including available documentation of the event. Adverse climatic conditions which may prohibit the collection of samples include weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.) or otherwise make the collection of a sample impracticable (drought, extended frozen conditions, etc.).

5. Wet Weather Screening Program: The permittee shall implement a program to identify, investigate, and address areas within their jurisdiction that may be contributing excessive levels of pollutants to the MS4. The wet weather screening program:
 - a. Shall screen the MS4, in accordance with the procedures specified in the SWMP, at least once during the permit term.
 - b. Shall specify the sampling and non-sampling techniques (such as observations or quantitative methods), to be used for initial screening and follow-up purposes. For samples collected for screening purposes only, sample collection and analysis need not conform to the requirements of 40 CFR Part 136 and are not subject to the requirements of Paragraphs 1, 2, and 3 above.

D. DRY WEATHER DISCHARGES

1. Dry Weather Screening Program: The permittee shall continue ongoing efforts to detect the presence of illicit connections and improper discharges to the MS4. All major outfalls identified in the Part I application and all other areas (but not necessarily all outfalls) of the MS4 must be screened at least once during the permit term. A schedule of inspections shall be identified to support activities undertaken in accordance with Part I.B.2.g. and may be in conjunction with any activities undertaken in accordance with Part I.C.. The schedule of inspections shall be included in the annual report Part I.E.
2. Screening Procedures: Screening methodology may be developed and/or modified based on experience gained during actual field screening activities and need not conform to the protocol at 40 CFR §122.26(d)(1)(iv)(D).
3. Follow-up on Dry Weather Screening Results: The permittee shall implement a program to locate and eliminate suspected sources of illicit connections and improper disposal identified during dry weather screening activities. Follow-up activities shall be prioritized on the basis of:
 - a. magnitude and nature of the suspected discharge;
 - b. sensitivity of the receiving water; and
 - c. other relevant factors.

E. ANNUAL REPORT:

The permittee shall prepare an annual system-wide report to be submitted no later than April 1, 2000 and annually thereafter. The report shall include the following separate sections, with an overview for the entire MS4:

1. The status of implementing the storm water management program(s) (status of compliance with any schedules established under this permit shall be included in this section);
2. Proposed changes to the storm water management program(s);
3. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (d)(2)(v);
4. An evaluation of all the authorized non-storm water discharges at Part I.B.2.g. and whether it was determined that any controls or restrictions are necessary for any of these and descriptions of such;
5. A summary of the data, including monitoring data, that is accumulated throughout the reporting year; a portion of this data shall be compared to National Urban Runoff Program (NURP) values, as was done in the Part II application and to ambient water quality criteria.
6. A revised list of all current separate storm sewer outfalls and their locations, reflecting changes of the previous year and justification for any new outfalls.
7. Annual expenditures for the reporting period, with a breakdown of the major elements of the storm water management program, and the budget for the year following each annual report;
8. A summary describing the number and nature of enforcement actions, inspections, and public education programs;
9. Identification of water quality improvements or degradation; and,

10. Update on the illicit connection program to include the total number of identified connections with an estimate of flow for each, total number of connections found in the reporting period to include how they were found (i.e. citizen complaint, routine inspection), number of connections corrected in the reporting period to include total estimated flow, and the financing required for such to include how the repairs were financed (i.e. by the permittee, costs provided to the permittee by the responsible party, repairs effected and financed by the responsible party). As an attachment to the report, the permittee should submit any existing tracking system information. Also include updates to schedules and a summary of activities conducted under Parts I.C. and I.D.

F. CERTIFICATION AND SIGNATURE OF REPORTS

All reports required by the permit and other information requested by the Director shall be signed and certified in accordance with the General Conditions - Part II of this permit.

G. REPORT SUBMISSION

1. All original, signed notifications and reports required herein, shall be submitted to the Director at the following address:

U.S. Environmental Protection Agency
Water Technical Unit (SEW)
P.O. Box 8127
Boston, MA 02114
Attn: George Papadopoulos, Permit Writer

2. Signed copies of all other notifications and reports shall be submitted to the State at:

Massachusetts Department of Environmental Protection
Division of Watershed Management
Watershed Planning and Permitting Section
627 Main Street
Worcester, Massachusetts 01608

H. RETENTION OF RECORDS

The permittee shall retain all records of all monitoring information, copies of all reports required by this permit and records of all other data required by or used to demonstrate compliance with this permit, until at least three years after coverage under this permit terminates. This period may be modified by alternative provisions of this permit or extended by request of the Director at any time. The permittee shall retain the latest approved version of the SWMP developed in accordance with Part I of this permit until at least three years after coverage under this permit terminates.

I. STATE PERMIT CONDITIONS

1. This Discharge Permit is issued jointly by the U. S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection under Federal and State law, respectively. As such, all the terms and conditions of this permit are hereby incorporated into and constitute a discharge permit issued by the Commissioner of the Massachusetts DEP pursuant to M.G.L. Chap. 21, §43.
2. Each Agency shall have the independent right to enforce the terms and conditions of this Permit. Any modification, suspension or revocation of this Permit shall be effective only with respect to the Agency taking such action, and shall not affect the validity or status of this Permit as issued by the other Agency, unless and until each Agency has concurred in writing with such modification, suspension or revocation. In the event any portion of this Permit is declared, invalid, illegal or otherwise issued in violation of State law such permit shall remain in full force and effect under Federal law as an NPDES Permit issued by the U.S. Environmental Protection Agency. In the event this Permit is declared invalid, illegal or otherwise issued in violation of Federal law, this Permit shall remain in full force and effect under State law as a Permit issued by the Commonwealth of Massachusetts.

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ATTACHMENT A
CITY OF WORCESTER
OUTFALL INFORMATION

OUTFALL ID	GRID	LOCATION	OUTFALL SIZE	RECEIVING
2	5F	MOUNTAIN ST WEST	48 inch storm drain	KENDRICK B
6	6F	ARARAT ST	48 inch storm drain	UNNAMED B
7	7F	BROOKS ST	24 inch storm drain	KENDRICK B
8	6D	GROVE ST	36 inch storm drain	UNNAMED B
10	8F	W BOYLSTON DR/HWY	15 inch storm drain	MILL BROOK
11	7F	NEW BOND ST	24 inch storm drain	MILL BROOK
12	7E	INDIAN HILL RD NEAR NASHOBA PL	18 inch storm drain	INDIAN LAK
16	7E	INDIAN LAKE RD	36 inch storm drain	INDIAN LAK
17	7E	SHOREHAM RD	42 inch storm drain	INDIAN LAK
27	10B	EDWIDGE ST	48 inch storm drain	UNNAMED B
32	10C	MOWER ST	42 inch storm drain	TATNUCK B
38	10C	MAPLE LEAF RD	48 inch storm drain	TATNUCK B
39	11D	CHANDLER ST	42 inch storm drain	OVERLAND
40	12D	BEAV BK PLAYGROUND	42 inch storm drain	BEAVER BRO
45	13D	BEAVER BROOK PKWY	60 inch storm drain	BEAVER BRO
46	12E	BEAVBK PLG/CHANDLER	48 inch storm drain	BEAVER BRO
56	12E	BEAVBK PLG/CHANDLER	15 inch storm drain	BEAVER BRO
58	13E	MID BEAV BK PLG	33 X 48 inch storm drain	BEAVER BRO
62	14D	LAKESIDE AVE	21 inch storm drain	COES POND
65	15D	STAFFORD ST	48 inch storm drain	CURTIS PON
68	14D	MILL/PARK/MAIN	21 inch storm drain	BEAVER BRO
69	14D	MILL/PARK/MAIN	12 inch storm drain	BEAVER BRO
70	14D	MAIN ST	24 inch storm drain	BEAVER BRO
72	13D	OLIVER ST/PARK AVE	24 X 36 inch storm drain	BEAVER BRO
74	14D	WEBSTER ST	18 inch storm drain	MIDDLE RIV
75	15D	CAMBRIDGE ST	24 inch storm drain	MIDDLE RIV
77	15D	LYMAN ST	24 inch storm drain	CURTIS PON
78	15C	MAIN ST/TOWN LINE	12 inch storm drain	UNNAMED P
80	16C	STAFFORD ST	39 inch storm drain	KETTLE BRO
81	16C	JAMES ST	36 inch storm drain	KETTLE BRO
84	16E	SOUTHBRIDGE ST	54 inch storm drain	OVERLAND
85	15D	HWY/RR/S OF RIVER	36 inch storm drain	MIDDLE RIVE

CITY OF WORCESTER
OUTFALL INFORMATION

OUTFALL ID	GRID	LOCATION	OUTFALL SIZE	RECEIVING WATER
86	16E	SOUTHBRIDGE ST	24 inch storm drain	OVERLAND FLOW TO MIDDLE RIVER
87	15E	CAMP ST	24 X 36 inch storm drain	MIDDLE RIVER
88	15E	SOUTHBRIDGE ST/1WY	18 inch storm drain	BLACKSTONE RIVER
90	16F	FALMOUTH ST NEAR RR	24 inch storm drain	BLACKSTONE RIVER
91	17F	WISER AVE NEAR RR	30 inch storm drain	OVERLAND FLOW TO BLACKSTONE RIVER
92	17F	AGRAND ST/WARMLAND	36 inch storm drain	OVERLAND FLOW TO BLACKSTONE RIVER
93	18F	SEWAGE TMT PLANT	36 inch storm drain	WORCESTER SEWAGE TREATMENT PLANT
94	16G	MILLBURY ST	42 inch storm drain	BLACKSTONE RIVER
95	17G	MILLBURY ST	21 inch storm drain	BLACKSTONE RIVER
108	14H	JOLMA ROAD	12 inch storm drain	UNNAMED BROOK TO QUINSIGAMOND LAKE
109	14H	BRANDY LANE	36 inch storm drain	UNNAMED BROOK TO QUINSIGAMOND LAKE
110	12H	AYRSHIRE/COBURN	60 inch storm drain	UNNAMED BROOK TO QUINSIGAMOND LAKE
114	11H	BELMONT/LAKE	36 inch storm drain	QUINSIGAMOND LAKE
115	11H	SHERBROOK/LAKE AVE	36 inch storm drain	QUINSIGAMOND LAKE
119	9H	PLANT ST	36 inch storm drain	COAL MINE BROOK
124	7F	W BOYLSTON ST/BOURNE ST	36 inch storm drain	MILL BROOK
125	7F	W BOYLSTON ST/SUMMERHILL ST	36 inch storm drain	MILL BROOK TRIB
128	7G	CONSTITUTION AVE	42 inch storm drain	POOR FARM BROOK
129	7H	PLANT/W BOYLSTON	30 inch storm drain	POOR FARM BROOK
130	7F	BROOKS ST	30 inch storm drain	KENDRICK BROOK
131	6G	CLARK ST	36 inch storm drain	POOR FARM BROOK
134	6F	W BOYLSTON ST	36 inch storm drain	KENDRICK BROOK
135	6F	EAMES ST	24 inch storm drain	KENDRICK BROOK
138	5F	HIGGINS ST	30 inch storm drain	KENDRICK BROOK
139	8F	NEPONSET/W BOYLSTON	12 inch storm drain	MILL BROOK
140	9F	W BOYLSTON TER/GOLD STAR	18 inch storm drain	MILL BROOK
141	9F	W BOYLSTON TER/GOLD STAR	24 inch storm drain	MILL BROOK
142	9F	GENNIE ST/DIST CTR	36 inch storm drain	MILL BROOK
143	9F	GENNIE ST/DIST CTR	66 inch storm drain	MILL BROOK
144	9F	GENNIE ST	15 inch storm drain	MILL BROOK
192	15F	PERRY/MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
194	15F	MAXWELL/MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER

CITY OF WORCESTER
OUTFALL INFORMATION

OUTFALL ID	GRID	LOCATION	OUTFALL SIZE	RECEIVING WATER
202	8D	SALISBURY ST	3.6 inch storm drain	UNNAMED BROOK TO FLAGG ST SCHOOL
1007	13C	WILLIAMSBURG DR	6.0 inch storm drain	UNNAMED BROOK TO WILLIAMS MILLPOND
1008	15D	JACQUES ST	1.5 inch storm drain	MIDDLE RIVER
1012	17G	MILLBURY ST	1.2 inch storm drain	BLACKSTONE RIVER
1013	17G	MILLBURY ST	1.2 inch storm drain	BLACKSTONE RIVER
1014	18G	MILLBURY ST	1.2 inch storm drain	BLACKSTONE RIVER
1015	18G	MILLBURY ST	1.2 inch storm drain	BLACKSTONE RIVER
1016	16E	HOPE AVE/1WY	2.4 inch storm drain	LEESVILLE POND
1019	15E	MIDDLE RIV/1WY	1.2 inch storm drain	MIDDLE RIVER
1020	15E	MIDDLE RIV/1WY	1.2 inch storm drain	MIDDLE RIVER
1021	15E	MIDDLE RIV/1WY	4.8 inch storm drain	MIDDLE RIVER
1022	15E	MIDDLE RIV/1WY	4.8 inch storm drain	MIDDLE RIVER
1039	7F	STORES ST/SHORE RD	2.4 inch storm drain	DITCH TO MILL BROOK TRIB
1040	7F	STORES ST/SHORE DR	2.4 inch storm drain	DITCH TO MILL BROOK TRIB
1043	17H	ROUTE 20	1.2 inch storm drain	BROAD MEADOW BROOK
1045	8H	LAKE AVE	3.6 inch storm drain	QUINSIGAMOND LAKE
1046	9H	LAKE AVE	3.6 inch storm drain	QUINSIGAMOND LAKE
1048	15D	STAFFORD ST	3.0 inch storm drain	CURTIS POND
1049	17G	MILLBURY ST	1.2 inch storm drain	BLACKSTONE RIVER
1050	17G	MILLBURY ST	1.2 inch storm drain	BLACKSTONE RIVER
1051	8F	RT 190/WEST OF KENWOOD AVE	1.8 inch storm drain	MILL BROOK
1052	6F	HIGGINS ST	1.2 inch storm drain	KENDRICK BROOK
2003	16C	STAFFORD ST	3.0 inch storm drain	KETTLE BROOK
2004	16C	JAMES ST	1.2 inch storm drain	KETTLE BROOK
2006	17G	MILLBURY ST	3.0 inch storm drain	BLACKSTONE RIVER
3000	15G	DUNKIRK AND HAMPTON	6.0 inch storm drain	BROAD MEADOW BROOK
3001	5F	MOUNTAIN ST WEST	3.5 X 4 inch storm drain	KENDRICK BROOK
3002	10B	BAILEY ST AT AIRPORT DR	3.6 inch storm drain	UNNAMED BROOK TO TATNUCK BROOK
3003	6F	ARARAT ST	1.8 inch storm drain	UNNAMED BROOK TO KENDRICK BROOK

**DOCUMENTS IN SUPPORT OF REBUTTAL
COMMENTS OF JOINT TEST CLAIMANTS
CALIFORNIA REGIONAL WATER QUALITY CONTROL
BOARD, SAN DIEGO REGION
ORDER NO. R9-2010-0016, 11-TC-03**

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Jacks v. City of Santa Barbara (2017) 3 Cal. 5th 248

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Division of Occupational Safety & Health v. State Bd. Of Control (1987) 189 Cal. App. 3d 794

Virginia Dept. of Transp. v. U.S. EPA, Civil Action No. 1:12-CV-775 (U.S. District Court, E.D. Va.) (January 3, 2013)

Tab 2, Federal Statutes and Regulations

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40 C.F.R. § 122.21

40 C.F.R. § 122.42

40 C.F.R. § 123.25

40 C.F.R. § 124.8

Proposed rule, National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 53 Fed. Reg. 49416 (December 7, 1988) (excerpts)

Tab 3, California Statutes

Evid. Code § 452

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Tab 4, Administrative Decisions and Orders

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State Water Resources Control Board, Water Quality Order No. 97-03-DWQ (excerpts)

TAB 1

Jacks v. City of Santa Barbara

Supreme Court of California

June 29, 2017, Filed

S225589

Reporter

3 Cal. 5th 248 *; 397 P.3d 210 **; 219 Cal. Rptr. 3d 859 ***; 2017 Cal. LEXIS 4769 ****; 2017 WL 2805638

ROLLAND JACKS et al., Plaintiffs and Appellants, v. CITY OF SANTA BARBARA, Defendant and Respondent.

Subsequent History: Reported at Jacks v. City of Santa Barbara, 2017 Cal. LEXIS 5545 (Cal., June 29, 2017)

Rehearing denied by Jacks v. City of Santa Barbara, 2017 Cal. LEXIS 6402 (Cal., Aug. 16, 2017)

Prior History: [****1] Superior Court of Santa Barbara County, No. 1383959, Thomas Pearce Anderle, Judge. Court of Appeal, Second Appellate District, Division Six, No. B253474.

Jacks v. City of Santa Barbara, 234 Cal. App. 4th 925, 184 Cal. Rptr. 3d 539, 2015 Cal. App. LEXIS 178 (Cal. App. 2d Dist., Feb. 26, 2015)

Core Terms

customers, franchise, franchise fee, surcharge, charges, taxes, electricity, Ordinance, City's, purposes, ratepayers, local government, value of the franchise, voter approval, negotiations, costs, reasonable relation, courts, rates, requires, incidence, gross receipts, italics, voters, municipality, payor, collected, services, parties, bills

Case Summary

Overview

HOLDINGS: [1]-In a case in which plaintiffs

challenged a city's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity within the city, the Supreme Court held that to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred; [2]-Liberally construed, the first amended complaint and the stipulated facts adequately alleged the basis for a claim that the surcharge bore no reasonable relationship to the value of the franchise, and was therefore a tax requiring voter approval under Proposition 218; accordingly, the trial court erred in granting judgment on the pleadings to the city; [3]-However, the facts on which plaintiffs relied in seeking summary adjudication did not establish their claim that the surcharge was a tax.

Outcome

Judgment of court of appeal affirmed in part and reversed in part; case remanded with directions.

LexisNexis® Headnotes

Governments > Local Governments > Finance

HN1 [↓] **Local Governments, Finance**

A charge imposed in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise.

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real
Property Taxes > Assessment & Valuation

Governments > State & Territorial
Governments > Finance

Governments > State & Territorial
Governments > Legislatures

HN2[↓] **Local Governments, Finance**

State voters have imposed various limitations upon the authority of state and local governments to impose taxes and fees. Proposition 13, which was adopted in 1978, set the assessed value of real property as the full cash value on the owner's 1975-1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value. Cal. Const., art. XIII A, §§ 1, 2. In addition, to prevent tax savings related to real property from being offset by increases in state and local taxes, Proposition 13 required approval by two-thirds of the members of the legislature in order to increase state taxes, and required approval by two-thirds of the local electors of a city, county, or special district in order for such a local entity to impose special taxes. Cal. Const., art. XIII A, §§ 3, 4.

Governments > Local Governments > Finance

HN3[↓] **Local Governments, Finance**

The term "special taxes" in Cal. Const., art. XIII A, § 4, means taxes which are levied for a specific purpose. In addition, a "special tax" does not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes. Gov. Code, § 50076.

Governments > Local Governments > Finance

HN4[↓] **Local Governments, Finance**

Proposition 62, which added a new article to the California Government Code, Gov. Code, §§ 53720-53730, requires that all new local taxes be approved by a vote of the local electorate.

Governments > Local Governments > Charters

Governments > Local Governments > Finance

HN5[↓] **Local Governments, Charters**

Proposition 218 amended the California Constitution to add voter approval requirements for general and special taxes, thereby binding charter jurisdictions. Cal. Const., art. XIII C, §§ 1, 2.

Evidence > Burdens of Proof > Allocation

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real
Property Taxes > Assessment & Valuation

HN6[↓] **Burdens of Proof, Allocation**

Proposition 13 was not intended to limit traditional benefit assessments. It requires an agency proposing an assessment on property to determine the proportionate special benefit to be derived by each parcel subject to the assessment; to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. It also requires the agency to hold a public hearing, and bars imposition of the assessment if a majority of parcel owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel.

In the event legal action is brought contesting an assessment, the agency has the burden to establish that the burdened properties receive a special benefit and the assessment is proportional to the benefits conferred. Cal. Const., art. XIII D, §§ 2, subd. (b).

Constitutional Law > State Constitutional Operation

Evidence > Burdens of Proof > Allocation

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

HN7 [📄] Constitutional Law, State Constitutional Operation

Proposition 26 amended the California Constitution to provide that for purposes of article XIII C, which addresses voter approval of local taxes, "tax" means any levy, charge, or exaction of any kind imposed by a local government, Cal. Const., art. XIII C, § 1, subd. (e), except (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and (7) property-related assessments and fees as allowed under article XIII D. The local government bears the burden of establishing the exceptions. Cal. Const., art. XIII C, § 1, subd. (e).

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

HN8 [📄] Local Governments, Finance

If an assessment for improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive. But if the assessment exceeds the actual cost of the improvement, the exaction is a tax and not an assessment. With respect to costs, Proposition 13's goal of providing effective property tax relief is promoted rather than subverted by shifting costs to those who generate the costs. However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes.

Governments > Local Governments > Finance

HN9 [📄] Local Governments, Finance

Restricting allowable fees to the reasonable cost or value of the activity with which the charges are associated serves Proposition 13's purpose of limiting taxes. If a state or local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees. Therefore, to the extent charges exceed the rationale underlying the charges, they are taxes.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Finance

HN10 [📄] Public Improvements, Bridges & Roads

A franchise to use public streets or rights-of-way is a form of property, and a franchise fee is the purchase price of the franchise. Historically, franchise fees have not been considered taxes. Nothing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses. Cal. Const., arts. XIII A, § 3, subd. (b)(4), XIII C. This understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Proposition 26, the purpose of which was to reinforce the voter approval requirements set forth in Propositions 13 and 218. Although Proposition 26 strengthened restrictions on taxation by expansively defining "tax" as any levy, charge, or exaction of any kind imposed by a local government, Cal. Const., art. XIII C, § 1, subd. (e), it provided an exception for a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property. Art. XIII C, § 1, subd. (e)(4).

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Finance

[HN11](#) **Public Improvements, Bridges & Roads**

The Broughton Act's provision that a franchise fee be based on the receipts from the use, operation, or possession of the franchise results in a complicated calculation of franchise fees. Usually, some portion of a utility's rights-of-way are on private property or property outside the jurisdiction of the city or county granting the franchise, and the utility's gross receipts attributable to a particular franchise must be reduced in proportion to the utility's rights-of-way that are not within the franchise agreement. In addition, because gross receipts arise from all of a utility's operative property, such as equipment and

warehouses, the portion of gross receipts attributable to property other than the franchise must be excluded from the calculation of the franchise fee. Finally, if a utility also provides service under a constitutional franchise - for example, where it provides artificial light under a constitutional franchise in the same area in which it provides electricity under a franchise agreement entered pursuant to the Broughton Act - the franchise fee applies only to the gross receipts from the provision of services under the nonconstitutional franchise.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Utility Companies > Rates

[HN12](#) **Public Utility Commissions, Authorities & Powers**

The California Public Utilities Commission sets the rates of a publicly regulated utility to permit the utility to recover its costs and expenses in providing its service, and to receive a fair return on the value of the property it uses in providing its service. Among a utility's costs and expenses are government fees and taxes.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Utility Companies > Rates

[HN13](#) **Public Utility Commissions, Authorities & Powers**

The California Public Utilities Commission has established a procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. When a local government imposes

taxes or fees which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory, a utility may file an advice letter seeking approval to charge local government fee surcharges. Such surcharges shall be included as a separate item or items to bills rendered to applicable customers. Each surcharge shall be identified as being derived from the local governmental entity responsible for it.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Local Governments > Finance

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN14 [⚡] **Standards of Review, De Novo Review**

Whether a charge is a tax or a fee is a question of law for the appellate courts to decide on independent review of the facts.

Governments > Local Governments > Finance

Governments > Legislation > Interpretation

HN15 [⚡] **Local Governments, Finance**

The provisions of Proposition 218 shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Finance

HN16 [⚡] **Public Improvements, Bridges & Roads**

Sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. But to constitute compensation for the value received, the fees must reflect a reasonable estimate of the value of the franchise.

Governments > Local Governments > Finance

HN17 [⚡] **Local Governments, Finance**

In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. In determining whether a charge is a tax or a fee, a court looks to whether the primary purpose of a charge was to generate revenue. In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a government asset rather than compensation for a cost. Consequently, the revenue generated by the fee is available for whatever purposes the government chooses rather than tied to a public cost. The aspect of the transaction that distinguishes the charge from a tax is the receipt of value in exchange for the payment.

Governments > Local Governments > Finance

HN18 [⚡] **Local Governments, Finance**

A franchise fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters. Its value may be based on bona fide negotiations concerning the property's value, as well as other indicia of worth. Consistent with the principles that govern other fees, to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil
 Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Judgments > Pretrial
 Judgments > Judgment on Pleadings

HN19 [⚖] **Standards of Review, De Novo Review**

A motion for judgment on the pleadings presents the question of whether the plaintiff's complaint states facts sufficient to constitute a cause of action against the defendant. The trial court generally considers only the allegations of the complaint, but may also consider matters that are subject to judicial notice. Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties. The court's primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory. An appellate court independently reviews a trial court's order on such a motion.

Headnotes/Syllabus

Summary

[*248] CALIFORNIA OFFICIAL REPORTS
 SUMMARY

Plaintiffs filed a class action complaint challenging a city's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity within the city. The utility transferred the revenues from the surcharge to the city. The city contended this separate charge was the fee paid by the utility for the privilege of using city property in connection with the delivery of electricity. The superior court granted the city's motion for judgment on the pleadings, concluding that the surcharge was not a tax and therefore was not subject to the voter approval requirements of Prop. 218. (Superior Court of Santa Barbara County, No. 1383959, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No.

B253474, reversed the trial court's judgment, holding that the surcharge was a tax, and therefore required approval under Prop. 218.

The Supreme Court affirmed the judgment of the Court of Appeal to the extent it reversed the trial court's grant of the city's motion for judgment on the pleadings, reversed the judgment to the extent the Court of Appeal directed the trial court to grant plaintiffs' motion for summary adjudication, and remanded the case with directions. The court held that to constitute a valid franchise fee under Prop. 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred. Liberally construed, the first amended complaint and the stipulated facts adequately alleged the basis for a claim that the surcharge bore no reasonable relationship to the value of the franchise, and was therefore a tax requiring voter approval under Prop. 218. Accordingly, the trial court erred in granting judgment on the pleadings to the city. However, the facts on which plaintiffs relied in seeking summary adjudication did not establish their claim that the surcharge was a tax. (Opinion by Cantil-Sakauye, C. J., with Werdegar, Corrigan, Liu, Cuéllar, and Krueger, JJ., concurring. Dissenting opinion by Chin, J. (see p. 274).)

Headnotes

CALIFORNIA OFFICIAL REPORTS
 HEADNOTES

CA(1) [⚖] (1)

**Municipalities § 96—Franchise Fee—Tax—
 Reasonable Relationship—Value of Franchise.**

A charge imposed in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise.

CA(2) [⚖] (2)

Taxation § 1—Constitutional Limitations—Voter Approval—Special Taxes.

State voters have imposed various limitations upon the authority of state and local governments to impose taxes and fees. Prop. 13, which was adopted in 1978, set the assessed value of real property as the full cash value on the owner's 1975–1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value (Cal. Const., art. XIII A, §§ 1, 2). In addition, to prevent tax savings related to real property from being offset by increases in state and local taxes, Prop. 13 required approval by two-thirds of the members of the Legislature in order to increase state taxes, and required approval by two-thirds of the local electors of a city, county, or special district in order for such a local entity to impose special taxes (Cal. Const., art. XIII A, §§ 3, 4).

CA(3)[↓] (3)

Municipalities § 34—Fiscal Affairs—Special Taxes—Reasonable Cost.

The term “special taxes” in Cal. Const., art. XIII A, § 4, means taxes which are levied for a specific purpose. In addition, a “special tax” does not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes (Gov. Code, § 50076).

CA(4)[↓] (4)

Municipalities § 34—Fiscal Affairs—New Taxes—Voter Approval.

Prop. 62 requires that all new local taxes be approved by a vote of the local electorate.

CA(5)[↓] (5)

Municipalities § 34—Fiscal Affairs—General and Special Taxes—Voter Approval—Charter Jurisdictions.

Prop. 218 amended the California Constitution to add voter approval requirements for general and special taxes, thereby binding charter jurisdictions (Cal. Const., art. XIII C, §§ 1, 2).

CA(6)[↓] (6)

Taxation § 1—Assessment on Property—Special Benefit.

Prop. 13 was not intended to limit traditional benefit assessments. It requires an agency proposing an assessment on property to determine the proportionate special benefit to be derived by each parcel subject to the [*250] assessment; to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. It also requires the agency to hold a public hearing, and bars imposition of the assessment if a majority of parcel owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel. In the event legal action is brought contesting an assessment, the agency has the burden to establish that the burdened properties receive a special benefit and the assessment is proportional to the benefits conferred (Cal. Const., art. XIII D, §§ 2, subd. (b), 4).

CA(7)[↓] (7)

Municipalities § 34—Fiscal Affairs—Local Taxes—Voter Approval—Specific Benefit—Reasonable Cost.

Prop. 26 amended the California Constitution to

provide that for purposes of article XIII C, which addresses voter approval of local taxes, “tax” means any levy, charge, or exaction of any kind imposed by a local government (Cal. Const., art. XIII C, § 1, subd. (e)), except (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and (7) property-related assessments and fees as allowed under article XIII D. The local government bears the burden of establishing the exceptions (Cal. Const., art. XIII C, § 1, subd. (e)).

CA(8)[↓] (8)

Taxation § 1—Assessment on Property—Special Benefit—Reasonable Cost.

If an assessment for improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive. But if the assessment exceeds the actual cost of the improvement, the exaction is a tax and not an assessment. With respect to costs, Prop. 13's goal of providing effective property tax relief is promoted rather than subverted by shifting costs to those who generate the costs. However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes.

CA(9)[↓] (9)

Taxation § 1—Special Benefit—Reasonable Cost—Payor's Activities.

Restricting allowable fees to the reasonable cost or value of the activity [*251] with which the charges are associated serves Prop. 13's purpose of limiting taxes. If a state or local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees. Therefore, to the extent charges exceed the rationale underlying the charges, they are taxes.

CA(10)[↓] (10)

Municipalities § 96—Franchise Fee—Use of Rights-of-way.

A franchise to use public streets or rights-of-way is a form of property, and a franchise fee is the purchase price of the franchise. Historically, franchise fees have not been considered taxes. Nothing in Prop. 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses (Cal. Const., arts. XIII A, § 3, subd. (b)(4), XIII C). This understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Prop. 26, the purpose of which was to reinforce the voter approval requirements set forth in Props. 13 and 218. Although Prop. 26 strengthened restrictions on taxation by expansively defining “tax” as any levy, charge, or exaction of any kind imposed by a local government (Cal. Const., art. XIII C, § 1, subd. (e)), it provided an exception for a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property (Art. XIII C, § 1, subd. (e)(4)).

CA(11)[↓] (11)

Municipalities § 96—Franchise Fee—Calculation—Gross Receipts.

The Broughton Act's (Pub. Util. Code, § 6001 et seq.) provision that a franchise fee be based on the receipts from the use, operation, or possession of the franchise results in a complicated calculation of franchise fees. Usually, some portion of a utility's rights-of-way are on private property or property outside the jurisdiction of the city or county granting the franchise, and the utility's gross receipts attributable to a particular franchise must be reduced in proportion to the utility's rights-of-way that are not within the franchise agreement. In addition, because gross receipts arise from all of a utility's operative property, such as equipment and warehouses, the portion of gross receipts attributable to property other than the franchise must be excluded from the calculation of the franchise fee. Finally, if a utility also provides service under a constitutional franchise—for example, where it provides artificial light under a constitutional franchise in the same area in which it provides electricity under a franchise agreement entered pursuant to the Broughton Act—the franchise fee applies only to the gross receipts from the provision of services under the nonconstitutional franchise.

CA(12)[📄] (12)

Public Utilities § 9—Public Utilities Commission—Rates—Costs and Expenses.

The Public Utilities Commission sets the rates of a publicly regulated utility to permit the utility to recover its costs and expenses in providing its service, and to receive a fair return on the value of the property it uses in providing its service. Among a utility's costs and expenses are government fees and taxes.

CA(13)[📄] (13)

Public Utilities § 9—Public Utilities Commission—Rates—Surcharge.

The Public Utilities Commission has established a

procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. When a local government imposes taxes or fees which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory, a utility may file an advice letter seeking approval to charge local government fee surcharges. Such surcharges must be included as a separate item or items to bills rendered to applicable customers. Each surcharge must be identified as being derived from the local governmental entity responsible for it.

CA(14)[📄] (14)

Municipalities § 34—Fiscal Affairs—Taxes—Proposition 218—Liberal Construction.

The provisions of Prop. 218 must be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

CA(15)[📄] (15)

Municipalities § 96—Franchise Fee—Use of Rights-of-way—Value of Franchise.

Sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. But to constitute compensation for the value received, the fees must reflect a reasonable estimate of the value of the franchise.

CA(16)[📄] (16)

Municipalities § 34—Fiscal Affairs—Taxes—Revenue Purposes—Fee.

In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. In determining whether a charge is a tax or a fee, a court looks to whether the

primary purpose of a charge was to generate revenue. In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a government asset rather than compensation for a cost. Consequently, the revenue generated by the fee is available for whatever purposes the government chooses rather than tied to a public cost. The aspect of the transaction that distinguishes the charge from a tax is the receipt of value in exchange for the payment.

CA(17) [↓] (17)

Municipalities § 96—Franchise Fee—Tax—Voter Approval—Reasonable Relationship—Value of Franchise.

A franchise fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters. Its value may be based on bona fide negotiations concerning the property's value, as well as other indicia of worth. Consistent with the principles that govern other fees, to constitute a valid franchise fee under Prop. 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred.

CA(18) [↓] (18)

Municipalities § 34—Fiscal Affairs—Tax—Surcharge—Sale of Electricity—Reasonable Relationship—Value of Franchise—Voter Approval.

In a case in which plaintiffs challenged a city's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity within the city, the first amended complaint and the stipulated facts adequately alleged the basis for a claim that the surcharge bore no reasonable relationship to the value of the franchise, and was therefore a tax requiring voter approval under Prop. 218. Accordingly, the trial court erred in granting

judgment on the pleadings to the city.

[Cal. Forms of Pleading and Practice (2017) ch. 540, Taxes and Assessments, § 540.131; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 1.]

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Judges: Opinion by Cantil-Sakauye, C. J., with Werdegar, Corrigan, Liu, Cuéllar, and Kruger, JJ., concurring. Dissenting Opinion by Chin, J.

Opinion by: Cantil-Sakauye

Opinion

[*254]

[**212] [***862] **CANTIL-SAKAUYE, C. J.**—Pursuant to an agreement between Southern California Edison (SCE) and defendant City of Santa Barbara (the City), SCE includes on its electricity [****2] bills to customers within the City a separate charge equal to 1 percent of SCE's gross receipts from the sale of electricity within the City, and transfers the revenues to the City. The City contends this separate charge, together with

another charge equal to 1 percent of SCE's gross receipts that SCE includes in its electricity rates, is the fee paid by SCE for the privilege of using City property in connection with the delivery of electricity. Plaintiffs Rolland [**213] Jacks and Rove Enterprises, Inc., contend the 1 percent charge that is separately stated on electricity bills is not compensation for the privilege of using City property, but is instead a tax imposed without voter approval, in violation of Proposition 218. (Cal. Const., art. XIII C, § 2, added by Prop. 218.)

As we explain below, the right to use public streets or rights-of-way is a property interest, and Proposition 218 does not limit the authority of government to sell or lease its property and spend the compensation it receives for whatever purposes it chooses. Therefore, charges that constitute compensation for the use of government property are not subject to Proposition 218's voter approval requirements. To constitute compensation for a property [****3] interest, however, the amount of the charge must bear a reasonable relationship to the value of the property interest; to the extent the charge exceeds any reasonable value of the interest, it is a tax and therefore requires voter approval.

The litigation below did not address whether the charges bear a reasonable relationship to the value of the property interests. Therefore, we affirm the judgment of the Court of Appeal to the extent it reversed the trial court's grant of the City's motion for judgment on the pleadings, but we reverse the Court of Appeal's order that the trial court grant summary adjudication to plaintiffs.

[**863] I. FACTS

The parties stipulated to the following facts in the trial court. Beginning in 1959, the City and SCE entered into a series of franchise agreements granting SCE the privilege to construct and use equipment along, over, and under the City's streets

to distribute electricity.¹ At issue in this case is an agreement [*255] the City and SCE began negotiating in 1994, when their 1984 agreement was about to expire. The 1984 agreement required SCE to pay to the City a fee equal to 1 percent of the gross annual receipts from SCE's sale of electricity within the City in [****4] exchange for the franchise granted by the City. During the course of extended negotiations regarding a new agreement, the City and SCE extended the terms of the 1984 agreement five times, from September 1995 to December 1999.

In the negotiations for a long-term agreement, the City pursued a fee equal to 2 percent of SCE's gross annual receipts from the sale of electricity within the City. At some point in the negotiations, SCE proposed that it would remit to the City as a franchise fee 2 percent of its gross receipts if the Public Utilities Commission (PUC) consented to SCE's inclusion of the additional 1 percent as a surcharge on its bills to customers. Based on SCE's proposal, the City and SCE tentatively agreed to a 30-year agreement that included the provisions for payment of 2 percent of gross receipts. Following notice and a hearing, the City Council of Santa Barbara adopted the agreement as City Ordinance No. 5135 on December 7, 1999, with a term beginning on January 1, 2000 (the 1999 agreement). The ordinance was not submitted to the voters for their approval.

The 1999 agreement divides its 30-year period into two terms. The first two years [****5] were the "initial term," during which SCE was required to pay the City an "initial term fee" equal to 1 percent of its gross receipts from the sale of electricity

¹ A franchise is a privilege granted by the government to a particular individual or entity rather than to all as a common right. A utility franchise is a privilege to use public streets or rights-of-way in connection with the utility's provision of services to residents within the governmental entity's jurisdiction. (*Spring Valley W. W. v. Schottler* (1882) 62 Cal. 69, 106–108; *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949 [257 Cal.Rptr. 615] (*Santa Barbara County Taxpayer Assn.*); 12 McQuillin, *The Law of Municipal Corporations* (3d ed. 2017) § 34.2, p. 15.)

within the City. The subsequent 28 years are the “extension term,” during which SCE is to pay the additional 1 percent charge on its gross receipts, denominated the “recovery portion,” for a total “extension term fee” of 2 percent of SCE's gross receipts from the sale of electricity within the City. At issue in this case is the recovery portion, which we, like the parties, refer to as the surcharge.

[**214] The agreement required SCE to apply to the PUC by April 1, 2001, for approval to include the surcharge on its bills to ratepayers within the City, and to use its best efforts to obtain PUC approval by April 1, 2002. Approval was to be sought in accordance with the PUC's “Re Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities.” (*Investigation on the Commission's Own Motion To Establish Guidelines for the Equitable Treatment of Revenue-producing Mechanisms Imposed by Local Government Entities on Public Utilities* (1989) 32 Cal.P.U.C.2d 60, 63 [****6] (*PUC Investigation*)). The agreement further provided that, in [***864] the event the PUC did not give its approval by the end of the initial term, either party could terminate the agreement. Thereafter, [*256] the City agreed to delay the time within which SCE was required to seek approval from the PUC, but SCE eventually obtained PUC approval, and began billing its customers within the City for the full extension term fee in November 2005.

The agreement provided that half of the revenues generated by the surcharge were to be allocated to the City's general fund and half to a City undergrounding projects fund. In November 2009, however, the City Council decided to reallocate the revenues from the surcharge, directing that all of the funds be placed in the City's general fund without any limitation on the use of these funds.

In 2011, plaintiffs filed a class action complaint challenging the surcharge. In their first amended complaint, they alleged the surcharge was an illegal tax under Proposition 218, which requires voter

approval for all local taxes. (Cal. Const., art. XIII C.) Plaintiffs sought refunds of the charges collected, as well as declaratory relief and injunctive relief requiring the City to discontinue collection [****7] of the surcharge.

On cross-motions for summary adjudication and the City's motion for summary judgment, the trial court ruled that a franchise fee is not a tax under Proposition 218. Its ruling was based largely on *Santa Barbara County Taxpayer Assn.*, *supra*, 209 Cal.App.3d 940, which held that franchise fees are not “proceeds of taxes” for purposes of calculating limits on state and local appropriations under article XIII B of the California Constitution. Notwithstanding this ruling, the trial court denied the motions, based on its view that Proposition 26, which was approved by the voters in 2010, retroactively altered the definition of a tax under Proposition 218 to encompass franchise fees. Therefore, the court concluded, the City had failed to establish that the surcharge did not violate Proposition 218 during the period *after* Proposition 26 was adopted in 2010.

Thereafter, the City moved for judgment on the pleadings, contending that Proposition 26 does not apply retroactively to the surcharge. The trial court agreed, citing *Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195 [159 Cal. Rptr. 3d 424], which held that Proposition 26 does not apply retroactively. Based on its earlier conclusion that the surcharge, as a franchise fee, was not a tax under Proposition 218 (see *Santa Barbara County Taxpayer Assn.*, *supra*, 209 Cal.App.3d 940), and its additional conclusion that a franchise fee, as negotiated compensation, need [****8] not be based on the government's costs, the trial court ruled that the surcharge was not subject to the voter approval requirements of Proposition 218. Therefore, it granted the City's motion for judgment on the pleadings.

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The Court of Appeal reversed the judgment. It

looked to our opinion in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 [64 Cal. Rptr. 2d 447, 937 P.2d 1350] (*Sinclair Paint*), which considered whether a charge imposed by the state on those engaged in the stream of commerce of lead-containing products was a tax or a fee under Proposition 13, an earlier voter initiative that requires voter approval of various taxes. (Cal. Const., art. XIII A.) Noting that our analysis in *Sinclair Paint* focused on whether the primary [***865] purpose of the charge was to raise revenue or to regulate those charged, the Court of Appeal considered whether the primary purpose of the surcharge is to raise revenue or to compensate the City for allowing SCE to use its streets [**215] and rights-of-way. Based on its conclusion that the surcharge's "primary purpose is for the City to raise revenue from electricity users for general spending purposes rather than for SCE to obtain the right-of-way to provide electricity," the Court of Appeal held that the surcharge is a tax, and therefore requires voter approval under [****9] Proposition 218. (Cal. Const., art. XIII C, § 2, subd. (b).)

We granted review to address whether the surcharge is a tax subject to Proposition 218's voter approval requirement, or a fee that may be imposed by the City without voter consent.

II. DISCUSSION

CA(1)[↑] (1) Over the past four decades, California voters have repeatedly expanded voter approval requirements for the imposition of taxes and assessments. These voter initiatives have not, however, required voter approval of certain charges related to a special benefit received by the payor or certain costs associated with an activity of the payor. Whether the surcharge required voter approval hinges on whether it is a valid charge under the principles that exclude certain charges from voter approval requirements. Our evaluation of this issue begins with a review of four voter initiatives that require voter approval of taxes, and

the legal principles underlying the exclusion of certain charges from the initiatives' requirements. We then describe the historical characteristics of franchise fees, the Legislature's history of regulating the calculation of franchise fees, and the PUC's requirements concerning the imposition of franchise fees that exceed the average charges imposed by other [****10] local governments in the utility's service area. Finally, we analyze whether the surcharge is a valid franchise fee or a tax, and we hold that HN1[↑] a charge imposed in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise.

[*258]

A. Restrictions on Taxes and Other Charges

1. Voter Initiatives

CA(2)[↑] (2) Beginning in 1978, HN2[↑] state voters have imposed various limitations upon the authority of state and local governments to impose taxes and fees. Proposition 13, which was adopted that year, set the assessed value of real property as the "full cash value" on the owner's 1975–1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value. (Cal. Const., art. XIII A, §§ 1, 2.) In addition, to prevent tax savings related to real property from being offset by increases in state and local taxes, Proposition 13 required approval by two-thirds of the members of the Legislature in order to increase state taxes, and required approval by two-thirds of the local electors of a city, county, or special district in order for such [****11] a local entity to impose special taxes. (Cal. Const., art. XIII A, §§ 3, 4; *Sinclair Paint, supra*, 15 Cal.4th at p. 872; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231 [149 Cal. Rptr. 239, 583 P.2d 1281] (*Amador Valley*).)

CA(3)[↑] (3) Proposition 13 did not define "special taxes," but this court addressed the initiative's [***866] restrictions on such taxes in

two early cases. In *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197 [182 Cal. Rptr. 324, 643 P.2d 941], we held that the requirement that “special districts” obtain two-thirds voter approval for special taxes applied only to those special districts empowered to levy property taxes. (*Id.* at p. 207.) In *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47 [184 Cal. Rptr. 713, 648 P.2d 935] (*Farrell*), “we construe[d] HN3 the term ‘special taxes’ in section 4 [of article XIII A] to mean taxes which are levied for a specific purpose.” (*Id.* at p. 57.) In addition, the Legislature provided that “‘special tax’ shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes.” (*Gov. Code*, § 50076.)

CA(4) (4) Thereafter, in 1986, the voters approved HN4 Proposition 62, which “added a new article to the Government Code (§§ 53720–53730) requiring [**216] that all new local taxes be approved by a vote of the local electorate.” (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 231 [45 Cal. Rptr. 2d 207, 902 P.2d 225], fn. omitted.) The initiative embraced the definition of special taxes set forth in *Farrell, supra*, 32 Cal.3d 47 (*Gov. Code*, § 53721; see *Guardino*, at p. 232), but applied its voter approval requirements to any district rather than only to special districts, and defined “district” [****12] broadly. (*Gov. Code*, § 53720, subd. (b)) [“‘district’ means an agency of the state, formed ... for the local performance of governmental [*259] or proprietary functions within limited boundaries”].) By the time Proposition 62 was proposed, courts as well as the Legislature had recognized that various fees were not taxes for purposes of Proposition 13 (see *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227 [211 Cal. Rptr. 567]; *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656 [166 Cal. Rptr. 674]), but Proposition 62 was silent with respect to the imposition of fees.

CA(5) (5) Next, in 1996, state voters approved Proposition 218, known as the “Right to Vote on Taxes Act.” (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 835 [102 Cal. Rptr. 2d 719, 14 P.3d 930] (*Apartment Assn.*)) Proposition 218 addressed two principal concerns. First, it was not clear whether Proposition 62, which enacted statutory provisions, bound charter jurisdictions.² (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 390–391 [15 Cal. Rptr. 3d 457].) Therefore, HN5 Proposition 218 amended the Constitution to add voter approval requirements for general and special taxes, thereby binding charter jurisdictions. (*Cal. Const.*, art. XIII C, §§ 1, 2.)

CA(6) (6) Second, HN6 Proposition 13 was “not intended to limit ‘traditional’ benefit assessments.” (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 141 [14 Cal. Rptr. 2d 159, 841 P.2d 144] (*Knox*) [upholding property-based assessments for public landscaping and lighting improvements].) Proposition 218 [***867] was adopted in part to address *Knox*'s holding. (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 284 [109 Cal. Rptr. 3d 620, 231 P.3d 350].) It requires an agency proposing an assessment on property to determine the proportionate special [****13] benefit to be derived by each parcel subject to the assessment; to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. It also requires the agency to hold a public hearing, and bars imposition of the assessment if a majority of parcel

²“For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question.” (*Cal. Const.*, art. XI, § 3, subd. (a).) County charters “supersede ... all laws inconsistent therewith” (*ibid.*), and city charters supersede all inconsistent laws “with respect to municipal affairs.” (*Id.*, § 5, subd. (a)); see *Johnson v. Bradley* (1992) 4 Cal.4th 389, 394–400 [14 Cal. Rptr. 2d 470, 841 P.2d 990].)

owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel. In the event legal action is brought contesting an assessment, the agency has the burden to establish that the burdened properties receive a [*260] special benefit and the assessment is proportional to the benefits conferred. (Cal. Const., art. XIII D, §§ 2, subd. (b), 4; see *Apartment Assn., supra*, 24 Cal.4th 830.)³

[**217] CA(7)[↑] (7) Most recently, in 2010, after the charge at issue in this case was adopted, state voters approved Proposition 26. HN7[↑] That measure amended the Constitution to provide that for purposes of article XIII C, which addresses voter approval of local taxes, “ ‘tax’ means any levy, charge, or exaction of any kind imposed by a local government” (Cal. Const., art. XIII C, § 1, subd. (e)), *except* [****14] (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and

³ Proposition 218 also imposed restrictions on the imposition of fees and charges for property-related services, such as sewer and water services, but provided that “fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.” (Cal. Const., art. XIII D, § 3, subd. (b); *id.*, § 6; see *Silicon Valley Taxpayers’ Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443 [79 Cal. Rptr. 3d 312, 187 P.3d 37].) Based on its conclusion that the charges imposed by the 1999 agreement are compensation for the franchise rights conveyed to SCE, the trial court further concluded the charges are for the provision of electrical service, and therefore are not imposed as an incident of property ownership. Plaintiffs do not contend on appeal that the surcharge is a property-related fee.

(7) property-related assessments and fees as allowed under article XIII D. The local government bears the burden of establishing the exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).)⁴

2. Characteristics of Valid Fees

As noted above, following the enactment of Proposition 13, the Legislature and courts viewed various fees as outside the [***868] scope of the initiative. (Gov. Code, § 50076; *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 736–737 [4 Cal. Rptr. 2d 601] (*Evans*), and cases cited therein.) In *Sinclair Paint, supra*, 15 Cal.4th 866, we summarized three categories of charges that are fees rather than taxes, and therefore are not subject to the voter approval requirements of Proposition [****15] 13. First, special assessments may be imposed “in amounts reasonably reflecting the value of the benefits conferred by improvements.” (*Sinclair Paint*, at p. 874.) Second, development fees, which are [*261] charged for building permits and other privileges, are not considered taxes “if the amount of the fees bears a reasonable relation to the development’s probable costs to the community and benefits to the developer.” (*Id.* at p. 875.) Third, regulatory fees are imposed under the police power to pay for the reasonable cost of regulatory activities. (*Id.* at pp. 875–876.)

CA(8)[↑] (8) The commonality among these categories of charges is the relationship between the charge imposed and a benefit or cost related to the payor. With respect to charges for benefits received, we explained in *Knox, supra*, 4 Cal.4th 132, that HN8[↑] “if an assessment for ... improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive.” (*Id.* at p. 142; see *Evans, supra*, 3 Cal.App.4th at p. 738 [when a “discrete group is specially benefitted

⁴ Plaintiffs and the City both view Proposition 26 as confirming their view of the law before Proposition 26 was enacted, but no party contends that it applies to the charges in this case, which were imposed prior to the enactment of Proposition 26.

... [t]he public should not be required to finance an expenditure through taxation which benefits only a small segment of the population”). But “if the assessment exceeds the actual cost of the improvement, the exaction is a [****16] tax and not an assessment.” (*Knox*, at p. 142, fn. 15.) With respect to costs, we explained in *Sinclair Paint*, *supra*, 15 Cal.4th 866, 879, that Proposition 13's goal of providing effective property tax relief is promoted rather than subverted by shifting costs to those who generate the costs. (See *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148 [250 Cal. Rptr. 420].) However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes. (*Sinclair Paint*, at pp. 874, 881.)

CA(9)[T] (9) In sum, HN9[T] restricting allowable fees to the reasonable cost or value of the activity with which the charges are associated serves [**218] Proposition 13's purpose of limiting taxes. (See *Amador Valley*, *supra*, 22 Cal.3d at p. 231 [Prop. 13's restrictions on real property taxes “could be withdrawn or depleted by additional or increased state or local levies of other than property taxes”].) If a state or local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees. Therefore, to the extent charges exceed the rationale underlying the charges, they are taxes.

Although *Sinclair Paint*, *supra*, 15 Cal.4th 866, focused on restrictions imposed by Proposition 13, its analysis [****17] of the characteristics of fees that may be imposed without voter approval remains sound. According [***869] to Proposition 218's findings and declarations, “Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to

excessive tax, assessment, fee [*262] and charge increases that ... frustrate the purposes of voter approval for tax increases” (Prop. 218, § 2, reprinted at Historical Notes, 2B West's Ann. Cal. Const. (2013) foll. art. XIII C, § 1, p. 363, italics added.) As relevant here, this finding reflects a concern with excessive fees, not fees in general. In addition, although Proposition 218 imposed additional restrictions on the imposition of assessments, that initiative did not impose additional restrictions on other fees. (Cal. Const., arts. XIII C, §§ 1, 2, XIII D, § 4.) Finally, *Sinclair Paint*'s understanding of fees as charges reasonably related to specific costs or benefits is reflected in Proposition 26, which exempted from its expansive definition of tax (1) charges imposed for a specific benefit or privilege which do not exceed its reasonable cost, (2) charges for a specific government service or product provided which do not exceed [****18] its reasonable cost, and (3) charges for reasonable regulatory costs related to specified regulatory activities. ⁵ (Cal. Const., art. XIII C, § 1, subd. (e).)

To determine how franchise fees fit within these principles, we next consider the nature of franchise fees. We also describe the regulatory framework related to their calculation and imposition.

B. Franchise Fees

1. Nature of Franchise Fees

HN10[T] CA(10)[T] (10) A franchise to use public streets or rights-of-way is a form of property (*Stockton Gas etc. Co. v. San Joaquin Co.* (1905) 148 Cal. 313, 319 [83 P. 54]), and a franchise fee is the purchase price of the franchise. (*City & Co. of S. F. v. Market St. Ry. Co.* (1937) 9 Cal.2d 743, 749 [73 P.2d 234].) Historically, franchise fees have not been considered taxes. (See *County of Tulare v. City of Dinuba* (1922) 188 Cal. 664, 670 [206 P.

⁵ Proposition 26's description of valid charges based on regulatory costs does not mirror our discussion of such costs in *Sinclair Paint*, *supra*, 15 Cal.4th 866. (See Cal. Const., art. XIII C, § 1, subd. (e)(3).) We express no opinion on the breadth of the regulatory costs that Proposition 26 allows to be imposed without voter approval.

983] [franchise fee based on gross receipts of utility is not a tax]; *City & Co. of S. F. v. Market St. Ry. Co.*, *supra*, 9 Cal.2d at p. 749 [payments for franchises are not taxes]; *Santa Barbara County Taxpayer Assn.*, *supra*, 209 Cal.App.3d 940, 949–950 [franchise fees are not proceeds of taxes.] Nothing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses. (See Cal. Const., arts. XIII A, § 3, subd. (b)(4), XIII C.)

This understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Proposition 26, the [*263] purpose of which was to *reinforce* the voter approval requirements set forth in [****19] Propositions 13 and 218. (Prop. 26, § 1, subd. (f), Historical Notes, reprinted at 2B West's Ann. Cal. Const., *supra*, foll. art. XIII A, § 3, p. 297 [“to ensure the effectiveness of these constitutional limitations, [Proposition 26] defines a “tax” ... so that neither the Legislature nor local governments can circumvent these restrictions on [**219] increasing taxes by simply defining new or expanded taxes as “fees””].) Although Proposition 26 [***870] strengthened restrictions on taxation by expansively defining “tax” as “any levy, charge, or exaction of any kind imposed by a local government” (Cal. Const., art. XIII C, § 1, subd. (e)), it provided an exception for “[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.” (*Id.*, subd. (e)(4).) ⁶

2. Laws Governing the Calculation of Franchise Fees

The Legislature has taken several approaches to the issue of the amount of compensation to be paid to local jurisdictions in exchange for rights-of-way

over the jurisdictions' land relating to the provision of services such as electricity. As described more fully below, it initially barred the imposition of franchise fees due to perceived abuses by local governments. Thereafter, it authorized local agencies to grant franchises, [****20] and established two formulas with which to calculate franchise fees. These formulas do not bind charter jurisdictions, such as the City, but they provide helpful background to the PUC's regulation of charges imposed on ratepayers.

The California Constitution as adopted in 1879 provided that “[i]n any city where there are no public works owned and controlled by the municipality for the supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose ... , shall ... have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.” (Cal. Const., former art. XI, § 19.) The provision was intended to prevent a municipality from creating a monopoly within its jurisdiction by imposing burdens on parties who wanted to compete with an existing private utility. Although [****21] cities could not impose franchise fees on these “constitutional franchises,” they were authorized to tax a franchise on the basis that a franchise constitutes real property within the city. (*Stockton Gas etc. Co. v. San Joaquin [*264] Co.*, *supra*, 148 Cal. at pp. 315–321; *City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167 [1171, 99 Cal. Rptr. 2d 198].) In 1911, this constitutional provision was replaced with a provision that authorized the private establishment of public works for providing services such as light, water, and power “upon such conditions and under such regulations as the municipality may prescribe under its organic law.” (Sen. Const. Amend. No.

⁶We are concerned only with the validity of the surcharge under Proposition 218. Proposition 26's exception from its definition of “tax” with respect to local government property is not before us. (See Cal. Const., art. XIII C, § 1, subd. (e)(4).)

49, Stats. 1911 (1911 Reg. Sess.) res. ch. 67, p. 2180.) The constitutional amendment did not impair rights under existing constitutional franchises. (*Russell v. Sebastian* (1914) 233 U.S. 195, 210 [58 L.Ed. 912, 34 S.Ct. 517].)

In the meantime, in 1905, the Legislature enacted the Broughton Act (Pub. Util. Code, § 6001 et seq.), which authorized cities and counties to enter franchise agreements for the provision of electricity and various other services not encompassed by the constitutional restrictions [***871] on franchise fees. (Stats. 1905, ch. 578, p. 777; *County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1694–1695 [60 Cal. Rptr. 2d 187] (*County of Alameda*)). The legislation provided that when an application for a franchise was received by a city or county, the governing body was to advertise for bids and award the franchise to the highest bidder. The successful bidder was [****22] required to pay, in addition to the amount bid, 2 percent of the gross annual receipts from the “use, operation or possession” of the franchise after the first five years of the term of the franchise agreement had passed. (Stats. 1905, ch. 578, §§ 2–3, pp. 777–778.)

HN11 [↑] **CA(11)** [↑] (11) The Broughton Act's provision that the fee be based on the receipts from the use, operation or possession of the franchise results in a complicated calculation of franchise [**220] fees. Usually, some portion of a utility's rights-of-way are on private property or property outside the jurisdiction of the city or county granting the franchise, and the utility's gross receipts attributable to a particular franchise must be reduced in proportion to the utility's rights-of-way that are not within the franchise agreement. (*County of Tulare v. City of Dinuba, supra*, 188 Cal. at pp. 673–676.) In addition, because gross receipts arise from all of a utility's operative property, such as equipment and warehouses, the portion of gross receipts attributable to property other than the franchise must be excluded from the calculation of the franchise fee. (*County of L. A. v. Southern etc. Gas Co.* (1954) 42 Cal.2d 129, 133–

134 [266 P.2d 27].) Finally, if a utility also provides service under a constitutional franchise—for example, where it provides artificial light under a constitutional franchise [****23] in the same area in which it provides electricity under a franchise agreement entered pursuant to the Broughton Act—the franchise fee applies only to the gross receipts from the provision of services under the nonconstitutional franchise. (*Oakland v. Great Western Power Co.* (1921) 186 Cal. 570, 578–583 [200 P. 395].)

[*265]

In 1937, apparently due in part to the complexity involved in calculating franchise fees under the Broughton Act, the Legislature enacted an alternative scheme by which cities could grant franchises for the transmission of electricity and gas.⁷ (Stats. 1937, ch. 650, p. 1781; see Pub. Util. Code, § 6201 et seq. (1937 Act); *County of Alameda, supra*, 51 Cal.App.4th at pp. 1695–1696.) Instead of a bidding process, the 1937 Act requires only a public hearing before the local government that will decide whether to grant an application for a franchise, at which objections to the granting of the franchise may be made. (Pub. Util. Code, §§ 6232–6234.) In addition, although the 1937 Act reiterates the Broughton Act formula for calculating franchise fees, it also provides an alternative formula: “this payment shall be not less than 1 percent of the applicant's gross annual receipts derived from the sale within the limits of the municipality of the utility service for which the franchise is awarded.” (Pub. Util. Code, § 6231, subd. (c).)⁸ According to a review of that year's

⁷In 1971, the Legislature amended the act to provide that “municipality includes counties.” (Pub. Util. Code, § 6201.5.) In addition, the Act has been extended to franchises for the transmission of oil and oil products, and the transmission of water. (Pub. Util. Code, § 6202.)

⁸The 1937 Act includes a second alternative formula if the franchise is “complementary to a franchise derived under” the California Constitution. In that circumstance, the alternative payment is “one-half of 1 percent of the applicant's gross annual receipts from the sale of electricity within the limits of the municipality under both the electric franchises.” (Pub. Util. Code, § 6231, subd. (c).)

legislation, the new franchise [****24] [***872] system was “expected to bring more adequate returns to cities, while lessening disputes concerning amounts to be paid.” (David, *The Work of the 1937 California Legislature: Municipal Matters* (1937–1938) 11 S.Cal. L.Rev. 97, 107.)

As noted above, these statutory provisions do not bind jurisdictions governed by a charter, such as the City, but charter jurisdictions are free to follow the procedures set forth in the 1937 Act. (Pub. Util. Code, § 6205.)⁹ However, the 1937 Act's provisions “relating to the payment of a percentage of gross receipts shall not be construed as a declaration of legislative judgment as to the proper compensation to be paid a chartered municipality for the right to exercise franchise privileges therein.” (Pub. Util. Code, § 6205.) We explain below that although a charter jurisdiction's franchise fees are not limited by these statutory formulas, the PUC has concluded that it is not fair or reasonable to allow a utility to recoup from all of its utility customers charges imposed by a jurisdiction whose charges exceed the average amount of charges imposed by other local governments. Therefore, the PUC has established a procedure by which a utility may [**221] obtain approval [*266] to impose a surcharge on the bills of only those customers within the particular [****25] jurisdiction that imposes higher-than-average charges.

3. PUC Scrutiny of Utility Charges

HN12[↕] CA(12)[↕] (12) The PUC sets the rates of a publicly regulated utility to permit the utility to recover its costs and expenses in providing its service, and to receive a fair return on the value of the property it uses in providing its service. (*Southern Cal. Gas Co. v. Public Utilities Com.*

⁹ The trial court ruled that as a charter jurisdiction, the City is not subject to general laws concerning franchises. (See *Southern Pacific Pipe Lines, Inc. v. City of Long Beach* (1988) 204 Cal.App.3d 660, 667–670 [251 Cal. Rptr. 411] [except where the nature of the utility services reflects a matter of statewide concern, the granting of franchises is a municipal affair].) Plaintiffs do not challenge that conclusion.

(1979) 23 Cal.3d 470, 474–476 [153 Cal. Rptr. 10, 591 P.2d 34].) Among a utility's costs and expenses are government fees and taxes. Historically, “fees and taxes imposed upon the utility itself by the various governmental entities within the utility's service territory ... tended to average out, with the total derived from each taxing jurisdiction tending to be approximately equal. Therefore, rather than impose a special billing procedure upon utilities to account for the small differences historically involved, the [PUC] ... permitted a utility to simply average them and allowed them to be ‘buried’ in the rate structure applicable to the entire system.” (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at p. 63.) As voters restricted the taxing authority of local governments, however, some local jurisdictions increased the charges they imposed in connection with the provision of utility services. “As the number and increasing amounts of these local revenue-producing mechanisms [****26] began to multiply, the [PUC] became concerned that averaging these costs among all ratepayers would create inequities among ratepayers.” (*Ibid.*)

CA(13)[↕] (13) In response to this concern, HN13[↕] the PUC established a procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. [***873] (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at pp. 62, 69.) When a local government imposes taxes or fees “which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory,” a utility may file an advice letter seeking approval to charge “local government fee surcharges.” (*Id.* at p. 73.) Such surcharges “shall be included as a separate item or items to bills rendered to applicable customers. Each surcharge shall be identified as being derived from the local governmental entity responsible for it.” (*Ibid.*)

The purpose of the PUC's procedure concerning local government fee surcharges is to ensure that utility rates are just, reasonable, and

nondiscriminatory. (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at p. 69; see Pub. Util. Code, §§ 451 [all public utility charges shall be just and reasonable], 453 [no public utility shall discriminate], 728 [if PUC [****27] finds rates are unreasonable or discriminatory, it shall order just and reasonable rates].) “Basic rates ... are those designed to recoup a utility's costs incurred to serve all its customers.” [*267] (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at p. 69.) If disproportionate taxes and fees are incorporated into all customers' basic rates, “some of these ratepayers would be subsidizing others but are not themselves benefiting from such increased taxes or fees.” (*Ibid.*)

The PUC's decision does not concern the validity of any charges imposed by local government. The PUC explained that it “[did] not dispute or seek to dispute the authority or right of any local governmental entity to impose or levy any form of tax or fee upon utility customers or the utility itself, which that local entity, as a matter of general or judicial decision, has jurisdiction to impose, levy, or increase. Any issue relating to such local authority is a matter for the Superior Court, not this Commission.” (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at p. 69.)

C. Validity of the Surcharge

1. Relationship Between Franchise Rights and Franchise Fees

CA(14)[↑] (14) Plaintiffs contend the surcharge is a tax rather than a fee under Proposition 218, and therefore requires voter approval. HN14[↑] Whether a charge is a tax or a fee [****28] “is a question of law for the appellate courts to decide on independent review of the facts.” (*Sinclair Paint, supra*, 15 Cal.4th at p. 874.) In resolving this issue, HN15[↑] the provisions of Proposition 218 “shall be liberally construed to effectuate [**222] its purposes of limiting local government revenue and enhancing taxpayer consent.” (Prop. 218, § 5, reprinted at Historical Notes, *supra*, 2B West's Ann. Cal. Const., foll. Art. XIII C, § 1, at p. 363;

see *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority, supra*, 44 Cal.4th at pp. 446, 448 [express purpose of Prop. 218 was to limit methods of exacting revenue from taxpayers; its provisions are to be liberally construed].)

CA(15)[↑] (15) As explained earlier, a franchise is a form of property, and a franchise fee is the price paid for the franchise. Moreover, historically, franchise fees have not been considered taxes, and nothing in Proposition 218 reflects an intention to treat amounts paid in exchange for property interests as taxes. Finally, like the receipt by a discrete group of a special benefit from the government, the receipt of an [***874] interest in public property justifies the imposition of a charge on the recipient to compensate the public for the value received. Therefore, HN16[↑] sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. But as explained below, to constitute compensation for the value [****29] received, the fees must reflect a reasonable estimate of the value of the franchise.

Each of the categories of valid fees we recognized in *Sinclair Paint, supra*, 15 Cal.4th 866, was restricted to an amount that had a reasonable relationship [*268] to the benefit or cost on which it was based. We observed that special assessments were allowed “in amounts reasonably reflecting the value of the benefits conferred” (*id.* at p. 874), development fees were allowed “if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer” (*id.* at p. 875), and regulatory fees were allowed where the fees reflected bear a “reasonable relationship to the social or economic ‘burdens’ that [the payor's] operations generated” (*id.* at p. 876; see *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375 [228 Cal. Rptr. 726, 721 P.2d 1111]). To the extent fees exceed a reasonable amount in relation to the benefits or costs underlying their imposition, they are taxes. (*Sinclair Paint*, at p. 881; *Knox, supra*, 4 Cal.4th at p. 142, fn. 15.)

CA(16)[T] (16) In the course of our analysis, we observed that, **HN17[T]** “[i]n general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted,” and we looked to whether the primary purpose of a charge was to generate revenue. (*Sinclair Paint, supra*, 15 Cal.4th at p. 874; see *id.* at pp. 879–880.) The issue of whether the funds generated by the types of fees [****30] considered in *Sinclair Paint* were used primarily for revenue purposes was relevant because the fees were related to an expenditure by the government or a cost borne by the public. More particularly, in connection with special assessments, the government seeks to recoup the costs of the program that results in a special benefit to particular properties, and in connection with development fees and regulatory fees, the government seeks to offset costs borne by the government or the public as a result of the payee’s activities.

In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a government *asset* rather than compensation for a cost. Consequently, the revenue generated by the fee is available for whatever purposes the government chooses rather than tied to a public cost. The aspect of the transaction that distinguishes the charge from a tax is the receipt of value in exchange for the payment. (See *Sinclair Paint*, 15 Cal.4th at p. 874 [contrasting taxes from charges imposed in return for a special benefit or privilege]; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 1, p. 25 [“in taxation, ... no compensation is given to the taxpayer except by way of governmental [****31] protection and other general benefits”].)

Plaintiffs observe, however, that SCE customers pay the surcharge, but SCE receives the franchise rights; therefore, they contend, the ratepayers do not receive any value in exchange for their [***875] payment of the [**223] charge. As noted above, publicly regulated utilities are allowed to recover their costs and expenses by passing them

on to their ratepayers. Among the charges included in the rates charged to customers within the City is the initial 1 percent of [*269] gross receipts paid in exchange for franchise rights, yet plaintiffs do not contend that this initial 1 percent is a tax because ratepayers do not receive the franchise rights. The fact that the surcharge is placed on customers’ bills pursuant to the franchise agreement rather than a unilateral decision by SCE does not alter the substance of the surcharge; like the initial 1 percent charge, it is a payment made in exchange for a property interest that is needed to provide electricity to City residents.¹⁰ Because a publicly regulated utility is a conduit through which government charges are ultimately imposed on ratepayers, we would be placing form over substance if we precluded the City from establishing [****32] that the surcharge bears a reasonable relationship to the value of the property interest it conveyed to SCE because the City expressed in its ordinance what was implicit—that once the PUC gave its approval, SCE would place the surcharge on the bills of customers within the City.

Although *Sinclair Paint*’s consideration of the purposes to which revenues will be put is not relevant in the context of transfers of public property interests, its broader focus on the relationship between a charge and the rationale underlying the charge provides guidance in evaluating whether the surcharge is a tax. Just as the amount of fees imposed to compensate for the expense of providing government services or the cost to the public associated with a payer’s activities must bear a reasonable relationship to the costs and benefits that justify their imposition, fees imposed in exchange for a property interest must bear a reasonable relationship to the value received

¹⁰ As explained above, the division of the charge into two parts, with one included in the rates paid by customers and the other separately stated on the bill, was driven by the PUC’s effort to ensure that a local government’s higher-than-average charges are not unfairly imposed on ratepayers outside of the local government’s jurisdiction; this division of the charges is unrelated to the character or validity of the charges.

from the government. To the extent a franchise fee exceeds any reasonable value of the franchise, the excessive portion of the fee does not come within the rationale that justifies the imposition of fees without voter approval. Therefore, the [****33] excessive portion is a tax. If this were not the rule, franchise fees would become a vehicle for generating revenue independent of the purpose of the fees. In light of the PUC's investigation of local governments' attempts to produce revenue through charges imposed on public utilities, this concern is more than merely speculative. (See PUC Investigation, supra, 32 Cal.P.U.C.2d 60.)

We recognize that determining the value of a franchise may present difficulties. Unlike the cost of providing a government improvement or program, which may be calculated based on the expense of the personnel and materials used to perform the service or regulation, the value of property may vary greatly, depending on market forces and negotiations. Where a utility has an incentive to negotiate a lower fee, the negotiated fee may reflect the [*270] value of the franchise rights, just as the negotiated rent paid by the lessor of a publicly owned building reflects its market value, despite the fact that a different lessor might have negotiated a different rental rate. In the absence of bona fide negotiations, [****876] however, or in addition to such negotiations, an agency may look to other indicia of value to establish a reasonable value of franchise rights.¹¹

CA(17)[7] (17) In [****34] sum, HN18[7] a franchise fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters. Its value may be based on bona fide negotiations concerning the property's value, as well as other indicia of worth. Consistent with the principles that govern other fees, we hold that to constitute a valid franchise fee under Proposition

218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred. [**224] (See *Sinclair Paint, supra*, 15 Cal.4th at pp. 874–876.)

2. *The City's Alternative Theories To Support the Surcharge*

We find the City's remaining arguments in defense of the surcharge to be without merit.

The City contends that the surcharge is not a tax imposed on ratepayers because it is a burden SCE voluntarily assumed. The terms of the 1999 agreement belie the contention that SCE assumed a burden to pay the surcharge. The 1999 agreement states that SCE “shall collect” the surcharge from all SCE customers within the City, and the collection shall be based on electricity consumption. Arguably, these provisions are ambiguous as to whether the mandatory language imposes a duty to collect the surcharge, or imposes a [****35] duty, *if* it collects the surcharge, to apply it to all customers within the City based on consumption. However, the next paragraph of the 1999 agreement refers to “[t]he conditions precedent to *the obligation of [SCE] under this Section 5 to levy, collect, and deliver to City the [surcharge].*” In addition, the parties stipulated that “[t]he SCE assessments, collections and remittance of the [surcharge] were required by Santa Barbara Ordinance 5135.” Finally, as noted above, public utilities are allowed to pass along to their customers expenses the utilities incur in producing their services, and SCE could terminate the 1999 agreement if the PUC did not agree to the inclusion of the surcharge on customers' bills. Thus, it does not appear that SCE assumed any burden to pay the surcharge from its assets.

We also reject the City's contention that imposition of the surcharge on customers is the result of a decision by SCE and the PUC. As discussed [*271] above, the purpose of the PUC's involvement in the process was to ensure that higher-than-average fees were not imposed on customers who reside outside the City. The fact that

¹¹ The parties' briefs do not consider the means by which franchise rights might be valued. We leave this issue to be addressed by expert opinion and subsequent case law.

the 1999 agreement required SCE to seek the approval of the PUC to include the charge on [****36] customers' bills, and allowed either party to terminate the agreement if the PUC's approval was not obtained, reflects that SCE was not willing to assume the burden of paying the surcharge, and that both parties to the agreement understood that the charge would be collected from ratepayers. These conclusions are confirmed by the parties' negotiations, which reflect that SCE was willing only to collect the charge from its customers and remit the revenue to the City. Finally, the City stipulated that the parties reached their [***877] agreement on the condition that the surcharge would become payable only if SCE obtained the PUC's consent to include the surcharge as a customer surcharge. In sum, the City and SCE agreed that SCE would impose the surcharge on customers and remit the revenues to the City.

In a similar vein, the City contends we should look to a revenue measure's legal incidence—who is required to pay the revenues—rather than its economic incidence—who bears the economic burden of the measure. The City's contention is based on its view that SCE bears the legal incidence of the charges and, therefore, the charges are not a tax on the ratepayers. In support of its theory, the City [****37] cites case law holding that nonresidents do not have taxpayer standing under Code of Civil Procedure section 526a to challenge a jurisdiction's actions based on their payment of taxes within the jurisdiction. (See *Cornelius v. Los Angeles County etc. Authority* (1996) 49 Cal.App.4th 1761, 1777–1778 [57 Cal. Rptr. 2d 618] [plaintiff who did not live in Los Angeles County was denied taxpayer standing to challenge a county affirmative action program based in part on payment of sales and gasoline taxes in Los Angeles County]; *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1048 [17 Cal. Rptr. 2d 400] [plaintiffs who did not live within a city were denied taxpayer standing to challenge a redevelopment plan based on the payment of sales taxes in the city].) These cases would support an argument that individuals who

live outside the City do not have taxpayer standing to challenge the surcharge, but they do not provide guidance concerning what constitutes a tax under various voter initiatives restricting taxation.

In any event, all that the City ultimately contends in this regard is that the [**225] economic incidence of a charge does not determine whether it is a tax. We agree. Valid fees do not become taxes simply because their cost is passed on to the ratepayers. As our discussion above reflects, the determination of whether a charge that is nominally a franchise fee constitutes a tax depends on whether it is [****38] reasonably related to the value of the franchise rights.

[*272]

Finally, the City asserts that the negotiated value of the franchise is entitled to deference because the City's adoption of the 1999 agreement was a legislative act and because charter jurisdictions have broad discretion to enter franchise agreements. (See Gov. Code, § 50335 [the legislative body of a local agency may grant utility easements “upon such terms and conditions as the parties thereto may agree”].) The record does not adequately disclose the negotiations that occurred with respect to the value of the franchise, and we are therefore unable to evaluate what deference, if any, might be due.

III. THE JUDGMENT OF THE COURT OF APPEAL

As noted above, the Court of Appeal concluded that the surcharge's primary purpose was to raise revenue for general spending purposes rather than to compensate the City for the rights-of-way. Therefore, it held, the surcharge is a tax, and requires voter approval under Proposition 218. Based on these conclusions, it reversed the trial court's grant of the City's motion for judgment on the pleadings, and “directed the trial court to grant [plaintiffs'] motion for summary adjudication because the City imposed the [****39] 1% surcharge without complying with Proposition

218.” As explained below, we agree that the judgment on the pleadings must be reversed, [***878] but we conclude that plaintiffs did not establish a right to summary adjudication.

HN19 [↑] A motion for judgment on the pleadings presents the question of whether “the plaintiff’s complaint state[s] facts sufficient to constitute a cause of action against the defendant.” (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 145 [44 Cal. Rptr. 2d 441, 900 P.2d 690].) The trial court generally considers only the allegations of the complaint, but may also consider matters that are subject to judicial notice. (*Id.* at p. 146.) “Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties.’ [Citation.] ‘Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory.” (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1232 [44 Cal. Rptr. 2d 352, 900 P.2d 601].) “An appellate court independently reviews a trial court’s order on such a motion.” (*Smiley, supra*, at p. 146.)

CA(18) [↑] (18) The first amended complaint alleges that the surcharge is not a franchise fee, but is instead a tax that requires voter approval under Proposition 218. In addition, with the parties’ consent, the trial court took judicial notice of the written stipulation of facts submitted in connection [****40] with the motions for summary adjudication and summary judgment, and a second stipulation of facts submitted in connection with the City’s motion for judgment on the pleadings. As described above, the stipulated facts reflect that the City and SCE agreed to double the amount to be paid for the privilege of using the rights-of-way and to pass these charges on to the [*273] ratepayers, but they do not address the relationship, if any, between the surcharge and the value of the franchise. Liberally construed, the first amended complaint and the stipulated facts adequately allege the basis for a claim that the surcharge bears no reasonable relationship to the value of the franchise, and is therefore a tax

requiring voter approval under Proposition 218. Accordingly, the trial court erred in granting judgment on the pleadings to the City.

Next we consider the Court of Appeal’s direction to the trial court to grant plaintiffs’ motion for summary adjudication. A plaintiff moving for summary adjudication with respect to a claim must establish each element of the claim. The burden then shifts to the defendant to demonstrate a triable issue of fact exists as to the claim. (*Code Civ. Proc.*, § 437c, subd. (p)(1).) Like a ruling on a motion [****41] for judgment on the pleadings, a ruling on a motion for summary adjudication is reviewed de novo. (*Kendall v. Walker* (2009) [**226] 181 Cal.App.4th 584, 591 [104 Cal. Rptr. 3d 262].)

Plaintiffs sought summary adjudication of the allegation that the surcharge is a tax. (*Code Civ. Proc.*, § 437c, subd. (f).) They asserted that the tests set forth in *Sinclair Paint, supra*, 15 Cal.4th 866, remain good law, but like the Court of Appeal, they drew from *Sinclair Paint* the principle that if the primary purpose of a charge is to raise revenue, the charge is a tax. Plaintiffs also challenged the surcharge on the ground that it was not based on a determination that there was a reasonable relationship between the charge and any costs borne by the City. In response, the City noted that *Sinclair Paint, supra*, 15 Cal.4th 866, [***879] addressed the distinction between regulatory fees and taxes. The City relied instead on *Santa Barbara County Taxpayer Assn., supra*, 209 Cal.App.3d 940, which held that franchise fees are not “proceeds of taxes” for purposes of calculating limits on state and local appropriations under article XIII B of the California Constitution. The trial court concluded that “[b]ecause the measure of compensation [for a franchise] is a matter of contractual negotiation, the amount of the franchise fee need not be based on costs.”

Although plaintiffs’ allegations and the stipulated facts adequately allege the basis for a contention that the surcharge bears no reasonable relationship

to the value [****42] of the franchise, plaintiffs' motion for summary adjudication did not *establish* this contention. As explained in our discussion of franchise fees, cities are free to sell or lease their property, and the fact that a franchise fee is collected for the purpose of generating revenue does not establish that the compensation paid for the property interests is a tax. In addition, in contrast to fees imposed for the purpose of recouping the costs of government services or programs, which are limited to the reasonable costs of the services or programs, franchise fees are not based on the costs incurred in affording a [*274] utility access to rights-of-way. Therefore, the facts on which plaintiffs relied in seeking summary adjudication did not establish their claim that the surcharge is a tax.

IV. DISPOSITION

We affirm the judgment of the Court of Appeal to the extent it reversed the trial court's judgment, and we reverse the judgment to the extent it directed the trial court to grant plaintiffs' motion for summary adjudication. The case is remanded to the Court of Appeal with directions to remand the matter to the trial court for further proceedings consistent with this opinion.

Cantil-Sakauye, C. J., [****43] Werdegar, J., Corrigan, J., Liu, J., Cuéllar, J., and Kruger, J., concurred.

Dissent by: Chin

Dissent

CHIN, J., Dissenting.—Since 1970, the City of Santa Barbara (the City) has imposed “a tax” on those using electricity in the City. Since 1977, the amount of the tax has been “six percent (6%) of the charges made for” energy use. (Santa Barbara Mun. Code, § 4.24.030.) In 1999, the City, in order to raise revenues for general governmental purposes, passed an ordinance—City Ordinance No. 5135

(the Ordinance)—separately requiring those receiving electricity within the City from Southern California Edison (SCE) to pay *an additional* 1 percent of the amount of their electrical bill. I conclude that this additional charge constitutes a tax that the City imposed in violation of the voter approval requirements of article XIII C of the California Constitution, as adopted by the voters at the November 5, 1996 General Election through passage of Proposition 218 (Proposition 218). The City's arguments to the contrary are unpersuasive.

The majority agrees that most of the City's arguments fail, but it largely agrees [***880] with the City that the charge is a “valid franchise fee ... rather than a tax.” (Maj. [**227] opn., *ante*, at p. 257.) Putting its own gloss on the City's argument—a gloss the City expressly [****44] rejects—the majority concludes that the charge is a valid franchise fee to the extent it “bear[s] a reasonable relationship to,” as alternatively phrased, “the value of the property interests transferred” (maj. opn., *ante*, at p. 270), “the value of the franchise conveyed” (*ibid.*), or “the value of the franchise rights” (*id.* at p. 271).

There is a fundamental problem with this approach: The electricity users upon whom the City imposes the charge, and who actually pay it, do not receive the franchise, any franchise rights, or any property interests. The Ordinance grants those valuable rights and interests *only to SCE*, the electricity supplier. Because the Ordinance requires SCE's customers to pay for rights and interests the City has granted to SCE, the charge does not [*275] constitute a “franchise fee” for purposes of the rule that “franchise fees [are not] considered taxes.” (Maj. opn., *ante*, at p. 262.) In reality, it is just an increase in the City's user tax, which the City *calls* a franchise fee. It thus constitutes *precisely* what the voters adopted article XIII C of the California Constitution to preclude: a “tax increase[] disguised via euphemistic relabeling as ‘fees,’ ‘charges,’ or ‘assessments.’” (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839 [102 Cal. Rptr. 2d 719, 14 P.3d

930].) Consistent with our *duty*, as established [****45] by the voters themselves, to “liberally construe[]” article XIII C of the California Constitution “to effectuate [the] purpose[] of limiting local government revenue and enhancing taxpayer consent” (Prop. 218, § 5, reprinted at 1 Stats. 1996, p. A-299), I conclude that the charge is invalid because the City imposed it on SCE's customers without voter approval.

The majority cites no support for its conclusion that a charge imposed on and paid by someone who is granted nothing in return is not tax as to that person so long as *someone else* receives franchise rights for the payment. Indeed, as I explain below, the majority's analysis is inconsistent with our case law. And the line the majority draws between a valid franchise fee and a tax—whether the amount of the charge to a utility's customers bears a reasonable relationship to the value the entity receives—is problematic in many ways and renders long-standing statutory provisions regarding utility franchises vulnerable to constitutional challenge. For all of these reasons, I dissent.

I. FACTUAL AND LEGAL BACKGROUND

In 1887, SCE's predecessor, the Santa Barbara Electric Company, began supplying electricity in the City. In 1959, the City, pursuant to an agreement with SCE, adopted Ordinance [****46] No. 2728 granting SCE a 25-year franchise to use public property to transmit and distribute electricity. The ordinance required SCE to pay the City 2 percent of its “gross annual receipts ... arising from the use, operation or possession of [the] franchise,” with a minimum payment of one-half percent of SCE's “gross annual receipts derived ... from the sale of electricity within the [City's] limits ... under both” the franchise being granted by the ordinance and SCE's separate and preexisting “constitutional franchise.” The ordinance specified that the City was granting the franchise “under and in accordance with the provisions of [***881] [the] Franchise Act of

1937.”¹

In 1985, after the 1959 franchise expired, the City, pursuant to another agreement with SCE, adopted Ordinance No. 4312 granting SCE a 10-year [*276] franchise to use public property to transmit and distribute electricity. “[A]s compensation,” the ordinance required SCE to pay to the City 2 percent of its “annual gross receipts ... arising from the use, operation or possession of th[e] franchise,” with a minimum payment of 1 percent of SCE's “annual gross receipts derived ... from the sale of electricity within the limits of [the] [****47] City under both” the franchise being granted by the ordinance and SCE's separate and preexisting “constitutional franchise.” [**228] The 1985 ordinance also required SCE to “collect for [the] City any utility users tax imposed by [the] City.” This provision reflected the City's imposition in 1970 of “a tax” on “every person in” the City using electricity in the City. (Santa Barbara Ord. No. 3436.) The amount of the tax was initially three percent “of the charges made for” use of electricity. (*Ibid.*) In 1977, the City doubled the tax to 6 percent. (Santa Barbara Ord. No. 3927, amending Santa Barbara Mun. Code, § 4.24.030; see Santa Barbara Ord. No. 4289 (1984), amending Santa Barbara Mun. Code, tit. 4.)

The year after the City doubled its electricity users tax, California voters passed Proposition 13. As the majority notes, Proposition 13 amended our Constitution to limit increases in the assessed value of real property to 2 percent per year (absent a change in ownership) and to limit the rate of taxation on real property to 1 percent of its assessed value. (Maj. opn., *ante*, at p. 258.) In order to prevent these tax savings from being offset by increases in state and local taxes, Proposition 13 also amended [****48] our Constitution to require approval by two-thirds of the local electors of a

¹ Charter cities are not required to apply the Franchise Act of 1937 (the 1937 Act) (Pub. Util. Code, § 6201 et seq.), but may voluntarily follow its provisions. (Pub. Util. Code, § 6205; all further unlabeled statutory references are to the Public Utilities Code.)

city, county, or special district in order for such a local entity to impose or raise special taxes. (Maj. opn., *ante*, at p. 258.) Since the voters enacted these limits on the City's taxing powers, the City has not *formally* increased the percentage of its electricity users tax.

However, in 1999, the City informally and effectively increased this tax by passing the Ordinance, which codified a new franchise agreement with SCE and required users of electricity within the City to pay an additional 1 percent of their electrical bill. According to the parties' stipulated facts, this charge began as a proposal from "City staff," "[d]uring the negotiations for the new franchise agreement," to "increase[] [the] annual 'franchise fee'" from 1 percent of SCE's gross receipts for electricity sold within the City—the amount under the expiring agreement—to 2 percent. "City staff" proposed the increase in order "to raise additional revenues for the City for general City governmental purposes." "After a period of negotiations," SCE said it would agree "to remit to the City a two percent ... franchise fee provided that the City [****49] agreed that the increase in the franchise fee would be payable to the City only if the California Public Utilities Commission ... consented to SCE's request that it be allowed to include the additional 1% amount as a customer surcharge on the bills of SCE to its customers in the City." City [****882] staff and SCE [*277] reached agreement "[o]n that basis" and the City Council later adopted the tentative agreement as Ordinance No. 5135 (Dec. 7, 1999).

The Ordinance granted SCE a franchise to use public property to construct and operate an electric transmission system. It provided for an: "Initial Term" of three years—January 1, 2000, through December 31, 2002—and set the payment for that term at 1 percent of SCE's "Gross Annual Receipts." (Ord., §§ 3.A, 5.) The Ordinance also provided for an "Extension Term" beginning 60 days after the Public Utilities Commission (PUC) approved an "Extension Term Fee" and ending

December 31, 2029. (Ord., § 3.B.) The total Extension Term Fee was 2 percent of SCE's Gross Annual Receipts, and comprised two elements: (1) the 1 percent Initial Term Fee; and (2) a 1 percent "Recovery Portion." (Ord., § 5.B.) Like the City's electricity users tax, the Recovery Portion [****50] was to be collected from "all electric utility customers served by [SCE] within the boundaries of the City" and was "based on consumption or use of electricity." (*Ibid.*) SCE's "obligation" was "to levy" the Recovery Portion on its customers, "collect" this payment from its customers, and "deliver" the collected amount "to [the] City." (Ord., § 5.C.) In other words, according to the parties' stipulated facts, the Ordinance "obligate[d]" all persons in the City receiving electricity from SCE "to pay" the Recovery Portion, and "require[d] [SCE] to collect" the Recovery Portion "from" its City customers "and remit [it] to" the City. The Ordinance made PUC approval of the Extension Term Fee a "condition[] precedent to" SCE's "obligation ... to levy, collect, and deliver to [the] City the Recovery Portion." ² [**229] If that approval was not obtained by the end of the Initial Term—December 31, 2002—the franchise would "continue on a year to year basis at the Initial Term Fee"—1 percent of gross revenues—until terminated by either party upon written notice.

In April 2001, the City and [****51] SCE agreed to delay for up to two years the filing with the PUC of a request for approval of the Extension Term Fee. In December 2004, almost three years later, the City directed SCE to submit the request. During that period, the only compensation SCE paid the

² A utility may, "at its discretion," request permission from the PUC to set forth separate charges on certain of their customers' bills when a local governmental entity imposes upon the utility "[f]ranchise, general business license, or special taxes and/or fees ... [that] in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory." (*Re Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities* (1989) 32 Cal.P.U.C.2d 60, 73.)

City for the franchise was the Initial Term Fee. SCE eventually submitted the request on March 30, 2005, asking for approval “to bill and collect from its customers within the City ... a 1.0% electric franchise surcharge to be remitted to the City by SCE as a pass-through fee, pursuant to SCE's new franchise agreement with the City.” The request explained that the new franchise [*278] agreement “expressly provides for the additional amount to be surcharged to SCE's customers within the City,” and requires PUC approval “in order for SCE to bill and collect the additional franchise surcharge for the City.” The request also explained that, upon the PUC's approval, SCE would “bill and collect the surcharge revenues and pass through the revenues directly to the City.” [***883] On April 20, 2005, the PUC granted SCE's request.

In November 2005, SCE began billing the Recovery Portion to, and collecting it from, customers in the City, and remitting [****52] those revenues in their entirety to the City. At first, the City apportioned the revenues in accordance with the Ordinance, i.e., half to the City's general fund and half to a City undergrounding projects fund. In November 2009, the City directed that all revenues from the Recovery Portion be placed in its general fund without any limitation on use.

II. DISCUSSION

Plaintiffs Rolland Jacks and Rove Enterprises, Inc., claim that the City, by imposing the Recovery Portion through adoption of the Ordinance, violated article XIII C of the California Constitution. As here relevant, article XIII C provides that “[local government[s]]” may not “impose ... any general tax ... until that tax is submitted to the electorate and approved by a majority vote” (Cal. Const., art. XIII C, § 2, subd. (b)), and may not “impose ... any special tax ... until that tax is submitted to the electorate and approved by a two-thirds vote” (*id.*, § 2, subd. (d)). Plaintiffs argue that the Recovery Portion is a tax within the meaning of these provisions and that the City violated article XIII C

by imposing it without voter approval.

In opposition to this argument, the City focuses heavily on the word “impose” in California Constitution, article XIII C's provisions, asserting that the Recovery Portion was not “imposed” *by the City* on anyone. According [****53] to the City, the Recovery Portion is, as to SCE, a “voluntary” payment to which SCE, a “sophisticated, commercial entit[y] with substantial market power,” “willingly agreed” in order “to obtain use of valuable public rights of way in its for-profit business.” As to SCE's customers, SCE and/or the PUC “imposed” the Recovery Portion, and the City “played no part in” the decisions of those entities.

The majority correctly rejects these arguments, explaining that the terms of the agreement and the Ordinance require that the Recovery Portion “be collected from” SCE's customers and impose on SCE only an obligation “to collect the charge from its customers and remit the revenue to the City.” (Maj. opn., *ante*, at p. 271.) Indeed, the City's arguments necessarily fail in light of its stipulation that “[p]ursuant to City Ordinance [No.] 5135, all [*279] persons in the City receiving electricity from SCE *are obligated to pay* the 1% Recovery Portion.” (Italics added.)

In a related argument, the City asserts that the Recovery Portion is not “imposed” [**230] on SCE's customers because its “legal incidence”—i.e., the “legal duty to pay it”—“is on SCE.” According to the City, that SCE's customers in fact “ultimately bear[]” the Recovery [****54] Portion's “economic burden” is irrelevant because, under the law, “whether a charge is a tax is determined by its legal incidence.”

The City is correct to focus on the Recovery Portion's legal incidence, but its argument fails because, under the Ordinance, both the legal incidence and the economic burden of the Recovery Portion fall on SCE's customers, not on SCE. The rule in California is that where the government *mandates* payment of a charge by one party, and imposes a duty on some other party to collect the

payment and remit it to the government, the legal incidence of the charge falls, not on the party [***884] collecting the payment—who acts merely as the government's collection agent or conduit—but on the party from whom the payment is, by law, collected. (*Western States Bankcard Assn. v. City and County of San Francisco* (1977) 19 Cal.3d 208, 217 [137 Cal. Rptr. 183, 561 P.2d 273] (*Western States*) [tax ordinances lacked “mandatory pass-on provisions” that would “shift the legal incidence of the tax”]; *Bunker Hill Associates v. City of Los Angeles* (1982) 137 Cal.App.3d 79, 87 [186 Cal. Rptr. 719] [“the legal incidence of a tax does not necessarily fall on the party who acts as conduit by forwarding collected taxes to the state,” and charge imposed on tenants, that lessors were legally required to collect and transmit to the government, was not a tax on lessors]; *Occidental Life Ins. Co. v. State Bd. of Equalization* (1982) 135 Cal.App.3d 845, 850 [185 Cal. Rptr. 779] (*Occidental Life*) [whether “pass [****55] on” of charge is “mandatory” is “legally significant” in determining who bears the charge's “legal incidence”].) Consistent with this rule, in *City of Modesto v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504, 506 [110 Cal. Rptr. 111], the court held that a monthly charge imposed by the City of Modesto for use of water, gas, electricity, and telephone service, “paid by the service user (the consumer), but ... collected by the service supplier,” was “a tax against the utility user, not the utility supplier.”

Under these principles, the legal incidence of the Recovery Portion falls on SCE's customers, not, as the City asserts, on SCE. As noted above, the City has stipulated that SCE's customers “are obligated to pay” the Recovery Portion “[p]ursuant to City Ordinance [No.] 5135,” and that SCE's duty under the Ordinance is “to collect” the Recovery Portion “from all SCE electricity users in the City and remit those funds to the City.” The terms of the Ordinance and the representations in SCE's application for PUC approval, [*280] as set forth above, fully support this stipulation. On this record, it is clear that the Ordinance mandates payment of

the Recovery Portion by SCE's customers and makes SCE the City's collection agent and conduit regarding this payment. Accordingly, the legal incidence [****56] of the Recovery Portion is on SCE's customers.

The City's final argument is that the Recovery Portion is a “franchise fee”—i.e., “a bargained-for price for use of the City's rights of way in SCE's search for profits”—and that under California case law, a franchise fee “is not a tax.” The majority essentially agrees with the City. “Historically,” the majority begins, “franchise fees have not been considered” by California courts to be “taxes,” and “[n]othing in Proposition 218 reflects an intent to change” this rule. (Maj. opn., *ante*, at p. 262.) Putting its own gloss on the City's argument, the majority then concludes that the Recovery Portion is a “franchise fee” and not a tax insofar as its amount “is reasonably related to the value of the franchise.” (Maj. opn., *ante*, at p. 257.) “To the extent [it] exceeds any reasonable value of the franchise,” it “is a tax” rather than a “franchise fee,” because “the excessive portion ... does not come within the rationale that justifies the imposition of fees without voter approval.” (*Id.* at p. 269.)

Whether a charge constitutes a “tax” for purposes of the Constitution “is a question of law for the appellate courts to decide on independent review of the facts.” [****57] (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874 [64 Cal. Rptr. 2d 447, 937 P.2d 1350].) [***885] In answering this question, we [**231] should not, as the majority appears to do, rely on the circumstance that the charge is “nominally a franchise fee.” (Maj. opn., *ante*, at p. 271.) In determining whether a charge is a tax, courts “are not bound by what the parties may have called the liability” (*Bank of America v. State Bd. of Equal.* (1962) 209 Cal.App.2d 780, 801 [26 Cal. Rptr. 348] (*Bank of America*)), and are “not to be guided by labels” (*Beamer v. Franchise Tax Board* (1977) 19 Cal.3d 467, 475 [138 Cal. Rptr. 199, 563 P.2d 238]) or “bare legislative assertion” (*Flynn v. San Francisco*

(1941) 18 Cal.2d 210, 215 [115 P.2d 3]). Instead, their “task is to determine the[] true nature” of the charge (*Beamer v. Franchise Tax Board, supra*, at p. 475), based on “its incidents” and “the natural and legal effect of the language employed in” the enactment (*Ainsworth v. Bryant* (1949) 34 Cal.2d 465, 473 [211 P.2d 564]). This general principle is especially applicable here for two reasons: (1) Proposition 218’s “main concern” was “perhaps” the “euphemistic relabeling” of taxes “as ‘fees,’ ‘charges,’ or ‘assessments’” (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra*, 24 Cal.4th at p. 839), and (2) Proposition 218 expressly required courts to “liberally construe[]” article XIII C “to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent” (Prop. 218, § 5, reprinted at 1 Stats. 1996, p. A-299).

[*281]

Given the City’s argument, the question here is whether the Recovery Portion, in light of its incidents, constitutes the type of charge we have declared [****58] to be a franchise fee instead of a tax. One of our earliest decisions to discuss this type of charge is *County of Tulare v. City of Dinuba* (1922) 188 Cal. 664 [206 P. 983] (*Tulare*). There, we held that the annual payment imposed by the Broughton Act (§ 6001 et seq.) on the successful bidder for a franchise to provide electricity—2 percent of gross annual receipts from the use, operation or possession of the franchise—is “neither a tax nor a license.” (*Tulare*, at p. 670.) Instead, it is a “charge” that “the holder of the franchise undertakes to pay as part of the consideration for the privilege of using the avenues and highways occupied by the public utility [¶] It is purely a matter of contract. . . . [I]t is a matter of option with the applicant whether he will accept the franchise on those terms. His obligation to pay is not imposed by law but by his acceptance of the franchise.” (*Ibid.*)

Tulare makes clear that the Recovery Portion, irrespective of its relationship to the value of the franchise SCE received, is not a franchise fee for

purposes of the rule that a franchise fee is not a tax. As explained above, the Recovery Portion is not a charge that “the holder of the franchise”—SCE—“undert[ook] to pay.” (*Tulare, supra*, 188 Cal. at p. 670.) Indeed, as the majority correctly states, the terms [****59] of the Ordinance “belie” this characterization, establishing instead that SCE did not “assume[] a burden to pay” the Recovery Portion. (Maj. opn., *ante*, at p. 270.) And the City’s factual stipulation that the Ordinance “obligated” SCE’s customers “to pay” the Recovery Portion conclusively establishes that *their* “obligation to pay” the Recovery Portion was, in fact, “imposed by law,” not by *their* “acceptance of the franchise.” (*Tulare*, at p. 670.) Indeed, SCE’s customers did not receive a franchise, which, as the majority explains, “is a privilege granted by the [***886] government to a particular individual or entity rather than to all as a common right.” (Maj. opn., *ante*, at p. 254, fn. 1.) The Ordinance granted them no legal right to make any use of the City’s property or to conduct a franchise for supplying electricity. In short, the Recovery Portion simply lacks the incidents of a franchise fee for purposes of the rule that franchise fees are not taxes. “To call it a fee” rather than a tax is simply “a transparent evasion.” (*Fatjo v. Pfister* (1897) 117 Cal. 83, 85 [48 P. 1012].)

Although the majority recognizes the principles underlying the rule that franchise fees are not taxes, it fails to apply them. The majority observes that “a franchise fee is the [****60] purchase price of the franchise” (maj. opn., *ante*, at p. 262), but it does not explain how the Recovery Portion, which the City has imposed on [**232] someone *other than the purchaser* of the franchise, meets this test. The majority explains that “sums paid for the right to use a jurisdiction’s rights-of-way are fees rather than taxes” because “the receipt of an interest in public property justifies the imposition of a charge *on the recipient* to compensate the public for the value received.” (*Id.* at p. 267, italics added.) [*282] But the Recovery Portion is not imposed “on the recipient” of the interest in public property. (*Ibid.*) The majority explains that

“restrictions on taxation do not encompass amounts *paid in exchange for* property interests” (*id.* at p. 262, italics added), and that what “distinguishes” a valid charge “from a tax is the receipt of value *in exchange for the payment*” (*id.* at p. 268, italics added). But SCE's customers do not receive any property interest or value “in exchange for” paying the Recovery Portion. (*Ibid.*) In short, the Recovery Portion lacks the “historical characteristics of franchise fees” that the majority identifies from our decisions. (*Id.* at p. 257.) It therefore [****61] does not, to use the majority's own words, “come within the rationale that justifies” (*id.* at p. 269) the rule that franchise fees are not taxes.

According to the majority, in determining whether the Recovery Portion is a franchise fee rather than a tax, it is irrelevant that SCE's customers “pay the surcharge” while “SCE receives the franchise rights,” that SCE's customers “do not receive any value in exchange for their payment,” and that the City is requiring SCE's customers “to compensate the City for *the utility's* use of public property.” (See maj. opn., *ante*, at pp. 268–269, italics added.) The stated basis for this view is that “publicly regulated utilities are allowed to recover their costs and expenses by passing them on to their ratepayers,” and are therefore merely “conduit[s] through which government charges are ultimately imposed on ratepayers.” (*Ibid.*) Given this circumstance, the majority reasons, it makes no difference that the Recovery Portion is an obligation the City imposes directly on SCE's customers, instead of a contractual obligation of SCE that SCE “unilateral[ly]” decides to pass on to its customers. (*Id.* at p. 269.) The City, the majority asserts, should not be “precluded” from showing that the Recovery Portion [****62] bears a reasonable relationship to the value of the property interest it conveyed to SCE merely because the Ordinance *expressly mandates* what would have been “implicit” had SCE agreed to pay the Recovery Portion itself—“that once the PUC gave its approval, [***887] SCE would place the surcharge on the bills of customers within the City.” (*Ibid.*)

For a number of reasons, I disagree. First, the majority's view is inconsistent with our case law, which, as explained above, establishes that a franchise fee—as distinguished from a tax—is a “charge [that] *the holder of the franchise undertakes to pay*,” i.e., an “obligation to pay” that is “purely a matter of contract” and that is “imposed” on the payor “not ... by law but by *his* acceptance of the franchise.” (*Tulare, supra*, 188 Cal. at p. 670, italics added.) As also explained above, the Recovery Portion is *not* a charge that “the holder of the franchise undert[ook] to pay,” and it *is* imposed by the City on SCE's customers “by law” instead of by *their* “acceptance of [any] franchise.” (*Ibid.*) The majority cites no authority for its conclusion that a [*283] charge imposed by law on one person to pay for *someone else's* right to use public property in a business is a franchise fee rather than a tax. [****63] ³

[**233] Second, the majority fails to explain why SCE's purported unfettered ability to pass on to customers charges it contractually agrees to pay means that whether the charge is a tax *on its customers* depends on the value of the franchise *to SCE*. Had SCE contractually agreed to pay the Recovery Portion itself, it could *not* assert that the charge was a tax to the extent it exceeds the value of the franchise rights. As we have explained, because a municipality's power to permit utilities to

³According to the majority, by adding a definition of “tax” to California Constitution, article XIII C and excepting from that definition “[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property,” Proposition 26, approved by voters at the November 2, 2010 General Election, “confirmed” that “restrictions on taxation do not encompass amounts paid in exchange for property interests.” (Maj. opn., *ante*, at p. 263.) As the majority elsewhere acknowledges, Proposition 26 is not at issue here because “no party contends that it applies to the charges in this case.” (Maj. opn., *ante*, at p. 260, fn. 4.) Moreover, nothing in Proposition 26 indicates that a charge imposed on one party for *someone else's* use of government property comes within the exception the majority quotes. To the extent the majority's analysis suggests otherwise, it is dictum. Nor does anything in Proposition 26 support the majority's rule that payments for the privilege to use public property *are* taxes to the extent they exceed “the value of the franchise conveyed.” (Maj. opn., *ante*, at p. 270.)

use public property “on such terms as are satisfactory to it” includes the power to “require the payment of such compensation as seems proper,” courts do not “question whether or not the amount charged is a reasonable charge.” (*Sunset Tel. and Tel. Co. v. Pasadena* (1911) 161 Cal. 265, 285 [118 P. 796] (*Sunset*)). And if, as the majority asserts, the utility in this scenario is merely “a conduit through which government charges are ultimately imposed on ratepayers” (maj. opn., *ante*, at p. 269), then there is no logical reason why the value of the benefit *to the utility* would be the proper measure of whether the charge is a tax *as to the utility's customers*. Nor is there any logical reason for making this the test where, as here, a municipality imposes [****64] the charge directly on those customers.

Indeed, the majority's conclusion in this regard is inconsistent with its own discussion of the very case law on which it principally relies. As the majority explains, our prior decisions identify “categories of charges” that constitute valid “fees rather [***888] than taxes” for purposes of applying Proposition 13. (Maj. opn., *ante*, at p. 260.) “The commonality among these categories,” the majority states, “is the relationship between the charge imposed and a benefit ... *to the payor*.” (*Id.* at p. 261, italics added.) For example, the majority observes, “we [have] explained ... that ‘if an assessment for ... improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit *they receive*.’” (*Ibid.*, italics added.) Under these cases, the majority states, a purported fee is a tax for [*284] purposes of Proposition 13 to the extent it exceeds “the special benefit received *by the payor*.” (Maj. opn., *ante*, at p. 261, italics added.)

A closer look at our assessment decisions reveals that a nexus between the benefit conferred and the person *paying the charge* is a prerequisite to concluding that the charge is not a tax. As we explained [****65] over 100 years ago, “the compensating benefit to the property owner” on whom the government imposes a charge for an

improvement “is the warrant, and the sole warrant, for” finding that the charge is a valid assessment rather than a tax. (*Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, 30 [148 P. 217].) Thus, “if we are not able to say that the owner for the specific charge imposed is compensated by the increased value of the property, then most manifestly we have a special tax.” (*Ibid.*) In other words, an assessment levied upon property owners “without regard to the benefit actually accruing *to them* by means of the improvement, is a tax.” (*Creighton v. Manson* (1865) 27 Cal. 613, 627, italics added.) The majority purports to reaffirm and follow these decisions insofar as they set forth “the characteristics of fees that may be imposed without voter approval” (maj. opn., *ante*, at p. 261), but it then eliminates the *principal* characteristic it itself identifies: “the relationship between the charge imposed and a benefit ... *to the payor*” (*ibid.*, italics added).⁴

The charge the majority here says is a valid fee differs in another significant respect [**234] from the charges we have previously held to be permissible fees instead of taxes: the [****66] measure of what is permissible. As the majority observes, as to all of the charges for benefits we have dealt with in prior cases, we have held that they are “taxes” to the extent they “exceed the reasonable *cost* of the activity on which they are based.” (Maj. opn., *ante*, at p. 261, italics added.) This is true even of property assessments; although a given property may be assessed based on the proportionate share of the benefit it receives from a government improvement, the assessment is a valid fee rather than a tax only to the extent it does not exceed the proportionate *cost* of the improvement

⁴ The majority's analysis is likewise out of step with decisions from other jurisdictions holding that, to constitute a valid fee instead of a tax, a charge must be “based on a special benefit conferred *on the person paying the fee*.” (*Home Builders Assn. v. West Des Moines* (Iowa 2002) 644 N.W.2d 339, 347, italics added; see *American Council of Life Insurers v. DC Health* (D.C. Cir. 2016) 815 F.3d 17, 19 [whether charge is a fee or a tax depends on whether there is a “match between the sum paid and the ... benefit provided, *as seen from the payers' perspective*” (italics added)].)

to the government. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 142, fn. 15 [14 Cal. Rptr. 2d 159, 841 P.2d 144].) In other words, “an assessment [***889] is not measured by the precise amount of special benefits enjoyed by the assessed property,” but “reflects costs allocated according to relative benefit received.” (*Town of Tiburon v. Bonander* (2009) 180 [*285] Cal.App.4th 1057, 1081 [103 Cal. Rptr. 3d 485].) Thus, “an assessment exceeding the cost of the improvement, so as to furnish revenue to the city” constitutes a tax. (*City of Los Angeles v. Offner* (1961) 55 Cal.2d 103, 109 [10 Cal. Rptr. 470, 358 P.2d 926].) Consistent with these common law principles, Proposition 218 amended the state Constitution to provide that “[n]o assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel.” (Cal. Const., art. XIII D, § 4, subd. (a).) Thus, [****67] were a city, in order to raise revenue for general purposes, to impose a charge to recover the amount by which the benefit conferred by a government improvement exceeds the cost, the charge would be a tax.

The majority here affords different treatment to the general revenue-raising measure at issue. It holds that cost is irrelevant, and that a charge labeled a “franchise fee” becomes a tax as to a utility’s customers only to the extent the charge exceeds “the value” to the utility of “the property interests transferred” (maj. opn., *ante*, at p. 270), “the value of the franchise conveyed” (*ibid.*), or “the value of the franchise rights” (*id.* at pp. 270–271). Contrary to the majority’s analysis, our prior decisions clearly do *not* provide support for the line the majority draws between a valid fee and a tax, or for its conclusion that the method the City used here to raise money for general purposes is, uniquely, not a tax. And because there is no existing authority for the majority’s newly minted approach, the majority is incorrect that focusing on the fact the Recovery Portion is directly imposed by the City on SCE’s customers “preclude[s]” the City from doing something it otherwise could, i.e., proving the charge [****68] is a fee rather than a tax by

“establishing that [it] bears a reasonable relationship to the value of the property interest it conveyed to SCE.” (*Id.* at p. 269.)

Third, there is no factual or legal basis for the majority’s assumption that a utility, through price increases, *necessarily* can and will pass on to its customers charges it is legally required to pay. With respect to the sales tax, we have observed that a retailer “may choose simply to absorb the sales tax” imposed by statute instead of passing it on to its customers. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1103 [171 Cal. Rptr. 3d 189, 324 P.3d 50].) A utility could make a similar business decision with respect to higher payments it has become contractually obligated to pay in exchange for its right to operate; it could, for reasons related to the marketplace, simply decline to pass the increase on to its customers.

Moreover, in order to pass charges on to customers through a price increase, a utility would have to apply for and obtain approval from the PUC. Under our Constitution, the PUC has both the power and the duty to “fix rates” for California public utilities (Cal. Const., art. XII, § 6), such that the [*286] charges they demand for service are “just and reasonable” (§ 451; see *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 792 [3 Cal. Rptr. 3d 703, 74 P.3d 795]). This constitutional power, we have observed, [****69] includes the “power to prevent a utility from passing on to the ratepayers unreasonable costs for materials and services.” (*Pac. Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d 822, 826 [215 P.2d 441] (*Pac. Tel.*)). [***890] We have also [**235] observed that where “the safeguards provided by arms-length bargaining are absent,” the PUC, in exercising its constitutional power, has “been vigilant to protect the rate-payers from excessive rates reflecting excessive payments.” (*Ibid.*)

In one especially relevant example of its exercise of this power, the PUC disallowed, for purposes of a requested rate increase, contractual payments a utility made to its controlling parent company for

various services. (*Pac. Tel., supra*, 34 Cal.2d at p. 825.) The contract between the two entities specified that the amount of the payment was 1 percent of the utility's gross receipts. (*Ibid.*) In disallowing these payments as a basis for a rate increase, the PUC reasoned that the utility “exercise[d] no real, untrammled and independent judgment in its negotiations” with its parent company and that “arms-length bargaining” between the two entities was “not, in fact, engaged in, although ... in some instances” they had “made [an attempt] to simulate the same.” (Dec. No. 42529 (1949) 48 Cal.P.U.C. 461, 470.) The PUC further reasoned that the formula for the amount [****70] of the payments—a “percentage of gross revenues”—was “a false measuring rod”: it was “totally unrealistic and [bore] no rational relationship to the reasonable cost of services rendered, reflect[ed] no causal or proximate connection or relationship between payments made thereunder and reasonable value of the services rendered and [was] neither supported by law, logic nor elementary common sense.” (*Id.* at p. 472.) The utility's “payment of these excessive amounts,” the PUC concluded, did not support the utility's request for a rate increase. (*Ibid.*)

Nothing would preclude the PUC from finding, for similar reasons, that it would not be just and reasonable for a utility, having agreed to pay a city double what it had paid for many years as compensation for using public property, to raise its rates in order to recoup from customers the doubled cost to which it agreed. Nor would anything preclude the PUC from finding that where the utility's duty to pay the increase was expressly made contingent on the utility's ability to recoup the expense from its customers, the increase was not “based on bona fide negotiations.” (Maj. opn., *ante*, at p. 270.) Indeed, the majority rightly questions whether “the negotiations” [****71] here, which placed responsibility for paying the Recovery Portion on SCE's ratepayers and imposed no financial responsibility for that charge on SCE, reasonably reflect “the value” of what SCE received from the City. (*Id.* at p. 271.) And where

the payment is set as a percentage of a utility's gross annual receipts, the PUC could also find that the formula is “a false measuring rod,” i.e., it “bears [*287] no rational relationship to” the value of what the utility is receiving. (Dec. No. 42529, *supra*, 48 Cal.P.U.C. at p. 472.) In short, had SCE agreed to pay the Recovery Portion and then applied for a rate increase to pass on the charge to its customers, the PUC could have “disallow[ed] expenditures that it [found] unreasonable, thus insuring that any excessive costs [would] be met from [SCE's] profits. The effect of the payments on rates and services [would have been] no greater than in any other case where the [PUC] and management disagree on the reasonableness of an expenditure, and the management concludes that it is good business judgment to make such payments from its profits despite the fact that it cannot recoup them from its rate payers.” (*Pac. Tel., supra*, 34 Cal.2d at p. 832.) [***891] The majority ignores this precedent in assuming that [****72] a utility, through rate increases, necessarily can pass on to its customers any and all charges it has agreed to pay.

Indeed, the facts in the record indicate that SCE and the City did not share the majority's assumption. As the majority explains, the record shows “that SCE was not willing to assume the burden of paying” the additional 1 percent the City demanded, and “was willing only to collect the charge from its customers and remit the revenue to the City.” (Maj. opn., *ante*, at p. 271.) It is for this reason that the agreement and the Ordinance provided that “the charge would be collected from ratepayers” and “would become payable only if SCE obtained the PUC's consent to include the surcharge as a customer surcharge.” (Maj. opn., *ante*, at p. 271.) Moreover, as explained [**236] above, although the agreement required SCE to *obtain* PUC approval by December 31, 2002, SCE and the City agreed not even to *apply* for PUC approval until over two years later, in March 2005. According to a letter from the City to SCE, the delay was “[b]ased” in part “upon the tremendous uncertainty associated with the end of the [California] deregulation transition period ... and the volatility and

uncertainty of rates.” Were it true, as the [****73] majority assumes, that SCE necessarily could have passed on the Recovery Portion to its customers, there would have been no reason for SCE to have refused legal responsibility for the proposed charge, for SCE and the City to have made the Recovery Portion contingent on “the PUC’s consent to include the surcharge as a customer surcharge” (maj. opn., *ante*, at p. 271), or for SCE and the City to have delayed submission of the application for PUC approval. In other words, as plaintiffs assert, the facts in the record indicate that, unlike the majority, SCE and the City did not consider the PUC to be “a mere rubber stamp of financial burdens” SCE and the City “might try to impose upon utility users.”

Fourth, the majority’s approach, in addition to being inconsistent with our case law, is fundamentally inconsistent with Proposition 218’s purpose. The majority, partially quoting the first two sentences of Proposition 218’s findings and declarations, suggests that the voters were “concern[ed] with excessive fees, not fees in general.” (Maj. opn., *ante*, at p. 262.) But the [*288] majority ignores the very next sentence of the findings and declarations: “This measure protects taxpayers by limiting the methods by [****74] which local governments exact revenue from taxpayers without their consent.” (Prop. 218, § 2, reprinted at 1 Stats. 1996, p. A-295.) Proposition 218 expressly provided that article XIII C “shall be liberally construed to effectuate” this goal, i.e., “limiting local government revenue and enhancing taxpayer consent.” (Prop. 218, § 5, reprinted at Historical Notes, 2B West’s Ann. Cal. Const. (2013), foll. Art. XIII C, § 1, at p. 363.) The majority also ignores the ballot arguments in favor of Proposition 218, which (1) warned that “politicians [had] created a loophole in the law that allows them to raise taxes without voter approval by calling taxes ‘assessments’ and ‘fees,’” and (2) stated that “Proposition 218 guarantees your right to vote on local tax increases—even when they are called something else, like ‘assessments’ or ‘fees’ and imposed on homeowners.” (Ballot Pamp., Gen.

Elec. (Nov. 5, 1996) argument in favor of Prop. 218, p. 76.) The record here shows that the City imposed the Recovery Portion on SCE’s customers in order to raise revenue for [***892] general governmental purposes. The charge clearly constitutes one of the “revenue-producing mechanisms” that, as the majority explains, local governments [****75] adopted because “voters restricted [their] taxing authority.” (Maj. opn., *ante*, at p. 266.) By holding that the City may raise revenue from SCE’s consumers by calling the charge a franchise fee, even though those paying the fee receive no franchise, the majority sanctions this obvious evasion of Proposition 218 and allows the City to use the utility as a middleman for what is a tax disguised as a fee, in derogation of Proposition 218’s express purpose and liberal construction clause.

Fifth, the majority’s concern about the *possible* treatment of charges passed on to ratepayers by a utility’s “unilateral decision” does not justify its refusal to recognize the significance under our case law of the fact that SCE’s customers do not receive franchise rights in exchange for paying the Recovery Portion, and its focus instead on the value of those rights to an entity that is not paying for them. (Maj. opn., *ante*, at p. 269.) Initially, the facts of this case do not present that scenario, and holding here that the Recovery Portion is a tax rather than a franchise fee because SCE’s customers receive no franchise rights in return for their payment would not preclude ratepayers from arguing *in a [****76] future case* that we should *expand* California Constitution, article XIII C’s reach to franchise charges that a utility, having contractually agreed to pay, unilaterally decides to pass on to its customers. The majority’s concern about this scenario does not justify its *contraction* of article XIII C so as to make it inapplicable where it clearly does and should apply: direct [**237] government imposition of a charge on those who receive nothing in return.

In any event, the majority’s analysis is contrary to decades of California case law establishing that, for

purposes of determining whether a charge is a tax or a fee as to the payor, charges passed on to the payor by the unilateral [*289] and discretionary decision of some third party are, in fact, different from charges legally imposed on the payor by the government. (E.g. *Western States*, *supra*, 19 Cal.3d at pp. 217–218; *Western L. Co. v. State Bd. of Equalization* (1938) 11 Cal.2d 156, 162–164 [78 P.2d 731] (*Western L.*.) The majority simply ignores these cases in reasoning that the two types of charges must be treated the same. (Maj. opn., *ante*, at p. 269.)

Indeed, the effect of the majority's approach is to allow claims that this long-standing and unbroken line of precedent precludes. Under that precedent, a charge that is not imposed by the government on the payor—either directly or by inclusion of a [****77] mandatory pass-on provision—and that is passed on to the payor by the unilateral and discretionary decision of some third party, is not a tax, even if it is “implicit” (maj. opn., *ante*, at p. 269) that the third party on whom the charge is imposed will pass it on to the payor. Notably, in *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 927 [26 Cal. Rptr. 3d 153], the court applied this principle to hold that a charge the City of Fresno had imposed on a utility, and that the utility had passed on to its customers, was not “a tax on utilities consumers” within the meaning of California Constitution article XIII C. The court explained that “[a]n exaction imposed on any particular ratepayer in an amount established in the discretion of the utility ... is not an exercise of the city's taxing power.” (*Howard Jarvis*, at p. 927.) [***893] Applying this principle, it held that the charge at issue was “not a tax upon consumers of utilities” because the legislation establishing it placed “the ‘levy’ directly upon the utility” and did “not require[]” the utility “to recover the ... fee from ratepayers in any particular manner.” (*Ibid.*)⁵

⁵ See *Western States*, *supra*, 19 Cal.3d at page 217 (charge imposed on nonprofit corporation providing services to banks, that was “recoup[ed]” from banks “by raising” fees, was not a tax on the banks because local ordinance imposing the charge did not

Courts applying the federal Constitution's prohibition on state taxation of the federal government have used the same analysis specifically with respect to so-called utility [****78] franchise fees. In *U.S. v. City of Leavenworth, Kan.* (D.Kan. 1977) 443 F.Supp. 274, 280–281, a city ordinance provided that an electrical [*290] utility would pay, as a franchise fee, “three percent (3%) of its gross revenue from the sale of electric energy to all customers within city limits, and the utility in turn billed its customers ‘a three percent franchise fee.’ The United States, as a purchaser of electricity from the utility, argued that the fee it had been charged constituted ‘an impermissible tax upon the federal government.’ (*Id.* at p. 281.) The court rejected the argument because the ordinance imposed ‘[l]egal liability for payment of the exaction’ on the utility and ‘contain[ed] no provisions for collection directly from’ the utility's customers and ‘no requirement that [the utility] pass on to’ its customers ‘all or any part of the financial burden of the franchise fee.’” (*Id.* at p. 282.)

Following this decision, in *U.S. v. State of Md.* (D.Md. 1979) 471 F.Supp. 1030, 1032, another federal court rejected the claim of [**238] the United States, again as a purchaser of electricity, that an environmental surcharge the State of Maryland had imposed was a constitutionally invalid tax on the federal government. Although agreeing that the surcharge was a tax—i.e., “an ‘enforced contribution to provide for the support of

“requir[e]” that it “be passed on” to customers); *Western L.*, *supra*, 11 Cal.2d at page 163 (state sales tax is not a tax on consumers even though retailers pass it on to consumers, because tax statute laid “the tax solely on the retailer”); *Occidental Life*, *supra*, 135 Cal.App.3d at page 849 (sales tax on retailer is a tax on purchasers from whom retailer recoups the charge only if it “‘must,’” “‘by its terms,’” “‘be passed on to the purchaser’”); *Rio Grande Oil Co. v. Los Angeles* (1935) 6 Cal.App.2d 200, 201 [44 P.2d 451] (charge on sale of gasoline is a tax as to the seller, but not as to the consumer, even though statute allows sellers to add the charge to the sale process and “‘in effect collect the tax from the consumer’”); see also *Bank of America*, *supra*, 209 Cal.App.2d at pages 792–793 (bank's statutory liability for use tax on checks it sold to customers, which by statute was imposed upon the purchaser rather than the seller, was not a tax on the bank).

[the] government” (*id.* at p. 1036)—the court [****79] denied relief because the surcharge was not a tax *on the federal government* (*id.* at pp. 1037–1041). By statute, the court first reasoned, the surcharge was “directly imposed on the electric companies” and was their “direct obligation.” (*Id.* at p. 1038.) As to whether the surcharge was a tax on customers of the electric companies, the determinative factor, the court explained, was whether the law “required [the companies] to pass [the charge] on to their customers for payment.” (*Ibid.*, italics added.) The surcharge was not a tax on the federal government, the court then held, because the utilities, although “[authorized] ... to pass [it] on to their customers” (*id.* at p. 1039), were “not required” by law to do so (*id.* at p. 1038.) Notably, in reaching this conclusion, the [***894] court both followed the Kansas franchise fee decision discussed above and distinguished a Minnesota decision holding that “a franchise fee imposed” upon a gas company by a city *was* an unconstitutional tax “as applied to purchases of natural gas by an agency of the United States ... because the city *required* the utility to add the franchise tax to its rates.” (*Id.* at p. 1040, italics added.)

This long-standing and consistent precedent from both California and elsewhere no doubt explains why, as the majority [****80] notes, “plaintiffs do not contend” in this case that the Initial Term Fee “is a tax” that was imposed in violation of the state Constitution. (Maj. opn., *ante*, at p. 269.) However, under the majority's holding that charges passed on by utilities are the same, for tax purposes, as charges imposed directly on ratepayers, plaintiffs now can, and surely will, make this argument. Indeed, the majority expressly states that the differences between the Initial Term Fee and the Recovery [*291] Portion are “unrelated to the character or validity” of these charges. (Maj. opn., *ante*, at p. 269, fn. 10.) Thus, plaintiffs may now allege that even the Initial Term Fee is a tax because it is passed on to them through SCE's rates and it exceeds the value of the franchise rights SCE

received.⁶

In the same way, the majority's holding renders both the Broughton Act and the 1937 Act vulnerable to constitutional challenge. Notwithstanding our holding almost 100 years ago that the fees utilities must pay under the Broughton Act are *not* taxes under the state Constitution (*Tulare, supra*, 188 Cal. at p. 670), under the majority's holding, both these payments and similar payments required by the 1937 Act are invalid taxes to the extent [****81] they are passed on by utilities to customers through rates and they exceed the value of the franchise rights conveyed. Notably, nothing suggests that these statutorily established charges reflect the value of a franchise. Moreover, the majority's holding that the Constitution *requires* courts to determine the value of a franchise would seem to render the 1937 Act unconstitutional insofar as it provides that “[n]o franchise granted under this chapter shall ever be given any value before any court ... in any proceeding of any character in excess of the cost to the grantee of the necessary publication and any other sum paid by it to the municipality therefor at the time of acquisition.” (§ 6263.)

Finally, as a practical matter, the majority's approach is problematic in a number of ways. The majority mentions one: the inherent “difficulties” in “determining the value of a franchise.” (Maj. opn., *ante*, at p. 269.) The majority references several factors it says may bear on value: “market forces” and [**239] “bona fide negotiations.” (*Id.* at pp. 269–270.) It suggests there may be “other indicia of value” (*id.* at p. 270), but it declines to offer any

⁶ According to the majority, the Ordinance's treatment of the Recovery Portion “was driven by the PUC's effort to ensure that a local government's higher-than-average charges are not unfairly imposed on ratepayers outside of the local government's jurisdiction.” (Maj. opn., *ante*, at p. 269, fn. 10.) As far as the record discloses, this is true only in the sense that the separate billing procedure the PUC permits, but does not require, utilities to employ enabled the City *to use SCE* to collect the additional 1 percent—which is a disguised tax—only from the City's taxpayers, and not from those who do not pay taxes to the City.

guidance as to what those other indicia might be, instead “leav[ing] th[e] issue to be ad [***895] dressed [****82] by expert opinion and subsequent case law” (*id.* at p. 270, fn. 11). But as we noted over 100 years ago, “[t]here are few subjects on which witnesses are more likely to differ than that of the value of property, and few are more difficult of satisfactory determination.” (*O’Hara v. Wattson* (1916) 172 Cal. 525, 528 [157 P. 608].) We also long ago recognized that “the value of franchises may be as various as the objects for which they exist, and the methods by which they are employed, and may change with every moment of time.” (*San Jose Gas Co. v. January* (1881) 57 Cal. 614, 616.) There are also uncertainties [*292] regarding the other side of the majority’s equation, i.e., the amount of the payment. As we have recognized, a utility’s annual receipts are “a most indefinite,” “elusive,” and “uncertain quantity” that is “dependent upon many conditions.” (*Thompson v. Board of Supervisors* (1896) 111 Cal. 553, 558 [44 P. 230].) Moreover, the total compensation the Ordinance requires for granting the franchise is 2 percent of SCE’s “Gross Annual Receipts.” Given the majority’s view that all costs are necessarily passed along to customers, this entire 2 percent—not just the one percent Recovery Portion—will have to be considered in determining the amount of the charge and whether it bears a “reasonable relationship” to “value.” (Maj. opn., *ante*, at p. 254.) And even were it possible to determine [****83] with any certainty the value of the franchise and the amount of the charge, the majority fails to explain what constitutes a “reasonable relationship” between these amounts. (*Ibid.*) Presumably, exact correspondence is unnecessary, but what is necessary, the majority does not say. As we have explained, “the question whether a contract” that impacts a utility’s rates and services “is reasonable is one on which, except in clear cases, there is bound to be conflicting evidence and considerable leeway for conflicting opinions.” (*Pac. Tel., supra*, 34 Cal.2d at p. 828.)

Perhaps to justify its failure to offer any real

guidance on this admittedly “difficult[]” issue (maj. opn., *ante*, at p. 269), the majority notes that “[t]he parties’ briefs do not consider the means by which franchise rights might be valued.” (*Id.* at p. 270, fn. 11.) But there is a simple explanation for this silence: Neither party has suggested that the value of the franchise should even be a consideration in determining whether the Recovery Portion is a tax or a fee. On the contrary, upon the court’s inquiry at oral argument, the City expressly disclaimed this approach. It asserted that, as to fees voluntarily negotiated for the use of government property, courts should not be concerned [****84] about whether the fee is reasonably related to the benefits, and should not second-guess what a utility is willing to pay for its use of public property. Nor, the City argued, are courts well positioned to second-guess the economic decisions of other branches of government. The City also noted, like the majority, the inherent difficulties of making this kind of determination, asking rhetorically, “what’s the fair and rational rate of a parking meter,” or “to rent a duck boat on the lake at the county fairgrounds,” or “to rent a meeting room at the community center?” Bringing the question back to the facts of this case, the City rightly asked, “What are the limits of [a municipality’s] ability to monetize its rights of way?” Instead, the City urges us to follow “well settled” law by focusing on the “legal incidence” of the Recovery Portion, “i.e., who has a legal duty to pay it.” This test, the City asserts, is “logical” [***896] and “predictable,” is “within the competence of courts to distinguish fees from taxes,” and “better serves the needs of courts and the society they serve.”

[*293]

I agree with the City. Indeed, regarding the City’s comment about monetizing its rights of way, we have explained, [****85] as noted above, that a municipality’s power to permit utilities to use public property “on such terms as are satisfactory to it” includes the power to “require the payment of such compensation as seems proper,” and that courts therefore do not “question whether or not the amount charged is a reasonable charge.” (*Sunset*,

supra, 161 Cal. at p. 285.) It is for these reasons, among others, [**240] that I focus my analysis, as our precedent directs, on the legal incidence of the Recovery Portion, and do not endorse a vague, unprecedented, unworkable, and standardless test that requires courts to determine the extent to which a charge “bear[s] a reasonable relationship to the value of the property interests transferred” (maj. opn., *ante*, at p. 270), “the value of the franchise conveyed” (*ibid.*), or “the value of the franchise rights” (*id.* at p. 271).

There are myriad other ways in which the majority's approach—determining whether the amount of the charge bears a reasonable relationship to the value of the franchise conveyed—is problematic. It essentially requires courts to determine the adequacy of consideration, in contravention of the well-established “general contract principle that courts should *not* inquire into the adequacy of consideration.” [****86] (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 679 [254 Cal. Rptr. 211, 765 P.2d 373], italics added; see *Whelan v. Swain* (1901) 132 Cal. 389, 391 [64 P. 560] [“The law does not weigh the *quantum* of the consideration”].) The majority's approach also essentially transfers responsibility for determining the reasonableness of a utility's rates from the PUC to the courts, thus usurping the PUC's *constitutional* power and duty to “fix [utility] rates” (Cal. Const., art. XII, § 6) and supplanting the PUC's far superior ability, relative to courts, to review the reasonableness of rates (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1183 [233 Cal. Rptr. 22, 729 P.2d 186] [“judicial review of rates is not comparable to regulation by the P.U.C.”]; *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 159–160 [161 Cal. Rptr. 172, 604 P.2d 566] [“PUC maintains an expert, independent staff to investigate rate requests” and “renders an independent decision on each record that it examines,” whereas courts “must limit ... review to the rates established by the involved utility and must depend upon the expert testimony presented by the parties”]; *Sale v. Railroad Commission* (1940) 15 Cal.2d 612, 617–

618 [104 P.2d 38]).

Given these difficulties and the lack of authority for the majority's approach, I disagree with the majority's conclusion that the Recovery Portion is not a tax unless it exceeds the reasonable value of the franchise. Instead, based on long-standing precedent, the purpose of Proposition 218 to limit local government revenue and enhance taxpayer consent, and the command [*294] that we liberally [****87] construe California Constitution, article XIII C to effectuate this purpose, I conclude that the Recovery Portion is a tax that the City may not impose without voter approval. I therefore dissent.

End of Document

City of Burbank v. State Water Resources Control Bd.

Supreme Court of California

April 4, 2005, Filed

S119248

Reporter

35 Cal. 4th 613 *; 108 P.3d 862 **; 26 Cal. Rptr. 3d 304 ***; 2005 Cal. LEXIS 3486 ****; 2005 Cal. Daily Op. Service 2861; 2005 Daily Journal DAR 3870; 35 ELR 20071; 60 ERC (BNA) 1470

CITY OF BURBANK, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants. CITY OF LOS ANGELES, Plaintiff and Respondent, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

limitations, Plant, narrative, stringent, economic factors, numeric, sections, River, issuing, water quality control, federal standard, concentrations, factors, navigable waters, beneficial use

Case Summary

Subsequent History: Time for Granting or Denying Rehearing Extended Burbank, City of v. State Water Resources Control Board, 2005 Cal. LEXIS 4271 (Cal., Apr. 21, 2005)

Rehearing denied by, Request denied by City of Burbank v. State Water Res. Control Bd., 2005 Cal. LEXIS 7185 (Cal., June 29, 2005)

Prior History: [****1] Superior Court of Los Angeles County, Nos. BS060960, BS060957, Dzintra I. Janavs, Judge. Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 & B152562.

City of Burbank v. State Water Resources Control Bd., 111 Cal. App. 4th 245, 4 Cal. Rptr. 3d 27, 2003 Cal. App. LEXIS 1236 (Cal. App. 2d Dist., 2003)

Disposition: Judgment affirmed in part and remanded in part..

Core Terms

pollutant, regional board, wastewater, clean water, permits, water quality, water quality standards, requirements, federal law, Cities, effluent limitation, restrictions, basin, discharged, regional,

Procedural Posture

Plaintiff cities sought review of a judgment of the Court of Appeal of California, Second Appellate District, Division Three, holding that Cal. Water Code §§ 13241 and 13263 required a regional water control quality board to take into account economic considerations when it adopted water quality standards in a basin plan but not when the board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

Overview

The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. The court held that whether the regional board should have complied with Cal. Water Code §§ 13263 and 13241 of California's Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 et seq., by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq. To comport

with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by federal law, from taking into account the economic effects of doing so.

Outcome

The court affirmed the judgment of the court of appeal, reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants were necessary to satisfy federal Clean Water Act requirements for treated wastewater. The court remanded for further proceedings to determine whether the pollutant limitations in the permits met or exceeded federal standards.

LexisNexis® Headnotes

Environmental Law > Water Quality > General Overview

Real Property Law > Water Rights > Beneficial Use

HN1 [📌] **Environmental Law, Water Quality**

Whereas the State Water Resources Control Board establishes statewide policy for water quality control, Cal. Water Code § 13140, the regional boards formulate and adopt water quality control plans for all areas within a region. Cal. Water Code § 13240. The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. Cal. Water Code § 13050(j). Basin plans must be consistent with state policy for water

quality control. Cal. Water Code § 13240.

Environmental

Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

Environmental Law > Water Quality > Clean Water Act > General Overview

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

HN2 [📌] **Discharge Permits, Effluent Limitations**

Under the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., each state is free to enforce its own water quality laws so long as its effluent limitations are not less stringent than those set out in the Clean Water Act. 33 U.S.C.S. § 1370.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental

Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN3 [📌] **Clean Water Act, Water Quality Standards**

The Clean Water Act, 33 U.S.C.S. § 1251 et seq., provides for two sets of water quality measures. Effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. 33 U.S.C.S. §§ 1311, 1314. Water quality

standards are, in general, promulgated by the states and establish the desired condition of a waterway. 33 U.S.C.S. § 1313. These standards supplement effluent limitations so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

Environmental Law > Water Quality > General Overview

HN4 [↓] Coverage & Definitions, Point Sources

See 33 U.S.C.S. § 1362(14).

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > Water Quality > General Overview

HN5 [↓] Clean Water Act, Water Quality Standards

The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C.S. § 1251 et seq., requires, inter alia, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the state fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the state. 33 U.S.C.S. § 1313(c).

Environmental Law > ... > Enforcement > Discharge

Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

Environmental Law > Water Quality > Clean Water Act > General Overview

Environmental

Law > ... > Enforcement > Discharge

Permits > General Overview

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

HN6 [↓] Discharge Permits, Effluent Limitations

Part of the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. The NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. 33 U.S.C.S. § 1342(a), (b). In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. Cal. Water Code § 13374.

Environmental Law > Water Quality > General Overview

Real Property Law > Water Rights > Beneficial Use

HN7 [↓] Environmental Law, Water Quality

See Cal. Water Code § 13263(a).

Environmental Law > Water Quality > General Overview

Real Property Law > Water Rights > Beneficial Use

[HN8](#) **Environmental Law, Water Quality**

See [Cal. Water Code § 13241](#).

Governments > Legislation > Interpretation

[HN9](#) **Legislation, Interpretation**

When construing any statute, the reviewing court's task is to determine the legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

[HN10](#) **Discharge Permits, Effluent Limitations**

[Cal. Water Code § 13263](#) directs regional boards, when issuing wastewater discharge permits, to take into account various factors including those set out in [Cal. Water Code § 13241](#). Listed among the [§ 13241](#) factors is economic considerations. [Cal. Water Code § 13241\(d\)](#).

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

[HN11](#) **Discharge Permits, Effluent**

Limitations

[Cal. Water Code § 13377](#) specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, [§ 13377](#) forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law, [33 U.S.C.S. § 1311\(a\)](#), and publicly operated wastewater treatment plants must comply with the act's clean water standards, regardless of cost. [33 U.S.C.S. §§ 1311\(a\), \(b\)\(1\)\(B\), \(C\), 1342\(a\)\(1\), \(3\)](#).

Constitutional Law > Supremacy Clause > General Overview

Environmental Law > Water Quality > General Overview

[HN12](#) **Constitutional Law, Supremacy Clause**

Because [Cal. Water Code § 13263](#) cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such a construction of [§ 13263](#) would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in [Cal. Water Code § 13377](#) that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's Supremacy Clause, U.S. Const. art. VI, [cl. 2](#), a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the

mandates of federal law.

Environmental

Law > ... > Enforcement > Discharge

Permits > Effluent Limitations

Environmental Law > Water Quality > General
Overview

Environmental Law > ... > Clean Water
Act > Enforcement > General Overview

HN13[] Discharge Permits, Effluent Limitations

The federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., reserves to the states significant aspects of water quality policy, 33 U.S.C.S. § 1251(b), and it specifically grants the states authority to "enforce any effluent limitation" that is not "less stringent" than the federal standard, 33 U.S.C.S. § 1370. It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are more stringent than required by federal law-from taking into account the economic effects of doing so.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court ruled that California law required a regional water quality control board to weigh the economic burden on a wastewater treatment facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. (Superior Court of Los Angeles County, Nos. BS060960 and BS060957, Dzintra I.

Janavs, Judge.) The Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 and B152562, concluded that Wat. Code, §§ 13241 and 13263, required a regional board to take into account "economic considerations" when it adopted water quality standards in a basin plan but not when the regional board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

The Supreme Court affirmed the judgment of the Court of Appeal, reinstating the wastewater discharge permits in part and remanding for further proceedings. The court held that whether the regional board should have complied with Wat. Code, §§ 13263 and 13241, of California's Porter-Cologne Water Quality Control Act, Wat. Code, § 13000 et seq., by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits, depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, 33 U.S.C. § 1251 et seq. To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by [*614] federal law, from taking into account the economic effects of doing so. (Opinion by Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J. (see p. 629).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1)[↓] (1)**Pollution and Conservation Laws § 5—Water—
“Basin Plans.”**

Whereas the State Water Resources Control Board establishes statewide policy for water quality control, Wat. Code, § 13140, the regional boards formulate and adopt water quality control plans for all areas within a region, Wat. Code, § 13240. Under Wat. Code, § 13050, subd. (j), the regional boards’ water quality plans, called “basin plans,” must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. Basin plans must be consistent with state policy for water quality control under Wat. Code, § 13240.

CA(2)[↓] (2)**Pollution and Conservation Laws § 5—Water—
Federal and State Standards.**

Under 33 U.S.C. § 1370, of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., each state is free to enforce its own water quality laws so long as its effluent limitations are not less stringent than those set out in the Clean Water Act.

CA(3)[↓] (3)**Pollution and Conservation Laws § 5—Water—
Federal and State Standards.**

The Clean Water Act, 33 U.S.C. § 1251 et seq., provides for two sets of water quality measures. Pursuant to 33 U.S.C. §§ 1311 and 1314, effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. Water quality standards are, in general, promulgated by the states and establish the desired condition of a waterway under 33 U.S.C. § 1313. These standards supplement effluent limitations so that numerous

point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

CA(4)[↓] (4)**Pollution and Conservation Laws § 5—Water—
Federal and State Standards.**

The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C. § 1251 et seq., requires, inter alia, that state authorities periodically review water quality [*615] standards and secure the EPA’s approval of any revisions in the standards. If the EPA recommends changes to the standards and the state fails to comply with that recommendation, 33 U.S.C. § 1313(c), authorizes the EPA to promulgate water quality standards for the state.

CA(5)[↓] (5)**Pollution and Conservation Laws § 5—Water—
National Pollutant Discharge Elimination System.**

Part of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. Title 33 U.S.C. § 1342(a), (b), of the NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. Under California law, Wat. Code, § 13374, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law.

CA(6)[↓] (6)

Statutes § 21—Construction—Legislative Intent.

When construing any statute, the reviewing court's task is to determine the Legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

CA(7)[↓] (7)**Pollution and Conservation Laws § 5—Water—Wastewater Discharge Permits—Economic Considerations.**

Wat. Code, § 13263, directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in Wat. Code, § 13241. Listed among the § 13241 factors is economic considerations, in § 13241, subd. (d).

CA(8)[↓] (8)**Pollution and Conservation Laws § 5—Water—Wastewater Discharge Permits—Economic Considerations.**

Wat. Code, § 13377, specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, § 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of [*616] the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants must comply with the act's clean water standards under 33 U.S.C. §§ 1311(a), (b)(1)(B) and (C), 1342(a)(1) and (3), regardless of cost.

CA(9)[↓] (9)**Pollution and Conservation Laws § 5—Water—Wastewater Discharge Permits—Economic Considerations.**

Because Wat. Code, § 13263, cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such a construction of § 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in Wat. Code, § 13377, that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's supremacy clause, U.S. Const., art. VI, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

CA(10)[↓] (10)**Pollution and Conservation Laws § 5—Water—Federal and State Standards.**

The federal Clean Water Act, 33 U.S.C. § 1251 et seq., reserves to the states significant aspects of water quality policy under 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 under 33 U.S.C. § 1370. It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state—when imposing effluent limitations that are more stringent than required by federal law—from taking into account the economic effects of doing so. Thus, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that

are less stringent than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit more stringent than federal law requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 68, 69.]

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[****3]

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Judges: Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J.

Opinion by: KENNARD [**864]

Opinion

KENNARD, J.—Federal law establishes national water quality standards but allows the states to enforce their own water quality laws so long as they comply with federal standards. Operating within this federal-state framework, California's nine Regional Water Quality Control Boards establish water quality policy. They also issue permits for the discharge of treated wastewater; these permits specify the maximum allowable concentration of chemical [****4] pollutants in the discharged wastewater.

The question here is this: When a regional board issues a permit to a wastewater treatment facility, must the board take into account the facility's costs of complying with the board's restrictions on pollutants in the wastewater to be discharged? The trial court ruled that California law required a regional board to weigh the economic burden on the facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The Court of Appeal disagreed. On petitions by the municipal operators of three wastewater treatment facilities, we granted review.

We reach the following conclusions: Because both California law and federal law require regional boards to comply with federal clean water standards, and because the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in [****5] a wastewater discharge permit *more stringent* than federal law requires, California law allows the board to take into account economic [**865] factors, including the wastewater discharger's cost of compliance. We remand this case for further proceedings to determine whether the pollutant

limitations in the permits challenged here meet or exceed federal standards.

[*619] I. Statutory Background

The quality of our nation's waters is governed by a “complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities.” (*PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 704 [128 L. Ed. 2d 716, 114 S. Ct. 1900].) We first discuss California law, then federal law.

A. California Law

In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (*Wat. Code, § 13000 et seq.*, added by Stats. 1969, ch. 482, § 18, p. 1051.)¹ Its goal is “to attain the highest water [***307] quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and [****6] 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).²

¹ Further undesignated statutory references are to the Water Code.

² The Los Angeles water region “comprises all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River

[****7] CA(1)[↑] (1) HNI[↑] 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). The regional boards’ water quality plans, called “basin plans,” must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. (§ 13050, subd. (j).) Basin plans must be consistent with “state policy for water quality control.” (§ 13240.)

B. Federal Law

In 1972, Congress enacted amendments (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816) to the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), which, as amended in 1977, is commonly known as the Clean [*620] Water Act. The Clean Water Act is a “comprehensive water quality statute designed to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ ” (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, supra*, 511 U.S. at p. 704, quoting 33 U.S.C. § 1251(a).) The act’s national goal was to eliminate by the year 1985 [****8] “the discharge of pollutants into the navigable waters” of the United States. (33 U.S.C. § 1251(a)(1).) To accomplish this goal, the act established “effluent limitations,” which are restrictions on the “quantities, rates, and concentrations of chemical, physical, biological, and other constituents”; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards. (33 U.S.C. §§ 1311, 1362(11).)

CA(2)[↑] (2) HN2[↑] Under the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not “less stringent” than those set out in the Clean Water Act. (33 U.S.C. § 1370.) This led the

California Legislature in 1972 to amend the state’s Porter-Cologne Act “to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act.” (§ 13372.)

[**866] CA(3)[↑] (3) Roughly a dozen years ago, the United States Supreme Court, in *Arkansas v. Oklahoma* (1992) 503 U.S. 91 [117 L. Ed. 2d 239, 112 S. Ct. 1046], described the distinct roles of the state and federal agencies [****9] in enforcing water quality: “The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ 33 U.S.C. § 1251(a). Toward [***308] this end, HN3[↑] [the Clean Water Act] provides for two sets of water quality measures. ‘Effluent limitations’ are promulgated by the [Environmental Protection Agency (EPA)] and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources.[³] See §§ 1311, 1314. ‘[W]ater quality standards’ are, in general, promulgated by the States and establish the desired condition of a waterway. See § 1313. These standards supplement effluent limitations ‘so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.’ *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12 [48 L. Ed. 2d 578, 96 S. Ct. 2022, 2025, n. 12] (1976).

[****10] [*621] CA(4)[↑] (4) “HN5[↑] The EPA provides States with substantial guidance in the drafting of water quality standards. See generally 40 CFR pt. 131 (1991) (setting forth model water quality standards). Moreover, [the Clean Water Act] requires, *inter alia*, that state authorities periodically review water quality

drainages.” (§ 13200, subd. (d).)

³ A “HN4[↑] point source” is “any discernible, confined and discrete conveyance” and includes “any pipe, ditch, channel ... from which pollutants ... may be discharged.” (33 U.S.C. § 1362 (14).)

standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State. 33 U.S.C. § 1313(c).” (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 101.)

CA(5)[7] (5) HN6[7] Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), “[t]he primary means” for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 101.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater [****11] discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)

With this federal and state statutory framework in mind, we now turn to the facts of this case.

II. Factual Background

This case involves three publicly owned treatment plants that discharge wastewater under NPDES permits issued by the Los Angeles Regional Board.

The City of Los Angeles owns and operates the Donald C. Tillman Water Reclamation Plant (Tillman Plant), which serves the San Fernando Valley. The City of Los Angeles also owns and operates the Los Angeles-Glendale Water Reclamation Plant (Los Angeles-Glendale Plant), which processes wastewater from areas within the City of Los Angeles and the independent cities of Glendale and Burbank. Both the Tillman Plant and the Los Angeles-Glendale Plant discharge wastewater directly into the Los Angeles River, now a concrete-lined flood control channel that runs through the City of Los Angeles, ending at the Pacific Ocean. The State Board and the Los

Angeles Regional Board consider the Los Angeles River to be a navigable water of the United States for purposes of the federal Clean Water [****12] Act.

The third plant, the Burbank Water Reclamation Plant (Burbank Plant), is owned and operated by the City of Bur [***309] bank, serving residents and businesses within that city. The Burbank Plant discharges wastewater into the Burbank Western Wash, which drains into the Los Angeles River.

[*622] All three plants, which together process hundreds of millions of gallons of sewage [**867] each day, are tertiary treatment facilities; that is, the treated wastewater they release is processed sufficiently to be safe not only for use in watering food crops, parks, and playgrounds, but also for human body contact during recreational water activities such as swimming.

In 1998, the Los Angeles Regional Board issued renewed NPDES permits to the three wastewater treatment facilities under a basin plan it had adopted four years earlier for the Los Angeles River and its estuary. That 1994 basin plan contained general narrative criteria pertaining to the existing and potential future beneficial uses and water quality objectives for the river and estuary.⁴ The narrative criteria included municipal and domestic water supply, swimming and other recreational water uses, and fresh water habitat. The plan further provided: [****13] “All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life.” The 1998 permits sought to reduce these narrative criteria to specific numeric requirements setting daily maximum limitations for more than 30 pollutants present in

⁴ This opinion uses the terms “narrative criteria” or descriptions, and “numeric criteria” or effluent limitations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, “no toxic pollutants in toxic amounts” would be a narrative description. This contrasts with numeric criteria, which detail specific pollutant concentrations, such as parts per million of a particular substance.

the treated wastewater, measured in milligrams or micrograms per liter of effluent.⁵

[***14] The Cities of Los Angeles and Burbank (Cities) filed appeals with the State Board, contending that achievement of the numeric requirements would be too costly when considered in light of the potential benefit to water quality, and that the pollutant restrictions in the NPDES permits were unnecessary to meet the narrative criteria described in the basin plan. The State Board summarily denied the Cities' appeals.

Thereafter, the Cities filed petitions for writs of administrative mandate in the superior court. They alleged, among other things, that the Los Angeles Regional Board failed to comply with sections 13241 and 13263, part of California's Porter-Cologne Act, because it did not consider the economic burden on the Cities in having to reduce substantially the pollutant content of their discharged wastewater. They also alleged that compliance with the pollutant restrictions set out in the NPDES permits issued by the regional [*623] board would greatly increase their costs of treating the wastewater to be discharged into the Los Angeles River. According to the City of Los Angeles, its compliance costs would exceed \$ 50 million annually, representing more than 40 percent of its entire budget [***15] for operating its four wastewater treatment plants and its sewer system; the City of Burbank estimated its added costs at over \$ 9 million annually, a nearly 100 percent increase above its \$ 9.7 million annual budget for wastewater treatment.

[***310] The State Board and the Los Angeles Regional Board responded that sections 13241 and 13263 do not require consideration of costs of compliance when a regional board issues a NPDES permit that restricts the pollutant content of discharged wastewater.

⁵ For example, the permits for the Tillman and Los Angeles-Glendale Plants limited the amount of fluoride in the discharged wastewater to 2 milligrams per liter and the amount of mercury to 2.1 micrograms per liter.

The trial court stayed the contested pollutant restrictions for each of the three wastewater treatment plants. It then ruled that sections 13241 and 13263 of California's Porter-Cologne Act required a regional board to consider costs of compliance not only when it adopts a basin or water quality plan but also when, as here, it issues an NPDES permit setting the allowable pollutant content of a treatment plant's discharged wastewater. The court found no evidence that the Los Angeles Regional Board had considered economic factors at either stage. Accordingly, the trial court granted the Cities' petitions for writs of mandate, and it ordered the Los Angeles Regional Board to vacate the contested restrictions [***16] on pollutants in the wastewater discharge permits issued to the three municipal plants here and to conduct hearings [**868] to consider the Cities' costs of compliance before the board's issuance of new permits. The Los Angeles Regional Board and the State Board filed appeals in both the Los Angeles and Burbank cases.⁶

The Court of Appeal, after consolidating the cases, reversed the trial court. It concluded that sections 13241 and 13263 require a regional board to take into account "economic [***17] considerations" when it adopts water quality standards in a basin plan but not when, as here, the regional board sets specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards. We granted the Cities' petition for review.

[*624] III. Discussion

⁶ Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that (1) the Los Angeles Regional Board failed to show how it derived from the narrative criteria in the governing basin plan the specific numeric pollutant limitations included in the permits; (2) the administrative record failed to support the specific effluent limitations; (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages; and (4) the permits improperly specified the manner of compliance.

A. Relevant State Statutes

The California statute governing the issuance of *wastewater permits* by a regional board is section 13263, which was enacted in 1969 as part of the Porter-Cologne Act. (See *ante*, at p. 619.) Section 13263 provides in relevant part: “HN7[↑] *The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge [of wastewater]. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.*” (§ 13263, subd. (a), italics added.)

Section 13241 states: “HN8[↑] Each regional board shall establish such water quality objectives in water quality control [****18] plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

[***311] “(a) Past, present, and probable future beneficial uses of water.

“(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

“(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

“(d) *Economic considerations.*

“(e) The need for developing housing within the region.

“(f) The need to develop and use recycled water.” (Italics added.)

The Cities here argue that section 13263's express reference to section 13241 requires the Los Angeles Regional Board to consider section 13241's listed factors, notably “[e]conomic considerations,” before issuing NPDES permits requiring specific pollutant reductions [****19] in discharged effluent or treated wastewater.

[*625] Thus, at issue is language in section 13263 stating that when a regional board “prescribe[s] requirements as to the nature of any proposed discharge” of treated wastewater it must “take into consideration” certain factors including “the provisions of Section 13241.” According to the Cities, this statutory language requires that a regional board make an independent evaluation of the section 13241 factors, including “economic considerations,” before restricting the pollutant content in an NPDES permit. This was the view expressed in the trial court's ruling. The Court of Appeal rejected that view. It held that a regional board need consider the section 13241 factors only when it adopts a basin or water quality plan, but not when, as in this case, it issues a wastewater discharge [**869] permit that sets specific numeric limitations on the various chemical pollutants in the wastewater to be discharged. As explained below, the Court of Appeal was partly correct.

B. Statutory Construction

CA(6)[↑] (6) HN9[↑] When construing any statute, our task is to determine the Legislature's intent when it enacted the statute “so that we may adopt the construction that [****20] best effectuates the purpose of the law.” (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 [3 Cal. Rptr. 3d 623, 74 P.3d 726]; see *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268 [121 Cal. Rptr. 2d 203, 47 P.3d 1069].) In doing this, we look to the statutory language, which ordinarily is “the most reliable indicator of

legislative intent.” (*Hassan, supra*, at p. 715.)

CA(7) (7) As mentioned earlier, our Legislature's 1969 enactment of the Porter-Cologne Act, which sought to ensure the high quality of water in this state, predated the 1972 enactment by Congress of the precursor to the federal Clean Water Act. Included in California's original Porter-Cologne Act were sections 13263 and 13241. HN10 Section 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in section 13241. Listed among the section 13241 factors is “[e]conomic considerations.” (§ 13241, subd. (d).) The plain language of sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit.

Our [****21] construction of sections 13263 and 13241 does not end with their plain statutory language, however. We must also analyze them in the context of the statutory scheme of which they are a part. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [12 [***312] Cal. Rptr. 3d 343, 88 P.3d 71].) Like sections 13263 and 13241, section 13377 is part of the Porter-Cologne Act. But unlike the former two statutes, section 13377 was [*626] not enacted until 1972, shortly after Congress, through adoption of the Federal Water Pollution Control Act Amendments, established a comprehensive water quality policy for the nation.

CA(8) (8) HN11 Section 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States

unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater [****22] treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost (see *id.*, §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3)). HN12 CA(9) (9) Because section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. ⁷ [****24] Such a construction of section 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's [**870] declaration in section 13377 that all discharged wastewater must satisfy federal standards. ⁸ This was also the conclusion of the Court of Appeal. Moreover, under the federal Constitution's supremacy clause (art. VI), a state law that conflicts with federal law is “ ‘without

⁷ The concurring opinion misconstrues both state and federal clean water law when it describes the issue here as “whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions that meet the clean water standards in more cost-effective and economically efficient ways.” (Conc. opn. of Brown, J., *post*, at p. 629, some italics added.) This case has nothing to do with meeting federal standards in more cost effective and economically efficient ways. State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit. (§§ 13241 & 13263.) Federal law, by contrast, as stated above in the text, “prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the [federal] act's *clean water standards, regardless of cost* (see *id.*, §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3)).” (Italics added.)

⁸ As amended in 1978, section 13377 provides for the issuance of waste discharge permits that comply with federal clean water law “together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.” We do not here decide how this provision would affect the cost-consideration requirements of sections 13241 and 13263 when more stringent effluent standards or limitations in a permit are justified for some reason independent of compliance with federal law.

effect.’ ” (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 [120 L. Ed. 2d 407, 112 S. Ct. 2608]; see *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923 [12 Cal. Rptr. 3d 262, 88 P.3d 1].) To comport with the principles of federal supremacy, California law cannot authorize this [*627] state's regional boards to allow the discharge of pollutants [****23] into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

[**313] Thus, in this case, whether the Los Angeles Regional Board should have complied with sections 13263 and 13241 of California's Porter-Cologne Act by taking into account “economic considerations,” such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits, depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act. We therefore remand this matter for the trial court to resolve that issue.

C. Other Contentions

The Cities [****25] argue that requiring a regional board at the wastewater discharge permit stage to consider the permit holder's cost of complying with the board's restrictions on pollutant content in the water is consistent with federal law. In support, the Cities point to certain provisions of the federal Clean Water Act. They cite section 1251(a)(2) of title 33 United States Code, which sets, as a national goal “*wherever attainable*,” an interim goal for water quality that protects fish and wildlife, and section 1313(c)(2)(A) of the same title, which requires consideration, among other things, of waters' “*use and value for navigation*” when revising or adopting a “water quality standard.” (Italics added.) These two federal statutes, however, pertain not to permits for wastewater discharge, at issue here, but to establishing water quality standards, not at issue here. Nothing in the federal Clean Water Act

suggests that a state is free to disregard or to weaken the federal requirements for clean water when an NPDES permit holder alleges that compliance with those requirements will be too costly.

CA(10)[↑] (10) At oral argument, counsel for amicus curiae National Resources Defense Council, which argued on [****26] behalf of California's State Board and regional water boards, asserted that the federal Clean Water Act incorporates state water policy into federal law, and that therefore a regional board's consideration of economic factors to justify greater pollutant concentration in discharged wastewater would conflict with the federal act even if the specified pollutant restrictions were not less stringent than those required under federal law. We are not persuaded. HN13[↑] The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to “enforce any effluent limitation” that is not “*less stringent*” than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit [*628] a state—when imposing effluent limitations that are *more stringent* than required by federal law—from taking into account the economic effects of doing so.

Also at oral argument, counsel for the Cities asserted that if the three municipal wastewater treatment facilities ceased [****27] releasing their treated wastewater into the concrete channel that makes up the Los Angeles River, it would (other than during the rainy season) contain no water at all, and thus would not be a “navigable water” of the [**871] United States subject to the Clean Water Act. (See *Solid Waste Agency v. United States Army Corps of Engineers* (2001) 531 U.S. 159, 172 [148 L. Ed. 2d 576, 121 S. Ct. 675] [“The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or

which could reasonably be so made.”.) It is unclear when the Cities first raised this issue. The Court of Appeal did not discuss it in its opinion, and the Cities did not seek rehearing on this ground. (See Cal. Rules of Court, rule [***314] 28(c)(2).) Concluding that the issue is outside our grant of review, we do not address it.

Conclusion

Through the federal Clean Water Act, Congress has regulated the release of pollutants into our national waterways. The states are free to manage their own water quality programs so long as they do not compromise the federal clean [****28] water standards. When enacted in 1972, the goal of the Federal Water Pollution Control Act Amendments was to *eliminate* by the year 1985 the discharge of pollutants into the nation's navigable waters. In furtherance of that goal, the Los Angeles Regional Board indicated in its 1994 basin plan on water quality the intent, insofar as possible, to remove from the water in the Los Angeles River toxic substances in amounts harmful to humans, plants, and aquatic life. What is not clear from the record before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles-Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements. This is an issue of fact to be resolved by the trial court.

Disposition

We affirm the judgment of the Court of Appeal reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants are necessary to satisfy federal Clean Water Act requirements for treated wastewater. [****29] The Court of Appeal is directed to remand this [*629] matter to the trial court to decide whether any numeric limitations, as

described in the permits, are “more stringent” than required under federal law and thus should have been subject to “economic considerations” by the Los Angeles Regional Board before inclusion in the permits.

George, C. J., Baxter, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

Concur by: BROWN

Concur

BROWN, J., Concurring.—I write separately to express my frustration with the apparent inability of the government officials involved here to answer a simple question: How do the federal clean water standards (which, as near as I can determine, are the state standards) prevent the state from considering economic factors? The majority concludes that because “the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require.” (Maj. opn., *ante*, at p. 618.) That seems a pretty self-evident proposition, but not a useful one. [****30] The real question, in my view, is whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions that *meet* the clean water standards in more cost-effective and economically efficient ways. I can see no reason why a federal law—which purports to be an example of cooperative federalism—would decree such a result. I do not think the majority's reasoning is at fault here. Rather, the agencies involved seemed to have worked hard to make this simple question impenetrably obscure.

A brief review of the statutory framework at issue is necessary to understand my concerns. [***315]

[**872] I. Federal Law

“In 1972, Congress enacted the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), commonly known as the Clean Water Act (CWA) [Citation.] ... [¶] Generally, the CWA ‘prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]’ ... The most important of those exceptions is pollution discharge under a valid NPDES [National Pollution Discharge Elimination System] permit, which can be issued either by the Environmental [****31] Protection Agency (EPA), or by an EPA-approved state permit program such as California’s. [Citations.] NPDES permits are valid for five years. [Citation.] [¶] Under the CWA’s NPDES permit system, the states are required to develop *water quality standards*. [Citations.] A water quality standard ‘establish[es] the desired condition of a waterway.’ [Citation.] A water quality standard for any [*630] given waterway, or ‘water body,’ has two components: (1) the designated beneficial uses of the water body and (2) the *water quality criteria* sufficient to protect those uses. [Citations.] [¶] Water quality criteria can be either *narrative* or *numeric*. [Citation.]” (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092–1093 [1 Cal. Rptr. 3d 76].)

With respect to satisfying water quality standards, “a polluter must comply with *effluent limitations*. The CWA defines an effluent limitation as ‘any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, [****32] the waters of the contiguous zone, or the ocean, including schedules of compliance.’ [Citation.] ‘Effluent limitations are a means of *achieving* water quality standards.’ [Citation.] [¶] NPDES permits establish effluent limitations for the polluter. [Citations.] CWA’s NPDES permit system provides for a two-step process for the establishing of

effluent limitations. First, the polluter must comply with *technology-based effluent limitations*, which are limitations based on the best available or practical technology for the reduction of water pollution. [Citations.] [¶] Second, the polluter must also comply with more stringent *water quality-based effluent limitations* (WQBEL’s) where applicable. In the CWA, Congress ‘supplemented the “technology-based” effluent limitations with “water quality-based” limitations “so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.” ’ [Citation.] [¶] The CWA makes WQBEL’s applicable to a given polluter whenever WQBEL’s are ‘necessary to meet water quality standards, treatment standards, or schedules of compliance, [****33] established pursuant to any State law or regulations’ [Citations.] Generally, NPDES permits must conform to state water quality laws insofar as the state laws impose more stringent pollution controls than the CWA. [Citations.] Simply put, WQBEL’s implement water quality standards.” (*Communities for a Better Environment v. State Water Resources Control Bd.*, *supra*, 109 Cal.App.4th at pp. 1093–1094, fns. omitted.)

This case involves water quality-based effluent limitations. As set forth above, “[u]nder the CWA, states have the primary role in promulgating water quality standards.” (*Piney Run Preservation Ass’n v. Commrs. of Carroll Co.* (4th Cir. 2001) 268 F.3d 255, 265, fn. 9.) “Under the CWA, the water quality standards referred to in section 301 [see 33 U.S.C. § 1311] are primarily the states’ handiwork.” [****316] (*American Paper Institute, Inc. v. U.S. Envtl. Protection Agency* (D.C. Cir. 1993) 302 U.S. App. D.C. 80 [996 F.2d 346, 349] (*American Paper*).) In fact, upon the 1972 passage of the CWA, “[s]tate water quality standards in effect at the time ... were deemed to be the initial water [****34] quality benchmarks for CWA purposes The states were to revisit and, if [*631] necessary, revise those initial standards at least once every three years.” (*American Paper*, at

p. 349.) Therefore, “once a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard.” (*American Paper*, at p. 350.) Accordingly, it appears that in most instances, **[**873]** state water quality standards are identical to the federal requirements for NPDES permits.

II. State Law

In California, pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.; Stats. 1969, ch. 482, § 18, p. 1051; hereafter Porter-Cologne Act), the regional water quality control boards establish water quality standards—and therefore federal requirements for NPDES permits—through the adoption of water quality control plans (basin plans). The basin plans establish water quality objectives using enumerated factors—including economic factors—set forth in Water Code section 13241.

In addition, as one court observed: “The Porter-Cologne **[***35]** Act ... established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (Wat. Code, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter-Cologne Act identified these permits as ‘waste discharge requirements,’ and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (Wat. Code, §§ 13263, subd. (a), 13377, 13374.) [¶] Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added Chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (Wat. Code, § 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards ‘shall, as required or authorized by the [Clean Water Act], issue **[***36]** waste discharge requirements ...

which apply and ensure compliance with all applicable provisions [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.’ (Wat. Code, § 13377.) Water Code section 13374 provides that ‘[t]he term “waste discharge requirements” as referred to in this division is the equivalent of the term “permits” as used in the [Clean Water Act].’ [¶] California subsequently obtained the required approval to issue NPDES permits. [Citation.] Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat. Code, § 13374.)” (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875 [22 Cal. Rptr. 3d 128].)

[*632] Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los **[***37]** Angeles Regional Water Quality Control Board (Board)—the body responsible to enforce the statutory framework—failed to comply with its statutory mandate.

[*317]** For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirement set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of “gotcha” by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do

so.

Moreover, the Board acknowledges that it has neglected other statutory provisions that might have provided an additional opportunity to air these concerns. As set forth above, pursuant to the CWA, “[t]he states were to revisit [****38] and, if necessary, revise those initial standards at least once every three years—a process commonly known as triennial review. [Citation.] Triennial reviews consist of public hearings in which current water quality standards are examined to assure that they ‘protect the public health or welfare, enhance the quality of water and serve the purposes’ of the Act. [Citation.] Additionally, the CWA directs [**874] states to consider a variety of competing policy concerns during these reviews, including a waterway's ‘use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.’ ” (*American Paper, supra*, 996 F.2d at p. 349.)

According to the Cities, “[t]he last time that the narrative water quality objective for toxicity contained in the Basin Plan was reviewed and modified was 1994.” The Board does not deny this claim. Accordingly, the Board has failed its duty to allow public discussion—including economic considerations—at the required intervals when making its determination of proper water quality standards.

What is unclear is why this process should be viewed as a contest. State [****39] and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.

[*633] Our decision today arguably allows the Board to continue to shirk its statutory duties. The majority holds that when read together, Water Code sections 13241, 13263, and 13377 do not allow the Board to consider economic factors when issuing NPDES permits to satisfy federal CWA requirements. (Maj. opn., *ante*, at pp. 625–627.)

The majority then bifurcates the issue when it orders the Court of Appeal “to remand this matter to the trial court to decide whether any numeric limitations, as described in the permits, are ‘more stringent’ than required under federal law and thus should have been subject to ‘economic considerations’ by the Los Angeles Regional Board before inclusion in the permits.” (*Id.* at pp. 628–629.)

The majority overlooks the feedback loop established by the CWA, under which federal standards are linked to state-established water quality standards, including narrative water quality criteria. (See 33 U.S.C. § 1311 [****40] (b)(1)(C); 40 C.F.R. § 122.44(d)(1) (2004).) Under the CWA, NPDES permit requirements include the state narrative criteria, which are incorporated into the Board's basin plan under the description “no toxins in toxic amounts.” As far as I can determine, NPDES permits [***318] designed to achieve this narrative criteria (as well as designated beneficial uses) will usually implement the state's basin plan, while satisfying federal requirements as well.

If federal water quality standards are typically identical to state standards, it will be a rare instance that a state exceeds its own requirements and economic factors are taken into consideration.¹ In light of the Board's initial failure to consider costs of compliance and its repeated failure to conduct required triennial reviews, the result here is an unseemly bureaucratic bait-and-switch that we should not endorse. The likely outcome of the majority's decision is that the Cities will be economically burdened to meet standards imposed on them in a highly questionable manner.² In these

¹ (But see *In the Matter of the Petition of City and County of San Francisco, San Francisco Baykeeper et al.* (Order No. WQ 95-4, Sept. 21, 1995) 1995 WL 576920.)

² Indeed, given the fact that “water quality standards” in this case are composed of broadly worded components (i.e., a narrative criteria and “designated beneficial uses of the water body”), the Board possessed a high degree of discretion in setting NPDES permit requirements. Based on the Board's past performance, a proper exercise of this discretion is uncertain.

times of tight fiscal budgets, it is difficult to imagine imposing additional financial burdens on municipalities without at least [****41] allowing them to present alternative views.

Based on the facts of this case, our opinion today appears to largely retain the status quo for the Board. If the Board can actually demonstrate that only the precise limitations at issue here, implemented in only one way, will achieve the desired water standards, perhaps its obduracy is justified. That case has yet to be made.

[*634] Accordingly, I cannot conclude that the majority's decision is wrong. The analysis [**875] may provide a [****42] reasonable accommodation of conflicting provisions. However, since the Board's actions "make me wanna holler and throw up both my hands,"³ I write separately to set forth my concerns and concur in the judgment—*dubitante*.⁴

The petitions of all appellants and respondent for a rehearing were denied June 29, 2005. Brown, J., did not participate therein.

End of Document

³ Marvin Gaye (1971) "Inner City Blues."

⁴ I am indebted to Judge Berzon for this useful term. (See *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir. 2005) 400 F.3d 1119 [2005 WL 466202] (conc. opn. of Berzon, J.))

Div. of Occupational Safety & Health v. State Bd. of Control

Court of Appeal of California, Third Appellate District

February 19, 1987

No. C000006

Reporter

189 Cal. App. 3d 794 *; 234 Cal. Rptr. 661 **; 1987 Cal. App. LEXIS 1410 ***; 1987 OSHD (CCH) P27,921

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH, Plaintiff and Respondent, v. STATE BOARD OF CONTROL, Defendant and Respondent; ARCADE FIRE DISTRICT, Real Party in Interest and Appellant

County (California), granted the writ. Appellant then filed a writ of mandamus challenging the trial court's decision.

Overview

Appellant fire district filed a claim with defendant board asserting that Cal. Admin. Code, tit. 8, § 5144 (g) (Regulation), imposed additional manpower requirements upon it and other local fire protection districts and therefore it was entitled to state reimbursement under former Cal. Rev. & Tax. Code § 2231. Defendant board held that the Regulation created a reimbursable state mandated cost and approved appellant's reimbursement claim. Plaintiff division sought review of defendant's decision, by mandamus and the trial court granted its request. Appellant petitioned the court for a peremptory writ of mandate directing defendant's decision to be set aside. On appeal, the court applied the substantial evidence standard of review and affirmed the trial court's decision. The court held that since plaintiff was not required to promulgate the Regulation in order to comply with federal law, the exemption for federally mandated costs did apply. The court further found that the regulation did not mandate an increase in appellant's fire protection costs, and therefore the trial court did not err when it directed defendant to vacate its decision.

Subsequent History: [***1] A Petition for a Rehearing was Denied March 17, 1987.

Prior History: Superior Court of Sacramento County, No. 299306, Roger K. Warren, Judge.

Disposition: The order granting the Division's petition for a writ of mandate is affirmed.

Core Terms

regulation, costs, executive order, reimbursable, mandated, occupational safety, levels, costs mandated, local agency, requires, standby, atmosphere, implements, increases, costs incurred, federal mandate, state-mandated, firefighting, subdivisions, federal government, state regulation, confined space, increased cost, respiratory, interprets, Appeals, service level, local fire, companies, districts

Case Summary

Procedural Posture

Defendant board found that Cal. Admin. Code, tit. 8, § 5144 (g), which imposed higher safety standards, created a reimbursable state mandated cost; therefore defendant approved appellant fire district's reimbursement claim. Plaintiff division sought review of defendant's decision by mandamus and the Superior Court of Sacramento

Outcome

The court affirmed the trial court's decision granting defendant board's petition for a writ mandamus. The court held that the regulation, which raised safety requirements, did not create a reimbursable interest, because the regulation did

not mandate an increase in appellant's fire protection costs. **HN3[↓] Judicial Review, Standards of Review**

LexisNexis® Headnotes

Business & Corporate Compliance > ... > State & Local Taxes > Tax Law > State & Local Taxes

HN1[↓] Tax, State & Local Taxes

See Cal. Rev. & Tax. Code § 2207.

Governments > Legislation > Types of Statutes

HN2[↓] Legislation, Types of Statutes

Cal. Admin. Code, tit. 8, § 5144 (g), requires only two persons to be on the job when atmospheres immediately hazardous to life or health are encountered -- one person to stand by in a location unaffected by likely incidents and the other to encounter the dangerous atmosphere itself.

Administrative Law > Judicial Review > Standards of Review > General Overview

Labor & Employment Law > Occupational Safety & Health > Administrative Proceedings > Jurisdiction

Administrative Law > Judicial Review > Remedies > Mandamus

Administrative Law > Judicial Review > Standards of Review

Labor & Employment Law > ... > Administrative Proceedings > Judicial Review > Standards of Review

In an administrative mandamus proceeding, the court is bound by the State Board of Control findings on all issues of fact within its jurisdiction which are supported by substantial evidence on the record. Cal. Gov't Code, § 17559. The interpretation of an administrative regulation, however, like the interpretation of a statute, is a question of law ultimately to be resolved by the courts.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Administrative Law > Judicial Review > Standards of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN4[↓] Reviewability, Factual Determinations

Where the substantial evidence test applies, the court exercises an essentially appellate function in determining whether the administrative findings are supported by substantial evidence and the proceedings free from legal error; the scope of our appellate review is coextensive with that of the superior court.

Business & Corporate Compliance > ... > State & Local Taxes > Tax Law > State & Local Taxes

HN5[↓] Tax, State & Local Taxes

As defined by Cal. Rev. & Tax. § 2206, costs mandated by the federal government include any increased costs mandated upon a local agency after January 1, 1973, in order to comply with the requirements of federal statute or regulation. Although an executive order implementing a

federal law may result in federally mandated costs in this general definitional sense, former § 2253.2(b)(3), as amended in 1978 (see now Cal. Gov't. Code, § 17556 (c)), provided that state reimbursement is available to a claimant if the executive order mandates costs which "exceed the mandate" of federal law or regulation.

Business & Corporate Compliance > ... > Labor & Employment Law > Occupational Safety & Health > Industry Standards

Governments > Legislation > General Overview

HN6 Occupational Safety & Health, Industry Standards

See 29 C.F.R. § 1910.134(e)(3) (1986).

Business & Corporate Compliance > ... > Labor & Employment Law > Occupational Safety & Health > Industry Standards

Labor & Employment Law > Employment Relationships > At Will
Employment > Definition of Employers

Labor & Employment Law > Occupational Safety & Health > General Overview

Labor & Employment Law > Occupational Safety & Health > Administrative Proceedings > Jurisdiction

HN7 Occupational Safety & Health, Industry Standards

By definition, regulated employers under federal OSHA do not include the political subdivisions of a state. 29 U.S.C.S § 652(5), 29 C.F.R. § 1910.2(c). On the other hand, the state OSHA broadly defines the "places of employment" over which the Division of Occupational Safety and Health of the Department of Industrial Relations exercises safety

jurisdiction to include public agency employers within the state. Cal. Lab. Code § 6303 (a).

Business & Corporate
Compliance > ... > Occupational Safety & Health > Administrative Proceedings > Federal Preemption

Labor & Employment Law > Occupational Safety & Health > Administrative Proceedings > Jurisdiction

Labor & Employment Law > Occupational Safety & Health > General Overview

Business & Corporate
Compliance > ... > Occupational Safety & Health > Administrative Proceedings > OSHA Rulemaking

HN8 Administrative Proceedings, Federal Preemption

Where a state chooses to adopt its own occupational safety and health plan, the federal OSHA requires as a condition for approval of the plan that the state establish and maintain a comprehensive program which extends, to the extent permitted by state law, to all employees of public agencies of the state and its political subdivisions. 29 U.S.C.S § 667(c)(6), 29 C.F.R. § 1902.3(j).) A state plan, if approved, must also provide for the development and enforcement of safety standards at least as effective as the standards promulgated under federal OSHA. 29 U.S.C.S. § 667(c)(2).) The initial decision to establish locally a federally approved plan is an option which the state exercises freely. In no sense is the state compelled to enter a compact with the federal government to extend jurisdiction over occupational safety to local government employers in exchange for the removal of federal preemption. 29 U.S.C.S. § 667(b).

Labor & Employment Law > Occupational
Safety & Health > General Overview

Transportation Law > Private Vehicles > Safety
Standards > Seat Belts

HN9 [↓] **Labor & Employment Law, Occupational Safety & Health**

Regulation 5182 provides: (b) An approved safety belt with a life line attached or other approved device shall be used by employees wearing respiratory equipment within tanks, vessels, or confined spaces. At least one employee shall stand by on the outside while employees are inside, ready to give assistance in case of emergency. If entry is through a top opening, at least one additional employee, who may have other duties, shall be within sight and call of the stand-by employee. (c) When conditions require the wearing of respiratory equipment in a confined space, at least two men equipped with approved respiratory equipment, exclusive of the employees that may be necessary to operate blowers and perform stand-by duties, shall be on the job. One or more of the employees so equipped may be within the confined space at the same time, provided, however, that this shall not apply to tanks of less than 12 feet in diameter, when entrance is through a side manhole. Cal. Admin. Notice Register, tit. 8, Register 72, No. 6, dated Feb. 5, 1972.

Business & Corporate Compliance > ... > State
& Local Taxes > Tax Law > State & Local
Taxes

HN10 [↓] **Tax, State & Local Taxes**

See Cal. Rev. & Tax. Code § 2207.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted the petition of the State Division of Occupational Safety and Health challenging a decision of the State Board of Control approving the claim of a local fire control district for reimbursement, under Rev. & Tax. Code, § 2207 (state reimbursement of state-mandated local costs), for expenses incurred in maintaining additional firefighters on duty at fires requiring the use of artificial breathing devices pursuant to a regulation delineating standby and rescue procedures. The district construed the regulation as requiring, in addition to the "buddy system" pairs of firefighters with respirators it employed as a standard firefighting practice, a third standby firefighter prepared to undertake rescue of the others, if necessary. The division took the position that the regulation merely passed on nonreimbursable standards mandated by the federal government. (Superior Court of Sacramento County, No. 299306, Roger K. Warren, Judge.)

The Court of Appeal affirmed, holding that Rev. & Tax. Code, § 2207, subd. (f), which did not become effective until after the fiscal years for which reimbursement was sought, was not intended to be retroactive and could not support the claim. Turning to Rev. & Tax. Code, § 2207, subd. (c), which was in effect during those fiscal years, the court deferred to the division's interpretation of the regulation, concluding that, so construed, it did not require the district to increase its respirator-equipped manpower; rather, it contemplated that one firefighter so equipped be maintained on standby, whether two "buddies" or a single firefighter entered the hazardous atmospheres to which the regulation applied. Thus, the court held that the district sought reimbursement for its own interpretation that the "buddy system" was a minimum standard to which the standby requirement had been added, not an express state mandate that three firefighters be deployed at every hazardous-atmosphere fire. (Opinion by Puglia, P. J., with Regan and Sparks, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS

HEADNOTES

Classified to California Digest of Official Reports,
3d Series

CA(1)[↓] (1)**Mandamus and Prohibition § 74—Mandamus—
Review—Administrative Regulation.**

--The interpretation of an administrative regulation, like the interpretation of a statute, is a question of law ultimately to be resolved by the courts. Where the substantial evidence test applies, the superior court exercises an essentially appellate function in determining whether the administrative findings are supported by substantial evidence and the proceedings are free from legal error. The scope of the Court of Appeal's review is coextensive with that of the superior court.

CA(2)[↓] (2)**Fires and Fire Districts § 2—Statutes and
Ordinances—Occupational Safety and Health—
Reimbursement of State-mandated Local Costs.**

--The 1974 legislative finding of federal mandate underlying the state Occupational Safety and Health Act (Lab. Code, § 6300 et seq.) has been superseded by former Rev. & Tax. Code, § 2253, subds. (b) and (c), as amended, and does not in and of itself preclude an administrative finding that there is no federal mandate preventing reimbursement to a local fire district for state-mandated costs.

CA(3a)[↓] (3a) CA(3b)[↓] (3b)**Fires and Fire Districts § 2—Statutes and
Ordinances—Health and Safety Regulations—
State-mandated Local Costs—Federally Mandated
Costs.**

--Because the state was not required to promulgate

a health and safety regulation requiring certain manpower and equipment minimums for firefighting in hazardous atmospheres in order to comply with federal law, the exception for federally mandated costs, to the requirement that the state reimburse local agencies for costs incurred by compliance with state-mandated standards, did not apply to a local fire district's claim for reimbursement for the costs of compliance with the state regulation.

CA(4)[↓] (4)**Labor § 6—Regulation of Working Conditions—
Occupational Safety and Health Regulations—
Federal Preemption.**

--Under § 667 of the federal Occupational Safety and Health Act (OSHA) (29 U.S.C. § 651 et seq.), California is preempted from regulating matters covered by the federal OSHA standards unless the state has adopted a federally approved plan. The federal law does not, however, confer federal power upon a state that has adopted such a plan. It merely removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health. There is no indication in the language of the act that a state with an approved plan may not establish more stringent standards than those developed by the federal OSHA, or grant to its own occupational safety and health agency more extensive jurisdiction than that enjoyed by the federal OSHA.

CA(5)[↓] (5)**State of California § 11—Fiscal Matters—
Reimbursement of Local Governments—
Reimbursement for Increased Program Levels.**

--State regulations that do not increase program levels above those required prior to January 1, 1973, do not result in "costs mandated by the state" within the meaning of Rev. & Tax. Code, § 2207, subd. (c), which requires that the state reimburse

local governments for costs incurred in meeting state mandates. CA(8)[↓] (8)

Statutes § 31—Construction—Language—Words and Phrases—Singular and Plural.

--As a general rule of construction, words used in the singular include the plural and vice versa.

CA(6)[↓] (6)

State of California § 11—Fiscal Matters—Reimbursement of Local Governments for State-mandated Costs—Statute—Construction—Retroactivity of Amendments.

--The 1980 amendment to Rev. & Tax. Code, § 2207 (reimbursement of local agency for "costs mandated by the state"), was substantive in nature, rather than procedural or remedial, since it significantly expanded the situations in which a claimant could seek reimbursement for such costs. Nothing in the legislative history of the 1980 amendment expressed a legislative intent that the amendment's provisions be applied retroactively. A statute affecting substantive rights is presumed not to have retrospective application unless the courts can clearly discern from the express language of the statute or extrinsic interpretive aids that the Legislature intended otherwise.

CA(9)[↓] (9)

Statutes § 44—Construction—Aids—Contemporaneous Administrative Construction—Ambiguous Statutes.

--In view of inherent ambiguities in a regulation of the state Division of Occupational Safety and Health (Division) delineating firefighting manpower and equipment safety and health standards, the interpretation given the regulation by the Division, which is charged with its enforcement, was entitled to great weight. Thus, it was proper to defer to that agency's interpretation that the regulation requires the presence of only two persons using respiratory equipment in work places involving hazardous atmospheres, notwithstanding that the State Board of Control, in ruling on a claim of reimbursement, had adopted a different interpretation.

CA(7)[↓] (7)

State of California § 11—Fiscal Matters—Reimbursement of Local Governments—State-mandated Costs—Retroactivity.

-- Rev. & Tax. Code, § 2207, subd. (f), which provides for state reimbursement of local governmental agencies for costs incurred as a result of enactments after January 1, 1973, that remove options previously available to such agencies, thereby increasing program or service levels, or that prohibit specific activities with the result that such agencies use more costly alternatives, applies prospectively only to costs incurred by local agencies after its effective date, by Jan. 1, 1981. The statute cannot support a claim for reimbursement arising before its effective date.

CA(10)[↓] (10)

Fires and Fire Districts § 2—Statutes and Ordinances—Hazardous Atmospheres Regulations—Standby Regulation—State-mandated Costs.

--Increased local program levels, such as would be reimbursable by the state under Rev. & Tax. Code, § 2207, subd. (c), were not mandated by the adoption of hazardous atmospheres firefighting regulations by the Division of Occupational Safety and Health. Although division inspectors previously gave firefighting agencies the impression that three-person teams equipped with respirators would be required, rather than the standard-practice two-person teams, the practice of

continuing to use the two-person teams while adding a third to stand by was a choice made by local fire districts. The regulation did not expressly require three-person teams, and no agency had been cited for failure to use them. Verbal exchanges between regulators and the agencies do not rise to the level of a legislative mandate or official policy.

Counsel: Ross & Scott, William D. Ross and Diana P. Scott for Real Party in Interest and Appellant.

Michael D. Mason and A. Margaret Cloudt for Plaintiff and Respondent.

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Jeffrey J. Fuller and Faith J. Geoghegan, Deputy Attorneys General, for Defendant and Respondent.

Judges: Opinion by Puglia, P. J., with Regan and Sparks, JJ., concurring.

Opinion by: PUGLIA

Opinion

[*797] [*663] In this appeal we consider whether a safety regulation promulgated by the Division of Occupational Safety and Health (Division) of the Department of Industrial Relations mandates increased costs to local [*798] government such that they are reimbursable under the provisions of Revenue and Taxation Code section 2201 et seq.¹ With respect to the period of time in issue, we conclude that the regulation does not create reimbursable state-mandated costs.

[**2] On October 8, 1980, Arcade Fire District (Arcade) filed a test claim with the State Board of Control (Board) asserting that title 8, section 5144, subdivision (g), of the California Administrative Code (hereafter referred to as Regulation) imposed additional manpower requirements upon it and other local fire protection districts beyond service

levels required prior to January 1, 1973.² A local governmental agency (§ 2211), Arcade sought state reimbursement under former section 2231. (Repealed Stats. 1986, ch. 879, § 23; see now Gov. Code, § 17561.) Arcade claimed it incurred additional manpower costs during [*664] fiscal years 1978-1979 and 1979-1980 as a result of Regulation 5144, subdivision (g), and that these costs were mandated by the state within the meaning of section 2207.

[**3] HNI[7]

Section 2207 defines reimbursable "Costs mandated by the state." They include "any increased costs which a local agency is required to incur as a result of . . . (c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973." An "executive order" includes a regulation issued by a state agency such as the Division (§ 2209, subd. (c)). Specifically excluded from the definition of "[costs] mandated by the State" are "[costs] mandated by the federal government" as defined in section 2206 and former section 2253.2, subdivision (b)(3) (repealed Stats. 1986, ch. 879, § 41; see now Gov. Code, § 17556, subd. (c)).

Regulation 5144, subdivision (g), was first adopted by the Division effective August 11, 1974. As amended effective October 14, 1978, the regulation provides: "In atmospheres immediately hazardous to life or health, at least two persons equipped with approved respiratory equipment shall be on the job. Communications shall be maintained between both or all individuals present. Standby persons, [*4] at least one of which shall be in a location which [*799] will not be affected by any likely incidents, shall be present with suitable rescue

¹ All references to sections or former sections of an unspecified code are to the Revenue and Taxation Code.

² In 1985, administrative jurisdiction to hear and decide claims for reimbursement of state-mandated costs was transferred from the State Board of Control to the newly created Commission on State Mandates. (Gov. Code, § 17500 et seq.)

equipment including self-contained breathing apparatus." ³

At the administrative hearing, Arcade established that it has always adhered to a practice, known as the "buddy system," whereby two firefighters enter a burning structure together. Arcade also presented evidence that the buddy system is considered essential to the safety of both firefighters and the public and is practiced by firefighting agencies nationwide. Prior to the 1974 effective date of Regulation 5144, subdivision (g), Arcade was unaware of any standby requirement and used only two-person teams in its engine companies. After its effective date, Arcade interpreted the regulation to mandate a minimum firefighting team [***5] of at least three persons equipped with respiratory equipment, one of whom was required to stand by outside a burning structure while the other two operated together under the "buddy system." In support of this interpretation, Arcade presented evidence that Division inspectors had previously informed local fire protection districts that Regulation 5144, subdivision (g), requires a minimum of three fire fighters at the scene.

In opposition to Arcade's claim, the Division maintained that any costs incurred as a result of Regulation 5144, subdivision (g), were federally mandated because the state regulation merely implemented a federal regulation under the 1979 Federal Occupational Safety and Health Act. (29 U.S.C. § 651 et seq.) Even if a state mandate were involved, the Division contended, Arcade's interpretation of the regulation was erroneous. In the Division's view, HN2[↑] Regulation 5144, subdivision (g), requires only two persons to be on the job when atmospheres immediately hazardous to life or health are encountered -- one person to stand by in a location unaffected by likely incidents and the other to encounter the dangerous atmosphere itself. While the Division would

certainly [***6] encourage the use of three-person teams at the option of local fire districts, it takes the position that additional manpower is neither mandated by the express language of the regulation nor, as a matter of official policy, a firefighting standard which the Division seeks to enforce.

The Board found the regulation created a reimbursable state-mandated cost and approved Arcade's claim. The Board apparently concluded the regulation did not "explicitly require three-person companies" but considered its effect nonetheless "was to remove the previously existing option of public fire departments to deploy two-person [**665] companies," and that this requirement "exceeded federal and prior state safety regulations."

[*800] The Division sought mandamus to review the Board's ruling. (See former § 2253.5 repealed Stats. 1986, ch. 879, § 44; see now Gov. Code, § 17559; Code Civ. Proc., § 1094.5.) The superior court found the Board had abused discretion in allowing Arcade's claim and issued a peremptory writ of mandate directing the Board to set aside its decision.

Arcade appeals from the order granting the Division mandamus relief. In challenging the court's conclusion that [***7] Regulation 5144, subdivision (g), did not create state-mandated costs, Arcade contends the court (1) applied the wrong standard of review, (2) improperly considered new evidence and legal issues which were not presented at the administrative hearing, and (3) erred in ruling that section 2207, subdivision (f), did not apply.

I

Preliminarily, we set forth the applicable standard of review. HN3[↑] In an administrative mandamus proceeding, we are bound by the Board's findings on all issues of fact within its jurisdiction which are supported by substantial evidence on the record. (See former § 2253.5; Gov. Code, § 17559.) CA(1)[↑] (1) The interpretation of an administrative regulation, however, like the

³ The 1978 amendment deleted from the last sentence the concluding clause "in accordance with Section 5182, Confined Spaces," which had been included in the original version in 1974.

interpretation of a statute, is a question of law ultimately to be resolved by the courts. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 310 [118 Cal.Rptr. 473, 530 P.2d 161]; *Skyline Homes, Inc. v. Occupational Safety & Health Appeals Bd.* (1981) 120 Cal.App.3d 663, 669 [174 Cal.Rptr. 665]; see also *People ex rel. Fund American Companies v. California Ins. Co.* (1974) 43 Cal.App.3d 423, 431 [117 Cal.Rptr. 623].)

HN4 Where the substantial evidence test applies, *****8** the superior court exercises an essentially appellate function in determining whether the administrative findings are supported by substantial evidence and the proceedings free from legal error; the scope of our appellate review is coextensive with that of the superior court. (*Bank of America v. State Water Resources Control Bd.* (1974) 42 Cal.App.3d 198, 207 [116 Cal.Rptr. 770]; *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 190 [203 Cal.Rptr. 258], disapproved on other grounds in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58, fn. 10 [233 Cal.Rptr. 38].; see also *Swaby v. Unemployment Ins. Appeals Bd.* (1978) 85 Cal.App.3d 264, 269 [149 Cal.Rptr. 336].) We therefore focus our review on the administrative proceedings, declining to consider specific claims of error committed by the superior court.

We shall also consider, as a preliminary matter, whether a federal mandate or an equally or more restrictive pre-1973 state regulation exists which would ***801** bar Arcade's claim for reimbursement. (See §§ 2206; 2207, subs. (c), (f); former § 2253.2, subd. (b)(3).) Although these legal theories may *****9** not have been thoroughly developed by the Division in the administrative proceedings, we are not foreclosed from addressing them on appeal. (See *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781 [200 Cal.Rptr. 642]; *Frink v. Prod* (1982) 31 Cal.3d 166, 170-171 [181 Cal.Rptr. 893, 643 P.2d 476].) Such consideration will not involve receipt of evidence not before the Board. The Board found Regulation 5144, subdivision (g), exceeded the requirements of

both federal and pre-1973 state safety regulations. Our review necessarily requires that we take judicial notice of any statutes and published administrative regulations which impact upon the contentions of the parties. (See Evid. Code, § 451, subs. (a), (b); Gov. Code, § 11343.6; 44 U.S.C. § 1507.) In any event, Arcade is not prejudiced by our consideration of these issues on appeal because, as will appear, we reject the Division's arguments that a federal mandate or a pre-1973 state regulation bars Arcade's claim.

II

CA(2) (2) The California Occupational Safety and Health Act (state OSHA; Lab. Code, [**666] § 6300 et seq.), from which the Division derives its regulatory authority, was enacted *****10** in 1973 (Stats. 1973, ch. 993, §§ 39-107) as a state plan under the Federal Occupational Safety and Health Act of 1970 (federal OSHA; see 29 U.S.C. § 667). In 1974, an uncodified amendment to state OSHA was enacted which provided: "Notwithstanding Section 2231 of the Revenue and Taxation Code [providing for reimbursement to local governments for state-mandated costs], there shall be no reimbursement pursuant to this section . . . because the Legislature finds that this act and any executive regulations or safety orders issued pursuant thereto merely implement federal law and regulations." (Stats. 1974, ch. 1284, § 36, adding § 106 to ch. 993 of the Stats. of 1973.)⁴ However, this legislative disclaimer of any reimbursable mandate with respect to state OSHA and regulations thereunder is not controlling here. Former section 2253, subdivisions (b) and (c) as amended (Stats. 1978, ch. 794, § 6; repealed Stats. 1986, ch. 879, § 40), permitted reimbursement claims for costs incurred after January 1, 1978, under an executive order or a bill chaptered after January 1, 1973, even though the bill or executive order contained a

⁴ Chapter 993 of Statutes 1973 already had a section 106 as part of the original enactment. The original section 106 disclaimed any obligation to reimburse local costs incurred in complying with state OSHA "because the cost of implementing this act is minimal on a statewide basis in relation to the effect on local tax rates." (P. 1954.)

provision making inoperative former section 2231. Thus [***11] the legislative finding of federal mandate underlying [*802] state OSHA (Stats. 1974, ch. 1284, § 36) has been superseded and does not in and of itself preclude a finding such as the Board made here that there is no federal mandate preventing reimbursement of Arcade.

CA(3a)[↑] (3a) Having disposed of the express legislative declaration on the subject, we next consider whether state OSHA, under authority of which Regulation 5144, subdivision (g), was promulgated, in fact did no more than impose costs mandated by federal law.

HN5[↑] As defined by section 2206, "[costs] mandated by the federal government" include "any increased costs mandated . . . upon a local agency . . . after January [***12] 1, 1973, in order to comply with the requirements of federal statute or regulation." Although an executive order implementing a federal law may result in federally mandated costs in this general definitional sense, former section 2253.2, subdivision (b)(3), as amended in 1978 (see now Gov. Code, § 17556, subd. (c)), provided that state reimbursement is available to a claimant if the executive order mandates costs which "exceed the mandate" of federal law or regulation. (Stats. 1978, ch. 794, § 10, eff. Sept. 18, 1978.)⁵

⁵ Effective January 1, 1981, section 2206 was amended to limit the definition of "costs mandated by the federal government" to increased costs mandated *specifically* by the federal government upon a local agency and to exclude from that definition those costs which result from programs or services "implemented at the option of the state, . . ." (Stats. 1980, ch. 1256, § 3.) Correspondingly, subdivision (d) was added to section 2207 to include within the definition of "costs mandated by the state" any increased costs a local agency is required to incur as a result of a post-1973 executive order which implements or interprets a federal or state regulation and by such implementation or interpretation "increases program or service levels above the levels required by such federal statute or regulation." (Stats. 1980, ch. 1256, § 4; see also Gov. Code, § 17513, which excludes from "[costs] mandated by the federal government" "programs or services which may be implemented at the option of the state, . . .") While these amendments are supportive of the conclusion we reach, we assume for present purposes they have no retrospective operation with respect to costs incurred by Arcade

[***13] We accept for purposes of discussion the Division's assertion that Regulation 5144, subdivision (g), simply mandates a safety standard patterned after and commensurate with a regulation promulgated under federal OSHA. Also governing the use of respirators, HN6[↑] 29 Code of Federal Regulations, section 1910.134(e)(3) (1986) reads in pertinent part: ". . . (i) In areas where the wearer, with failure of the respirator, could [**667] be overcome by a toxic or oxygen-deficient atmosphere, at least one additional man shall be present. Communications . . . shall be maintained between both or all individuals present. Planning shall be such that one individual will be unaffected by any likely incident and have the proper rescue equipment to be able to assist the other(s) in case of emergency. [para.] (ii) When self-contained apparatus or hose [*803] masks with blowers are used in atmospheres immediately dangerous to life or health, standby men must be present with suitable rescue equipment."

The federal regulation, unlike the state regulation in issue, has no applicability to local fire departments such as Arcade. HN7[↑] By definition, regulated employers under federal OSHA do not include [***14] the political subdivisions of a state. (29 U.S.C. § 652(5); 29 C.F.R. § 1910.2(c).)⁶ On the other hand, the state OSHA broadly defines the "places of employment" over which the Division exercises safety jurisdiction to include public agency employers within the state. (Lab. Code, § 6303, subd. (a); see also *United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 767 [187 Cal.Rptr. 387, 654 P.2d 157].)

HN8[↑] Where a state chooses to adopt its own occupational safety and health plan, the federal OSHA requires as a condition for approval of the

during fiscal years 1978-1979 and 1979-1980.

⁶ Indeed, to our knowledge the federal government did not assert safety jurisdiction over "private fire brigades until federal regulations on the subject were first published in September 1980. (See 29 C.F.R. § 1910.156(a)(2) and (f)(1)(i); 45 Fed. Reg. 60706, amended May 1, 1981, 46 Fed. Reg. 24557.)

plan that the state establish and maintain a comprehensive program which extends, to the extent permitted by state law, "to all [***15] employees of public agencies of the State and its political subdivisions." (29 U.S.C. § 667(c)(6); 29 C.F.R. § 1902.3(i).) A state plan, if approved, must also provide for the development and enforcement of safety standards "at least as effective" as the standards promulgated under federal OSHA. (29 U.S.C. § 667(c)(2).) However, these conditions for approval do not render costs incurred by a local agency as a result of a state safety regulation federally mandated costs within the meaning of former section 2253.2, subdivision (b)(3). Clearly, the initial decision to establish locally a federally approved plan is an option which the state exercises freely. In no sense is the state *compelled* to enter a compact with the federal government to extend jurisdiction over occupational safety to local government employers in exchange for the removal of federal preemption. (29 U.S.C. § 667(b).) (Accord, *City of Sacramento v. State of California*, *supra*, 156 Cal.App.3d at pp. 194-199.)

CA(4) [↑] (4) In *United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.*, *supra*, 32 Cal.3d 762, the court expressed this principle as follows: "Under the [29 United States Code] section [***16] 667 scheme, California is preempted from regulating matters covered by Fed/OSHA [Federal Occupational Safety and Health Administration] standards unless the state has adopted a federally approved plan. The section does not, however, confer federal power on a state - like California -- that has adopted such a plan; it merely removes federal preemption so that the state may exercise its own sovereign powers [*804] over occupational safety and health. (See, e.g., *American Federation of Labor, etc. v. Marshall* (D.C.Cir. 1978) 570 F.2d 1030, 1033; *Green Mt. Power v. Com'r of Labor and Industry* (1978) 136 Vt. 15 [383 A.2d 1046, 1051]. See also 29 U.S.C. § 651(b)(11).) There is no indication in the language of the act that a state with an approved plan may not establish more stringent standards than those developed by Fed/OSHA (see *Skyline Homes, Inc.*

v. Occupational Safety & Health Appeals Bd. (1981) 120 Cal.App.3d 663, 671 . . .) or grant to its own occupational safety and health agency more extensive jurisdiction than that enjoyed by Fed/OSHA." (*United Air Lines, Inc.*, *supra*, 32 Cal.3d at pp. 772-773.) **CA(3b) [↑] (3b)** Thus since Division was not required to promulgate [***17] [**668] Regulation 5144, subdivision (g), to comply with federal law, the exemption for federally mandated costs does not apply.

III

CA(5) [↑] (5) State regulations which do not *increase* program levels above the levels required prior to January 1, 1973, do not result in "costs mandated by the state" within the meaning of section 2207, subdivision (c). The Division submits that former Regulation 5182, which existed prior to 1973, provided standby personnel requirements which were equal to, if not more stringent than, those set forth in Regulation 5144, subdivision (g). A comparison of the two regulations, however, convinces us that former Regulation 5182 was limited to employees working within tanks, vessels, and similar "confined spaces" and was never intended more broadly to encompass fire fighters working in burning structures.

Subdivision (c) of former Regulation 5182 expressly required at least two persons on the job in addition to the standby employee when conditions necessitated the wearing of respiratory equipment in a confined space. ⁷ It was not replaced until

⁷ As pertinent here, former **HN9 [↑]** Regulation 5182 provided: ". . . (b) An approved safety belt with a life line attached or other approved device shall be used by employees wearing respiratory equipment within tanks, vessels, or confined spaces . . . At least one employee shall stand by on the outside while employees are inside, ready to give assistance in case of emergency. If entry is through a top opening, at least one additional employee, who may have other duties, shall be within sight and call of the stand-by employee. [para.] (c) When conditions require the wearing of respiratory equipment in a confined space, at least two men equipped with approved respiratory equipment, exclusive of the employees that may be necessary to operate blowers and perform stand-by duties,

1978, when new article 108 (Regulations 5156-5159, Cal. Admin. Code, tit. 8), entitled "Confined Spaces," was added. [***18] (Cal. Admin. Notice Register, tit. 8, Register 78, No. 37.) We do not agree with the Division that Regulation 5182 covered fire fighters (see *Carmona v. [**805] Division of Industrial Safety, supra*, 13 Cal.3d at p. 310). Moreover, we note that the Division's reading of the regulation would undermine, if not invalidate, its alternative position that it has always required only a minimum two-person, firefighting team. Thus if Regulation 5144, subdivision (g), properly interpreted, requires a minimum of three persons as contended by Arcade, it does increase program levels above those required prior to January 1, 1973. Before we address that issue directly, we consider the rationale of the Board's decision.

[***19] IV

The Board's approval of Arcade's claim was based on the conclusion that, although Regulation 5144, subdivision (g), did not expressly require three-person engine companies, its effect was to remove a previous option of local fire districts to use only two person companies. In so concluding, the Board apparently relied on the definition of "[costs] mandated by the state" as expressed in subdivision (f) rather than subdivision (c) of section 2207. Under subdivision (f), costs are mandated and reimbursable when they result from "Any . . . executive order issued after January 1, 1973, which . . . *removes an option previously available to local agencies and thereby increases program or service levels . . .*" (Italics added.)

Because subdivision (f) did not become effective until January 1, 1981 (Stats. 1980, ch. 1256, § 4), the Division contends the Board could not retroactively apply the removal-of-an-option criterion to Arcade's October 1980 reimbursement

shall be on the job. One or more of the employees so equipped may be within the confined space at the same time, provided, however, that this shall not apply to tanks of less than 12 feet in diameter, when entrance is through a side manhole." (Cal. Admin. Notice Register, tit. 8, Register 72, No. 6, dated Feb. 5, 1972.)

claim for costs incurred during fiscal years 1978-1979 and 1979-1980. We agree.

CA(6)[7] (6) We observe first that the amendment which added subdivisions (d) through (h) to section 2207 significantly expanded the situations in [***20] which a claimant could seek reimbursement for "[costs] mandated by the state." (See *County of Los Angeles v. [**669] State of California* (1984) 153 Cal.App.3d 568, 572 [200 Cal.Rptr. 394].) Before 1981, the entire spectrum of state-mandated costs was confined to those defined in subdivisions (a) through (c) of section 2207.⁸ As

⁸ HN10[7] As amended, section 2207 now reads in full: "Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following:

"(a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program;

"(b) Any executive order issued after January 1, 1973, which mandates a new program;

"(c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973.

"(d) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which implements or interprets a federal statute or regulation and, by such implementation or interpretation, increases program or service levels required by such federal statute or regulation.

"(e) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which implements or interprets a statute or amendment adopted or enacted pursuant to the approval of a statewide ballot measure by the voters and, by such implementation or interpretation, increases program or service levels above the levels required by such ballot measure.

"(f) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which (i) removes an option previously available to local agencies and thereby increases program or service levels or (ii) prohibits a specific activity which results in the local agencies using a more costly alternative to provide a mandated program or service.

"(g) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which requires that an existing program or service be provided in a shorter time period and thereby increases the costs of such program or service.

"(h) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which adds new requirements to an existing optional program or service and thereby increases the cost of

the 1980 amendment necessarily increased the state's liability for [*806] locally incurred costs, it must be construed as substantive rather than procedural or remedial in nature. (See *Alta Loma School Dist. v. San Bernardino County Com. on School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 553 [177 Cal.Rptr. 506].) A statute affecting substantive rights is presumed not to have retrospective application unless the courts can clearly discern from the express language of the statute or extrinsic interpretive aids that the Legislature intended otherwise. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587 [128 Cal.Rptr. 427, 546 P.2d 1371]; *Thompson v. Modesto City High School Dist.* (1977) 19 Cal.3d 620, 625, fn. 3 [139 Cal.Rptr. 603, 566 P.2d 237]; *Alta Loma School Dist., supra*, at p. 553.)

[**21] Although all of the new subdivisions added by the 1980 amendment to section 2207 expressly deal with executive orders issued after January 1, 1973, nothing has been brought to our attention which would indicate the Legislature intended retroactive operation of the expanded definition to resulting costs *incurred* before the 1981 effective date of the amendment. When section 2207 was originally enacted in 1975, the Legislature provided that subdivisions (a) through (c) were "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6.) However, the 1980 amendment adding subdivisions (d) through (h) conspicuously omits any such statement or other indication of retrospective application. CA(7)[7] (7) Moreover, other related statutory provisions make it clear that the Legislature intended strictly to limit the time period within which a reimbursement claim may be brought for costs incurred during a prior fiscal year. (Former § 2218.5, see now Gov. Code, § 17560; former § 2231, subd. (d)(2), see now Gov. Code, § 17561, subd. [*807] (d)(2); former § 2253; former § 2253.8, repealed Stats. 1986, ch. 879, § 45, see now Gov. Code, § 17557.) Hence, we presume that subdivision (f) of section [***22] 2207 applies

such program or service if the local agencies have no reasonable alternatives other than to continue the optional program."

prospectively only to costs incurred by local agencies after its effective date, January 1, 1981, and not before. (Accord, *City of Sacramento v. State of California, supra*, 156 Cal.App.3d at p. 194, disapproved on other [**670] grounds in *County of Los Angeles v. State of California, supra*, 43 Cal.3d at p. 58, fn. 10.) Subdivision (f) therefore is not available to support Arcade's claim.

V

The remaining issue is whether Arcade incurred state-mandated costs within the meaning of subdivision (c) of section 2207. It will be recalled that under subdivision (c) of section 2207, reimbursable costs mandated by the state include "any increased costs which a local agency is required to incur as a result of . . . (c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973."

As recognized by the Board, the problem resides in the ambiguity of Regulation 5144, subdivision (g). No one contests the regulation's applicability to the occupation of fire fighting. CA(8)[7] (8) (See fn. 9) But depending on the significance [***23] ascribed to certain of its language, e.g., "*In atmospheres*," "on the job," "Communications . . . between *both* or all" (italics added) and "standby persons," the regulation is reasonably susceptible to alternative interpretations: (1) at least two persons must *enter* a dangerous atmosphere, (i.e., to be "on the job" one must be "*in*" the atmosphere) while a third remains outside, (2) at least two persons must stand by (i.e., "standby persons") while others(s) perform a job in a dangerous atmosphere,⁹ or (3) a total of two persons -- one active and one standing by -- is all that is required when working in a

⁹ Notwithstanding the use of the plural ("standby persons"), a general rule of construction is that words used in the singular include the plural and vice versa. (See Lab. Code, § 13; Civ. Code, § 14.) Arcade does not contend the regulation requires more than one standby person.

dangerous atmosphere.

CA(9)[↑] (9) In view of these inherent ambiguities, the interpretation given the regulation by the Division [***24] as the administrative agency charged with its enforcement is entitled to great weight. (*People v. French* (1978) 77 Cal.App.3d 511, 521 [143 Cal.Rptr. 782]; see also *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101 111 [172 Cal.Rptr. 194, 624 P.2d 244]; *Carmona v. Division of Industrial Safety, supra*, 13 Cal.3d at p. 310.) We shall defer to the Division's interpretation that the [*808] intended meaning of the regulation, when considered generally and in the abstract, is to require the presence of only two persons using respiratory equipment in workplaces involving hazardous atmospheres. Such deference does not undercut the authority vested in the Board to determine the existence of state-mandated costs under section 2201 et seq. In the exercise of that authority the Board also owes a duty of deference to the administrative agency's interpretation of its regulation. The Board is not licensed to impress its own interpretation upon an administrative regulation in derogation of the reasonable construction of the responsible agency.

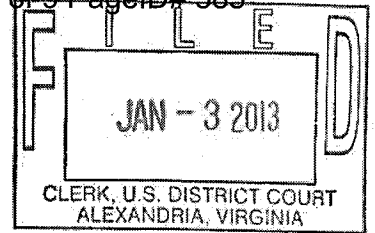
CA(10)[↑] (10) In this regard, Arcade contends that substantial evidence supports the conclusion that the [***25] practical consequence of Regulation 5144, subdivision (g), is to mandate an increase in firefighting manpower from two to three persons. Viewing as we must the evidence at the hearing in a light most favorable to Arcade, we accept as true the proposition that fire fighting agencies universally consider the two-person "buddy" system essential to the safety of the workers. We also accept as true that Division inspectors previously gave firefighting agencies the impression that three-person teams are a necessary safeguard.

It does not follow, however, that the regulation in question *mandates* an increase in "program levels above the levels *required* prior to January 1, 1973"

as defined by section 2207, subdivision (c). (Italics added.) Although founded on safety reasons, the continued practice of using two fire fighters to enter a burning structure [**671] while adding a third to meet the requirement of a standby was a choice which rested with the local fire districts. As the Board recognized, the regulation does not expressly require three-person teams nor has the Division issued a citation for failure to use the additional manpower. Verbal exchanges between Division [***26] personnel and the fire districts do not rise to the level of a legislative mandate or official policy. Failing proof that it is impossible to fight fires without the use of "buddies," Arcade cannot inject its own safety standards into a state regulation and say it is a "requirement" of the state.

We conclude that Regulation 5144, subdivision (g), did not mandate an increase in Arcade's fire protection costs for the 1978-1979 and 1979-1980 fiscal years. Accordingly, there was no error in the superior court's order directing the Board to vacate its decision allowing Arcade's claim.

The order granting the Division's petition for a writ of mandate is affirmed.



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

<p>VIRGINIA DEPARTMENT OF TRANSPORTATION, ET AL,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">-v-</p> <p>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL,</p> <p style="text-align: right;">Defendants.</p>	<p style="text-align: center;">Civil Action No. 1:12-CV-775</p>
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Memorandum Opinion

Before the Court is the Plaintiffs' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The Defendants opposed the motion, and the Plaintiffs replied. The Court heard oral arguments on December 14, 2012 and now issues this memorandum opinion and accompanying order granting the Plaintiffs' motion.

Background

The Clean Water Act, 33 U.S.C. § 1251 et seq., establishes the basic structure for regulating discharge of pollutants into the waters of the United States, and provides certain mechanisms to improve and maintain the quality of surface waters.

One such mechanism is the requirement that states identify "designated uses" for each body of water within their borders, as well as "water quality criteria" sufficient to support those uses. 33 U.S.C. § 1313(c)(2)(A). The Environmental Protection Agency ("EPA") evaluates the uses and criteria developed by the states, and either approves them or else proposes and

promulgates its own set of standards. § 1313(c)(3).

Once the standards are in place, each state is required to maintain a list—also subject to approval or modification by EPA—of its waterbodies that are “impaired” because they do not meet their respective water quality criteria. 33 U.S.C. § 1313(d)(1)(A). For each waterbody on the impaired list, the state is required to establish a set of total maximum daily loads (“TMDLs”) sufficient to bring the body back into compliance with its water quality criteria. § 1313(d)(1)(C). Each TMDL establishes the maximum amount of a pollutant that may be added to the waterbody daily from all sources (runoff, point sources, etc.). EPA is required to publish a list of pollutants suitable for maximum daily load measurement, § 1314(a)(2)(D), and it has determined that *all* pollutants are suitable for TMDLs, *see* Total Maximum Daily Loads Under Clean Water Act, 43 Fed. Reg. 60,662. Therefore, any pollutant that falls within the relatively broad definition of “pollutant” set forth in § 1362(6) may be regulated via TMDL. EPA can approve or modify as it sees fit TMDLs proposed by the states. § 1313(d)(2).

Here the state in question is Virginia, and the waterbody is a 25-mile long tributary of the Potomac River, located in Fairfax County, called Accotink Creek. The creek has been the subject of litigation in the past that is not relevant to this matter except the result: EPA was required to set TMDLs for Accotink Creek once Virginia failed to do so by a certain date. Specifically, the creek had been identified as having “benthic impairments,” which is to say the community of organisms that live on or near the bottom of the creek were not as numerous or healthy as they should be. EPA was to set appropriate TMDLs to improve the health of the benthic community in Accotink Creek.

On April 18, 2011, EPA established a TMDL for Accotink Creek which limited the flow rate of stormwater into Accotink Creek to 681.8 ft³/acre-day. The TMDL was designed to

regulate the amount of sediment in the Accotink, because EPA believed sediment was a primary cause of the benthic impairment. Both parties agree that sediment is a pollutant, and that stormwater is not. EPA refers to stormwater flow rate as a “surrogate” for sediment.

The Plaintiffs are now challenging the TMDL on multiple grounds, but presently before the Court is a single issue: Does the Clean Water Act authorize the EPA to regulate the level of a pollutant in Accotink Creek by establishing a TMDL for the flow of a nonpollutant into the creek?

Analysis

I. Standard of Review

Count I of the complaint, at issue here, is brought under the Administrative Procedures Act. *See* Comp. ¶ 169. The APA “confines judicial review of executive branch decisions to the administrative record of proceedings before the pertinent agency.” *Shipbuilders Council of Am. V. U.S. Dept. of Homeland Sec.*, 770 F. Supp. 2d 793, 802 (E.D. Va. 2011). As such, the district court “sits as an appellate tribunal,” and APA claims can be resolved equally well in the context of Rule 12 or Rule 56. *Univ. Med. Ctr. Of S. Nev. V. Shalala*, 173 F.3d 438, 441 n. 3 (D.C. Cir. 1999).

Because Count I presents a question of statutory interpretation, the Court reviews EPA’s decision using the two-step analysis set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). For a given question of statutory interpretation, the first step under *Chevron* is to determine whether Congress addressed the “precise question at issue.” 467 U.S. at 842. “If the intent of Congress is clear, that is the end of the matter” *Id.* If the Court cannot find that Congress has squarely addressed the question, the Court must move to *Chevron*’s second step. In

the second step of statutory construction under *Chevron*, the Court must determine whether the agency's interpretation of the statute is "permissible." *Id.* at 843. The agency's construction is permissible if it is reasonable, but it need not be what the Court considers the *best* or *most reasonable* construction. *See id.* at 845. The Court is not to simply impose its own construction on the statute, but instead it gives deference to any reasonable statutory construction by the agency. *Id.* at 843.

II. Chevron Step One

Whether statutory ambiguity exists so that the issue cannot be settled at *Chevron's* first step is for the Court to decide, and the Court "owe[s] the agency no deference on the existence of ambiguity." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005). The Court begins the inquiry by "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. As always, the analysis begins with the text of the statute. *Nat'l Elec. Mfrs. Ass'n v. U.S. Dept't of Energy*, 654 F.3d 496, 504 (4th Cir. 2011).

The text of the statute that requires states to establish their own TMDLs, 33 U.S.C. § 1313(d)(1)(C), is:

Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, **the total maximum daily load, for those pollutants which the Administrator identifies** under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.
(emphasis added)

The next subsection, § 1313(d)(2), grants EPA the authority to set TMDLs when the state

has not done so adequately. “Pollutant” is a statutorily defined term. 33 U.S.C. § 1362(6).

The Court sees no ambiguity in the wording of this statute. EPA is charged with establishing TMDLs for the appropriate pollutants; that does not give them authority to regulate nonpollutants. The parties agree that sediment is a pollutant under 33 U.S.C. § 1362(6), and stormwater is not. Then how does EPA claim jurisdiction over setting TMDLs for stormwater?

EPA frames the stormwater TMDL as a surrogate. EPA's research apparently indicates that the “[sediment] load in Accotink Creek is a function of the amount of stormwater runoff generated within the watershed.” Def. Opp. at 8. And EPA believes that framing the TMDL in terms of stormwater flow rate is superior to simply expressing it in terms of maximum sediment load.

The DC Circuit has considered and rejected a similar attempt by EPA to take liberties with the way Congress intended it to express its TMDLs. In *Friends of the Earth, Inc. v. Env. Protection Agency*, EPA had promulgated TMDLs for the Anacostia River that expressed the maximum load of certain pollutants in terms of annual and seasonal amounts. 446 F.3d 140, 143 (D.C. Cir. 2006). The court found that expressing a TMDL in terms of annual or seasonal maximums was not allowed, because the statute granted authority only for daily loads. *Id.* at 148. The court reached its conclusion even though EPA apparently made a strong argument that expressing TMDLs in terms of annual or seasonal loads was an effective and reasonable approach. *See id.* Presumably a daily load could have been derived by simply dividing the annual load by 365, yet the court still required expression in the terms dictated by Congress.

Here too, EPA hopes to express a TMDL in terms other than those contemplated by the statute, arguing that such an expression is the most effective method. But, as *Friends of the Earth* illustrates, EPA may not regulate something over which it has no statutorily granted power—

annual loads or nonpollutants—as a proxy for something over which it *is* granted power—daily loads or pollutants.

EPA's argument that its surrogate approach should be allowed because the statute does not specifically forbid it fails. EPA is not explicitly forbidden from establishing total maximum *annual* loads any more than they are explicitly barred from establishing TMDLs for nonpollutants. The question is whether the statute grants the agency the authority it is claiming, not whether the statute explicitly withholds that authority. And in this case, as in *Friends of the Earth*, the statute simply does not grant EPA the authority it claims.

The dicta in *Weyerhaeuser Co. v. Costle* is not as helpful to EPA's case as it would like. 590 F.2d 1011, 1022 n.6 (D.C. Cir. 1978). It is true that the court said in a footnote “[i]t is well recognized that EPA can use pollution parameters that are not harmful in themselves, but act as indicators of harm.” *Id.* But in that case, the non-harmful pollution parameters the EPA sought to regulate were components of the effluent commonly discharged from paper mills, *id.* at 1022, making them effluents themselves. And power to regulate effluents is expressly granted to the EPA in the relevant statutory section. *See* 33 U.S.C. § 1314(b).

EPA would like to create the impression that Congress has given it loose rein to determine exactly what it could and could not regulate. On page 16 of its opposition to this motion, EPA points out that “Congress authorized EPA to determine which pollutants were suitable for TMDL calculation and measurement.” (Internal quotes removed). While this may be true, EPA glosses over the fact that 33 U.S.C. § 1314(a)(2)(D) only gives EPA the power to regulate pollutants as that term is defined—by Congress—elsewhere in the statute. And, as discussed above, sediment is a pollutant for these purposes, but stormwater is not.

In a similar vein, EPA regulations which imply that the agency has discretion to set the

TMDL as it sees fit do not bear on the question now before the Court. EPA has promulgated a regulation allowing TMDLs to be “expressed in terms of either mass per time, toxicity, or other appropriate measure,” 40 C.F.R. § 130.2(i), and another that allows TMDLs to be expressed as a “property of pollution,” 50 Fed. Reg. 1774, 1776 (Jan. 11, 1985). But, EPA citing these regulations to demonstrate that the surrogate TMDL approach is permissible is mere bootstrapping. To the extent the regulations allow EPA to set TMDLs for nonpollutants, they exceed the statutory authority of EPA.

The plain language of the statute trumps all, but legislative history also supports Plaintiffs’ argument. Congress’s intent to limit EPA’s discretion in this context is evidenced by the committee record cited by Plaintiffs, which has also been used by the Ninth Circuit, in which Senator Randolph, Chairman of the Senate committee that amended the act in 1972, explained, “We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives [for] administrators to follow.” Pl. Mot. 7, citing *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1072 (9th Cir. 2011). Congress created a statutory scheme that included a precise definition of the word “pollutant,” and then gave EPA authority to set TMDLs for those pollutants. Senator Randolph’s comments strongly imply that Congress did not intend anything more or less than what is written in the statute.

The Court considers the language of 33 U.S.C. § 1313(d)(1)(C) to be unambiguous. Congress has spoken directly on the question at issue, and its answer is that EPA’s authority does not extend to establishing TMDLs for nonpollutants as surrogates for pollutants. The legislative history of the CWA is consistent with this reading. Therefore, this Court finds EPA’s interpretation of § 1313 and the related provisions to be impermissibly broad based on analysis

under the first step of *Chevron* analysis.

III. Chevron Step Two

Because the Court considers Congress's intent to be clear and unambiguously expressed by the language of the statute, it need not move to the second step of *Chevron* analysis. But the Court notes that there is substantial reason to believe EPA's motives go beyond "permissible gap-filling."

Page 9 of EPA's opposition says, "stormwater flow rates as a surrogate would more effectively address the process by which sediment impairs aquatic life in Accotink Creek." If the sediment levels in Accotink Creek have become dangerously high, what better way to address the problem than by limiting the amount of sediment permitted in the creek? If sediment level is truly "a function of" the amount of stormwater runoff, as EPA claims, then the TMDL could just as easily be expressed in terms of sediment load.

In fact, the Board of Supervisors of Fairfax County argued at the December 14th hearing (without objection from EPA) that EPA has approved 3,700 TMDLs for sediment nationwide, and in Virginia has addressed 111 benthic impairments with TMDLs. None of them regulated the flow rate of stormwater. By comparison, EPA has tried out its novel approach of regulating sediment via flow in only four instances nationwide, and all four attempts were challenged in court. One has settled, the other three are still pending.

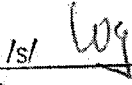
The Court suspects that the decision to regulate stormwater flow as a surrogate for sediment load would not constitute a permissible construction of § 1313(d)(1)(C), even given the deference due at *Chevron*'s second step. This is especially likely because EPA is attempting to increase the extent of its own authority via flow TMDLs, which courts must examine carefully.

See Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d 155, 161-62 (4th Cir. 1998). EPA's attempt to set TMDLs for nonpollutants probably goes beyond "permissible gap-filling" and is instead an impermissible construction of the statute.

Conclusion

The language of § 1313(d)(1)(C) is clear. EPA is authorized to set TMDLs to regulate pollutants, and pollutants are carefully defined. Stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via TMDL. Claiming that the stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulable, does not bring stormwater within the ambit of EPA's TMDL authority. Whatever reason EPA has for thinking that a stormwater flow rate TMDL is a better way of limiting sediment load than a sediment load TMDL, EPA cannot be allowed to exceed its clearly limited statutory authority. For these reasons, the Plaintiffs' motion for Rule 12(c) judgment on the pleadings on Count I of their complaint is granted.

January³, 2013
Alexandria, Virginia



Liam O'Grady
United States District Judge

TAB 2

33 USCS § 1311

Current through PL 115-90, approved 12/8/17

United States Code Service - Titles 1 through 54 > TITLE 33. NAVIGATION AND NAVIGABLE WATERS > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL > STANDARDS AND ENFORCEMENT

§ 1311. Effluent limitations

- (a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.
- (b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved--
 - (1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS § 1314(b)], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [33 USCS § 1317]; and
 - (B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act [33 USCS § 1283] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act [33 USCS § 1314(d)(1)]; or,
 - (C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 USCS § 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.
- (2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 [33 USCS § 1325]), that such

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elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act [33 USCS § 1317];

(B) [Repealed]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act [33 USCS § 1317] which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act [33 USCS § 1314(b)(4)]; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) [33 USCS § 1342(a)(1)] in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

- (c) Modification of timetable. The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.
- (d) Review and revision of effluent limitations. Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.
- (e) All point discharge source application of effluent limitations. Effluent limitations established pursuant to this section or section 302 of this Act [33 USCS § 1312] shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].
- (f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste or medical waste. Notwithstanding any other provisions of this Act [33 USCS §§ 1251 et seq.] it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.
- (g) Modifications for certain nonconventional pollutants.
- (1) General authority. The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.
- (2) Requirements for granting modifications. A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that--
- (A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;
- (B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and
- (C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.
- (3) Limitation on authority to apply for subsection (c) modification. If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under

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subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants.

(A) General authority. Up on petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)], toxic pollutants subject to section 307(a) of this Act [33 USCS § 1317(a)], and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing.

(i) Sufficient information. The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination. The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) of this Act [33 USCS § 1317(a)].

(iii) Listing as toxic pollutant. If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) [33 USCS § 1317(a)], the Administrator shall list the pollutant as a toxic pollutant under section 307(a) [33 USCS § 1317(a)].

(iv) Nonconventional criteria determination. If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions. A petition for listing of a pollutant under this paragraph--

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314];

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition. A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314].

(E) Burden of proof. The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

- (5) Removal of pollutants. The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.
- (h) Modification of secondary treatment requirements. The Administrator, with the concurrence of the State, may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--
- (1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act [33 USCS § 1314(a)(6)];
 - (2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;
 - (3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;
 - (4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;
 - (5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;
 - (6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;
 - (7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;
 - (8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;
 - (9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria

established under section 304(a)(1) of this Act [33 USCS § 1314(a)(1)] after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act [33 USCS § 1251(a)(2)]. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions.

- (1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act [33 USCS §§ 1251 et seq.] available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act [33 USCS § 1342] or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987]. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such

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other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act [33 USCS § 1281(b)-(g)], section 307 of this Act [33 USCS § 1317], and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

- (2) (A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and--
- (i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or
 - (ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or
 - (iii) if either an application made before July 1, 1977, for a construction grant under this Act [33 USCS §§ 1251 et seq.] for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 [33 USCS § 1342] to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection [enacted Dec. 27, 1977] or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

- (B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point

source to pay the costs required under section 204 of this Act [33 USCS § 1284], and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 307(a) and (b) [33 USCS § 1317(a), (b)] during the period of such time modification.

(j) Modification procedures.

(1) Any application filed under this section for a modification of the provisions of--

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later than [than] the 365th day which begins after the date of enactment of the Municipal Wastewater Treatment Construction Grant Amendments of 1981 [enacted Dec. 29, 1981], except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after the date of the enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987], and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314] or not later than 270 days after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act [33 USCS §§ 1251 et seq.], unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g).

(A) Effect of filing. An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this Act [33 USCS §§ 1251 et seq.] for all pollutants not the subject of such application or petition.

(B) Effect of disapproval. Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this Act [33 USCS §§ 1251 et seq.].

- (4) **Deadline for subsection (g) decision.** An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.
- (5) **Extension of application deadline.**
- (A) **In general.** In the 180-day period beginning on the date of the enactment of this paragraph [enacted Oct. 31, 1994], the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.
- (B) **Application.** An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will--
- (i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and
- (ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.
- (C) **Additional conditions.** The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies. A
- (D) **Preliminary decision deadline.** The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.
- (k) **Innovative technology.** In the case of any facility subject to a permit under section 402 [33 USCS § 1342] which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 402 [33 USCS § 1342], in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such

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subsection, if it is also determined that such innovative system has the potential for industry-wide application.

- (l) Toxic pollutants. Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act [33 USCS § 1317(a)(1)].
- (m) Modification of effluent limitation requirements for point sources.
- (1) The Administrator, with the concurrence of the State, may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 403 [33 USCS § 1343], with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that--
- (A) the facility for which modification is sought is covered at the time of the enactment of this subsection [enacted Jan. 8, 1983] by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;
- (B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 403 [33 USCS § 1343] exceed by an unreasonable amount the benefits to be obtained, including the objectives of this Act [33 USCS §§ 1251 et seq.];
- (C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;
- (D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;
- (E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;
- (F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 101(a)(2) of this Act [33 USCS § 1251(a)(2)];
- (G) the applicant accepts as a condition to the permit a contractual [contractual] obligation to use funds in the amount required (but not less than \$ 250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;
- (H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this Act [33 USCS §§ 1251 et seq.] applicable to similarly situated discharges; and
- (I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

- (2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.
 - (3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.
 - (4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.
- (n) Fundamentally different factors.
- (1) General rule. The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 307(b) [33 USCS § 1317(b)] for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that--
 - (A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 304(b) or 304(g) and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;
 - (B) the application--
 - (i) is based solely on information and supporting data submitted to the Administrator during the rule-making for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or
 - (ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;
 - (C) the alternative requirement is no less stringent than justified by the fundamental difference; and
 - (D) the alternative requirement will not result in a nonwater quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

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- (2) Time limit for applications. An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.
- (3) Time limit for decision. The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.
- (4) Submission of information. The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.
- (5) Treatment of pending applications. For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on the date of the enactment of this subsection [enacted Feb. 7, 1987] shall be treated as having been submitted to the Administrator on the 180th day following such date of enactment [enacted Feb. 7, 1987]. The applicant may amend the application to take into account the provisions of this subsection.
- (6) Effect of submission of application. An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.
- (7) Effect of denial. If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.
- (8) Reports. By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 301 or 304 of this Act [33 USCS § 1311 or 1314] or any national categorical pretreatment standard under section 307(b) of this Act [33 USCS § 1317(b)] filed before, on, or after such date of enactment [enacted Feb. 7, 1987].
- (o) Application fees. The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of section 301, section 304(d)(4), and section 316(a) of this Act [33 USCS §§ 1311(c), (g), (i), (k), (m), (n), 1314(d)(4), 1316(a)]. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.
- (p) Modified permit for coal remining operations.
 - (1) In general. Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 402(b) [33 USCS § 1342(b)], may issue a permit under section 402 [33 USCS § 1342] which modifies the

requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remaining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

- (2) **Limitations.** The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 303 of this Act [33 USCS § 1313].
- (3) **Definitions.** For purposes of this subsection--
- (A) **Coal remining operation.** The term "coal remining operation" means a coal mining operation which begins after the date of the enactment of this subsection [enacted Feb. 4, 1987] at a site on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.
- (B) **Remined area.** The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.
- (C) **Pre-existing discharge.** The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.
- (4) **Applicability of strip mining laws.** Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 to any coal remining operation, including the application of such Act to suspended solids.

History

(June 30, 1948, ch 758, Title III, § 301, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 844; Dec. 27, 1977, P.L. 95-217, §§ 42-47, 53(c), 91 Stat. 1582-1586, 1590; Dec. 29, 1981, P.L. 97-117, §§ 21(a) in part, (b), 22(a)-(d), 95 Stat. 1631, 1632; Jan. 8, 1983, P.L. 97-440, 96 Stat. 2289; Feb. 4, 1987, P.L. 100-4, Title III, §§ 301(a)-(e), 302(a)-(d), 303(a), (b)(1), (c)-(f), 304(a), 305, 306(a), (b), 307, 101 Stat. 29; Nov. 18, 1988, P.L. 100-688, Title III, Subtitle B, § 3202(b), 102 Stat. 4154; Oct. 31, 1994, P.L. 103-431, § 2, 108 Stat. 4396; Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, § 2021(b), 109 Stat. 727.)

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Current through PL 115-90, approved 12/8/17

United States Code Service - Titles 1 through 54 > TITLE 33. NAVIGATION AND NAVIGABLE WATERS > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL > GENERAL PROVISIONS

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

- (1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.
- (2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.
- (3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.
- (4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act [33 USCS § 1288].
- (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.
- (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
- (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

- (8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.
- (9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone [15 UST § 1606].
- (10) The term "ocean" means any portion of the high seas beyond the contiguous zone.
- (11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.
- (12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.
- (13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.
- (14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.
- (15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.
- (16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.
- (17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.
- (18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

- (19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.
- (20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.
- (21) Coastal recreation waters.
- (A) In general. The term "coastal recreation waters" means--
- (i) the Great Lakes; and
 - (ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) [33 USCS § 1313(c)] by a State for use for swimming, bathing, surfing, or similar water contact activities.
- (B) Exclusions. The term "coastal recreation waters" does not include--
- (i) inland waters; or
 - (ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.
- (22) Floatable material.
- (A) In general. The term "floatable material" means any foreign matter that may float or remain suspended in the water column.
- (B) Inclusions. The term "floatable material" includes--
- (i) plastic;
 - (ii) aluminum cans;
 - (iii) wood products;
 - (iv) bottles; and
 - (v) paper products.
- (23) Pathogen indicator. The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.
- (24) Oil and gas exploration and production. The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.
- (25) Recreational vessel.
- (A) In general. The term "recreational vessel" means any vessel that is--
- (i) manufactured or used primarily for pleasure; or
 - (ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion. The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that--

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) Treatment works. The term "treatment works" has the meaning given the term in section 212 [33 USCS § 1292].

History

(June 30, 1948, ch 758, Title V, § 502, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 886; Dec. 27, 1977, P.L. 95-217, § 33(b), 91 Stat. 1577; Feb. 4, 1987, P.L. 100-4, Title V, §§ 502(a), 503, 101 Stat. 75; Nov. 18, 1988, P.L. 100-688, Title III, Subtitle B, § 3202(a), 102 Stat. 4154; Feb. 10, 1996, P.L. 104-106, Div A, Title III, Subtitle C, § 325(c)(3), 110 Stat. 259; Oct. 10, 2000, P.L. 106-284, § 5, 114 Stat. 875; Aug. 8, 2005, P.L. 109-58, Title III, Subtitle C, § 323, 119 Stat. 694; July 30, 2008, P.L. 110-288, § 3, 122 Stat. 2650.)

(As amended June 10, 2014, P.L. 113-121, Title V, Subtitle B, § 5012(b), 128 Stat. 1328.)

UNITED STATES CODE SERVICE

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This document is current through the December 11, 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.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.21 Application for a permit (applicable to State programs, see § 123.25).

(a) Duty to apply.

(1) Any person who discharges or proposes to discharge pollutants or who owns or operates a "sludge-only facility" whose sewage sludge use or disposal practice is regulated by part 503 of this chapter, and who does not have an effective permit, except persons covered by general permits under § 122.28, excluded under § 122.3, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.44(m), must submit a complete application to the Director in accordance with this section and part 124 of this chapter. The requirements for concentrated animal feeding operations are described in § 122.23(d).

(2) Application Forms: (i) All applicants for EPA-issued permits must submit applications on EPA permit application forms. More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there. Application forms may be obtained by contacting the EPA water resource center at (202) 260-7786 or Water Resource Center, U.S. EPA, Mail Code 4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460 or at the EPA Internet site www.epa.gov/owm/pdes.htm. Applications for EPA-issued permits must be submitted as follows:

(A) All applicants, other than POTWs and TWTDS, must submit Form 1.

(B) Applicants for new and existing POTWs must submit the information contained in paragraph (j) of this section using Form 2A or other form provided by the director.

(C) Applicants for concentrated animal feeding operations or aquatic animal production facilities must submit Form 2B.

(D) Applicants for existing industrial facilities (including manufacturing facilities, commercial facilities, mining activities, and silvicultural activities), must submit Form 2C.

(E) Applicants for new industrial facilities that discharge process wastewater must submit Form 2D.

(F) Applicants for new and existing industrial facilities that discharge only nonprocess wastewater must submit Form 2E.

(G) Applicants for new and existing facilities whose discharge is composed entirely of storm water associated with industrial activity must submit Form 2F, unless exempted by § 122.26(c)(1)(ii). If the discharge is composed of storm water and non-storm water, the applicant must also submit, Forms 2C, 2D, and/or 2E, as appropriate (in addition to Form 2F).

(H) Applicants for new and existing TWTDS, subject to paragraph (c)(2)(i) of this section must submit the application information required by paragraph (q) of this section, using Form 2S or other form provided by the director.

(ii) The application information required by paragraph (a)(2)(i) of this section may be electronically submitted if such method of submittal is approved by EPA or the Director.

(iii) Applicants can obtain copies of these forms by contacting the Water Management Divisions (or equivalent division which contains the NPDES permitting function) of the EPA Regional Offices. The Regional Offices' addresses can be found at § 1.7 of this chapter.

(iv) Applicants for State-issued permits must use State forms which must require at a minimum the information listed in the appropriate paragraphs of this section.

(b) Who applies? When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.

(c) Time to apply.

(1) Any person proposing a new discharge, shall submit an application at least 180 days before the date on which the discharge is to commence, unless permission for a later date has been granted by the Director. Facilities proposing a new discharge of storm water associated with industrial activity shall submit an application 180 days before that facility commences industrial activity which may result in a discharge of storm water associated with that industrial activity. Facilities described under § 122.26(b)(14)(x) or (b)(15)(i) shall submit applications at least 90 days before the date on which construction is to commence. Different submittal dates may be required under the terms of applicable general permits. Persons proposing a new discharge are encouraged to submit their applications well in advance of the 90 or 180 day requirements to avoid delay. See also paragraph (k) of this section and § 122.26(c)(1)(i)(G) and (c)(1)(ii).

(2) Permits under section 405(f) of CWA. All TWTDS whose sewage sludge use or disposal practices are regulated by part 503 of this chapter must submit permit applications according to the applicable schedule in paragraphs (c)(2)(i) or (ii) of this section.

(i) A TWTDS with a currently effective NPDES permit must submit a permit application at the time of its next NPDES permit renewal application. Such information must be submitted in accordance with paragraph (d) of this section.

(ii) Any other TWTDS not addressed under paragraphs (c)(2)(i) of this section must submit the information listed in paragraphs (c)(2)(ii)(A) through (E) of this section to the Director within 1 year after publication of a standard applicable to its sewage sludge use or disposal practice(s), using Form 2S or another form provided by the Director. The Director will determine when such TWTDS must submit a full permit application.

(A)The TWTDS's name, mailing address, location, and status as federal, State, private, public or other entity;

(B)The applicant's name, address, telephone number, and ownership status;

(C)A description of the sewage sludge use or disposal practices. Unless the sewage sludge meets the requirements of paragraph (q)(8)(iv) of this section, the description must include the name and address of any facility where sewage sludge is sent for treatment or disposal, and the location of any land application sites;

(D)Annual amount of sewage sludge generated, treated, used or disposed (estimated dry weight basis); and

(E)The most recent data the TWTDS may have on the quality of the sewage sludge.

(iii)Notwithstanding paragraphs (c)(2)(i) or (ii) of this section, the Director may require permit applications from any TWTDS at any time if the Director determines that a permit is necessary to protect public health and the environment from any potential adverse effects that may occur from toxic pollutants in sewage sludge.

(iv)Any TWTDS that commences operations after promulgation of an applicable "standard for sewage sludge use or disposal" must submit an application to the Director at least 180 days prior to the date proposed for commencing operations.

(d) Duty to reapply.

(1)Any POTW with a currently effective permit shall submit a new application at least 180 days before the expiration date of the existing permit, unless permission for a later date has been granted by the Director. (The Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.)

(2)All other permittees with currently effective permits shall submit a new application 180 days before the existing permit expires, except that:

(i)The Regional Administrator may grant permission to submit an application later than the deadline for submission otherwise applicable, but no later than the permit expiration date; and

(3)[Reserved]

(e) Completeness.

(1)The Director shall not issue a permit before receiving a complete application for a permit except for NPDES general permits. An application for a permit is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. For EPA administered NPDES programs, an application which is reviewed under § 124.3 of this chapter is complete when the Director receives either a complete application or the information listed in a notice of deficiency.

(2)A permit application shall not be considered complete if a permitting authority has waived application requirements under paragraphs (j) or (q) of this section and EPA has disapproved the waiver application. If a waiver request has been submitted to EPA more than 210 days

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prior to permit expiration and EPA has not disapproved the waiver application 181 days prior to permit expiration, the permit application lacking the information subject to the waiver application shall be considered complete.

(3) Except as specified in 122.21(e)(3)(ii), a permit application shall not be considered complete unless all required quantitative data are collected in accordance with sufficiently sensitive analytical methods approved under 40 CFR part 136 or required under 40 CFR chapter I, subchapter N or O.

(i) For the purposes of this requirement, a method approved under 40 CFR part 136 or required under 40 CFR chapter I, subchapter N or O is "sufficiently sensitive" when:

(A) The method minimum level (ML) is at or below the level of the applicable water quality criterion for the measured pollutant or pollutant parameter; or

(B) The method ML is above the applicable water quality criterion, but the amount of the pollutant or pollutant parameter in a facility's discharge is high enough that the method detects and quantifies the level of the pollutant or pollutant parameter in the discharge; or

(C) The method has the lowest ML of the analytical methods approved under 40 CFR part 136 or required under 40 CFR chapter I, subchapter N or O for the measured pollutant or pollutant parameter.

Note to paragraph (e)(3)(i): Consistent with 40 CFR part 136, applicants have the option of providing matrix or sample specific minimum levels rather than the published levels. Further, where an applicant can demonstrate that, despite a good faith effort to use a method that would otherwise meet the definition of "sufficiently sensitive", the analytical results are not consistent with the QA/QC specifications for that method, then the Director may determine that the method is not performing adequately and the applicant should select a different method from the remaining EPA-approved methods that is sufficiently sensitive consistent with 40 CFR 122.21(e)(3)(i). Where no other EPA-approved methods exist, the applicant should select a method consistent with 40 CFR 122.21(e)(3)(ii).

(ii) When there is no analytical method that has been approved under 40 CFR part 136, required under 40 CFR chapter I, subchapter N or O, and is not otherwise required by the Director, the applicant may use any suitable method but shall provide a description of the method. When selecting a suitable method, other factors such as a method's precision, accuracy, or resolution, may be considered when assessing the performance of the method.

(f) Information requirements. All applicants for NPDES permits, other than POTWs and other TWTDS, must provide the following information to the Director, using the application form provided by the Director. Additional information required of applicants is set forth in paragraphs (g) through (k) of this section.

(1) The activities conducted by the applicant which require it to obtain an NPDES permit.

(2) Name, mailing address, and location of the facility for which the application is submitted.

(3) Up to four SIC codes which best reflect the principal products or services provided by the facility.

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(4)The operator's name, address, telephone number, ownership status, and status as Federal, State, private, public, or other entity.

(5)Whether the facility is located on Indian lands.

(6)A listing of all permits or construction approvals received or applied for under any of the following programs:

(i)Hazardous Waste Management program under RCRA.

(ii)UIC program under SDWA.

(iii)NPDES program under CWA.

(iv)Prevention of Significant Deterioration (PSD) program under the Clean Air Act.

(v)Nonattainment program under the Clean Air Act.

(vi)National Emission Standards for Hazardous Pollutants (NESHAPS) preconstruction approval under the Clean Air Act.

(vii)Ocean dumping permits under the Marine Protection Research and Sanctuaries Act.

(viii)Dredge or fill permits under section 404 of CWA.

(ix)Other relevant environmental permits, including State permits.

(7)A topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.

(8)A brief description of the nature of the business.

(g)Application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers. Existing manufacturing, commercial mining, and silvicultural dischargers applying for NPDES permits, except for those facilities subject to the requirements of § 122.21(h), shall provide the following information to the Director, using application forms provided by the Director.

(1)Outfall location. The latitude and longitude to the nearest 15 seconds and the name of the receiving water.

(2)Line drawing. A line drawing of the water flow through the facility with a water balance, showing operations contributing wastewater to the effluent and treatment units. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under paragraph (g)(3) of this section. The water balance must show approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined (for example, for certain mining activities), the applicant may provide instead a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

(3)Average flows and treatment. A narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outfall, including process wastewater, cooling water, and stormwater runoff; the average flow which each

process contributes; and a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations, or production areas may be described in general terms (for example, "dye-making reactor", "distillation tower"). For a privately owned treatment works, this information shall include the identity of each user of the treatment works. The average flow of point sources composed of storm water may be estimated. The basis for the rainfall event and the method of estimation must be indicated.

(4) Intermittent flows. If any of the discharges described in paragraph (g)(3) of this section are intermittent or seasonal, a description of the frequency, duration and flow rate of each discharge occurrence (except for stormwater runoff, spillage or leaks).

(5) Maximum production. If an effluent guideline promulgated under section 304 of CWA applies to the applicant and is expressed in terms of production (or other measure of operation), a reasonable measure of the applicant's actual production reported in the units used in the applicable effluent guideline. The reported measure must reflect the actual production of the facility as required by § 122.45(b)(2).

(6) Improvements. If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement requirement, a description of the abatement project, and a listing of the required and projected final compliance dates.

(7) Effluent characteristics.

(i) Information on the discharge of pollutants specified in this paragraph (g)(7) (except information on storm water discharges which is to be provided as specified in § 122.26). When "quantitative data" for a pollutant are required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under Part 136 of this chapter unless use of another method is required for the pollutant under 40 CFR subchapters N or O. When no analytical method is approved under Part 136 or required under subchapters N or O, the applicant may use any suitable method but must provide a description of the method. 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 quantitative data as applying to the substantially identical outfall. The requirements in paragraphs (g)(7)(vi) and (vii) of this section state that an applicant must provide quantitative data for certain pollutants known or believed to be present do not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. When paragraph (g)(7) of this section requires analysis of pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform (including E. coli), and Enterococci (previously known as fecal streptococcus at § 122.26 (d)(2)(iii)(A)(3)), or volatile organics, grab samples must be collected for those pollutants. For all other pollutants, a 24-hour composite sample, using a minimum of four (4) grab samples, must be used unless specified otherwise at 40 CFR Part 136. However, a minimum of one grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than 24 hours. In addition, for discharges other than storm water discharges, the Director may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of

four (4) grab samples will be a representative sample of the effluent being discharged. Results of analyses of individual grab samples for any parameter may be averaged to obtain the daily average. Grab samples that are not required to be analyzed immediately (see Table II at 40 CFR 136.3 (e)) may be composited in the laboratory, provided that container, preservation, and holding time requirements are met (see Table II at 40 CFR 136.3 (e)) and that sample integrity is not compromised by compositing.

(ii) Storm water discharges. For storm water discharges, all samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inch and at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Where feasible, the variance in the duration of the event and the total rainfall of the event should not exceed 50 percent from the average or median rainfall event in that area. For all applicants, a flow-weighted composite shall be taken for either the entire discharge or for the first three hours of the discharge. The flow-weighted composite sample for a storm water discharge may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes (applicants submitting permit applications for storm water discharges under § 122.26(d) 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). However, a minimum of one grab sample may be taken for storm water discharges from holding ponds or other impoundments with a retention period greater than 24 hours. For a flow-weighted composite sample, only one analysis of the composite of aliquots is required. For storm water discharge samples taken from discharges associated with industrial activities, quantitative data must be reported for the grab sample taken during the first thirty minutes (or as soon thereafter as practicable) of the discharge for all pollutants specified in § 122.26(c)(1). For all storm water permit applicants taking flow-weighted composites, quantitative data must be reported for all pollutants specified in § 122.26 except pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform, and fecal streptococcus. The Director may allow or establish appropriate site-specific sampling procedures or requirements, including sampling locations, the season in which the sampling takes place, the minimum duration between the previous measurable storm event and the storm event sampled, the minimum or maximum level of precipitation required for an appropriate storm event, the form of precipitation sampled (snow melt or rain fall), protocols for collecting samples under part 136 of this chapter, and additional time for submitting data on a case-by-case basis. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.)

(iii) Reporting requirements. Every applicant must report quantitative data for every outfall for the following pollutants:

Biochemical Oxygen Demand (BOD5)

Chemical Oxygen Demand

Total Organic Carbon

Total Suspended Solids

Ammonia (as N)

Temperature (both winter and summer)

pH

(iv)The Director may waive the reporting requirements for individual point sources or for a particular industry category for one or more of the pollutants listed in paragraph (g)(7)(iii) of this section if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements.

(v)Each applicant with processes in one or more primary industry category (see appendix A of this part) contributing to a discharge must report quantitative data for the following pollutants in each outfall containing process wastewater:

(A)The organic toxic pollutants in the fractions designated in table I of appendix D of this part for the applicant's industrial category or categories unless the applicant qualifies as a small business under paragraph (g)(8) of this section. Table II of appendix D of this part lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure which uses gas chromatography/mass spectrometry. A determination that an applicant falls within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes. See Notes 2, 3, and 4 of this section.

(B)The pollutants listed in table III of appendix D of this part (the toxic metals, cyanide, and total phenols).

(vi)

(A)Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in table IV of appendix D of this part (certain conventional and nonconventional pollutants) is discharged from each outfall. If an applicable effluent limitations guideline either directly limits the pollutant or, by its express terms, indirectly limits the pollutant through limitations on an indicator, the applicant must report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline, the applicant must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

(B)Each applicant must indicate whether it knows or has reason to believe that any of the pollutants listed in table II or table III of appendix D of this part (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under paragraph (g)(7)(v) of this section are discharged from each outfall. For every pollutant expected to be discharged in concentrations of 10 ppb or greater the applicant must report quantitative data. For acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4, 6 dinitrophenol, where any of these four pollutants are expected to be discharged in concentrations of 100 ppb or greater the applicant must report quantitative data. For every pollutant expected to be discharged in concentrations less

than 10 ppb, or in the case of acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4, 6 dinitrophenol, in concentrations less than 100 ppb, the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under paragraph (g)(8) of this section is not required to analyze for pollutants listed in table II of appendix D of this part (the organic toxic pollutants).

(vii)Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in table V of appendix D of this part (certain hazardous substances and asbestos) are discharged from each outfall. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.

(viii)Each applicant must report qualitative data, generated using a screening procedure not calibrated with analytical standards, for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) if it:

(A)Uses or manufactures 2,4,5-trichlorophenoxy acetic acid (2,4,5,-T); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 2,4,5,-TP); 2-(2,4,5-trichlorophenoxy) ethyl, 2,2-dichloropropionate (Erbon); O,O-dimethyl O-(2,4,5-trichlorophenyl) phosphorothioate (Ronnell); 2,4,5-trichlorophenol (TCP); or hexachlorophene (HCP); or

(B)Knows or has reason to believe that TCDD is or may be present in an effluent.

(8)Small business exemption. An application which qualifies as a small business under one of the following criteria is exempt from the requirements in paragraph (g)(7)(v)(A) or (g)(7)(vi)(A) of this section to submit quantitative data for the pollutants listed in table II of appendix D of this part (the organic toxic pollutants):

(i)For coal mines, a probable total annual production of less than 100,000 tons per year.

(ii)For all other applicants, gross total annual sales averaging less than \$ 100,000 per year (in second quarter 1980 dollars).

(9)Used or manufactured toxics. A listing of any toxic pollutant which the applicant currently uses or manufactures as an intermediate or final product or byproduct. The Director may waive or modify this requirement for any applicant if the applicant demonstrates that it would be unduly burdensome to identify each toxic pollutant and the Director has adequate information to issue the permit.

(10)[Reserved]

(11)Biological toxicity tests. An identification of any biological toxicity tests which the applicant knows or has reason to believe have been made within the last 3 years on any of the applicant's discharges or on a receiving water in relation to a discharge.

(12)Contract analyses. If a contract laboratory or consulting firm performed any of the analyses required by paragraph (g)(7) of this section, the identity of each laboratory or firm and the analyses performed.

(13)Additional information. In addition to the information reported on the application form, applicants shall provide to the Director, at his or her request, such other information as the Director may reasonably require to assess the discharges of the facility and to determine

whether to issue an NPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity of discharges to aquatic life and requirements to determine the cause of the toxicity.

(h) Application requirements for manufacturing, commercial, mining and silvicultural facilities which discharge only non-process wastewater. Except for stormwater discharges, all manufacturing, commercial, mining and silvicultural dischargers applying for NPDES permits which discharge only non-process wastewater not regulated by an effluent limitations guideline or new source performance standard shall provide the following information to the Director, using application forms provided by the Director:

(1) Outfall location. Outfall number, latitude and longitude to the nearest 15 seconds, and the name of the receiving water.

(2) Discharge date (for new dischargers). Date of expected commencement of discharge.

(3) Type of waste. An identification of the general type of waste discharged, or expected to be discharged upon commencement of operations, including sanitary wastes, restaurant or cafeteria wastes, or noncontact cooling water. An identification of cooling water additives (if any) that are used or expected to be used upon commencement of operations, along with their composition if existing composition is available.

(4) Effluent characteristics. **(i)** Quantitative data for the pollutants or parameters listed below, unless testing is waived by the Director. The quantitative data may be data collected over the past 365 days, if they remain representative of current operations, and must include maximum daily value, average daily value, and number of measurements taken. The applicant must collect and analyze samples in accordance with 40 CFR Part 136. When analysis of pH, temperature, residual chlorine, oil and grease, or fecal coliform (including *E. coli*), and Enterococci (previously known as fecal streptococcus) and volatile organics is required in paragraphs **(h)(4)(i)(A)** through **(K)** of this section, grab samples must be collected for those pollutants. For all other pollutants, a 24-hour composite sample, using a minimum of four (4) grab samples, must be used unless specified otherwise at 40 CFR Part 136. For a composite sample, only one analysis of the composite of aliquots is required. New dischargers must include estimates for the pollutants or parameters listed below instead of actual sampling data, along with the source of each estimate. All levels must be reported or estimated as concentration and as total mass, except for flow, pH, and temperature.

(A) Biochemical Oxygen Demand (BOD₅).

(B) Total Suspended Solids (TSS).

(C) Fecal Coliform (if believed present or if sanitary waste is or will be discharged).

(D) Total Residual Chlorine (if chlorine is used).

(E) Oil and Grease.

(F) Chemical Oxygen Demand (COD) (if non-contact cooling water is or will be discharged).

(G) Total Organic Carbon (TOC) (if non-contact cooling water is or will be discharged).

(H) Ammonia (as N).

(I) Discharge Flow.

(J) pH.

(K) Temperature (Winter and Summer).

(ii) The Director may waive the testing and reporting requirements for any of the pollutants or flow listed in paragraph (h)(4)(i) of this section if the applicant submits a request for such a waiver before or with his application which demonstrates that information adequate to support issuance of a permit can be obtained through less stringent requirements.

(iii) If the applicant is a new discharger, he must complete and submit Item IV of Form 2e (see § 122.21(h)(4)) by providing quantitative data in accordance with that section no later than two years after commencement of discharge. However, the applicant need not complete those portions of Item IV requiring tests which he has already performed and reported under the discharge monitoring requirements of his NPDES permit.

(iv) The requirements of parts i and iii of this section that an applicant must provide quantitative data or estimates of certain pollutants do not apply to pollutants present in a discharge solely as a result of their presence in intake water. However, an applicant must report such pollutants as present. Net credit may be provided for the presence of pollutants in intake water if the requirements of § 122.45(g) are met.

(5) Flow. A description of the frequency of flow and duration of any seasonal or intermittent discharge (except for stormwater runoff, leaks, or spills).

(6) Treatment system. A brief description of any system used or to be used.

(7) Optional information. Any additional information the applicant wishes to be considered, such as influent data for the purpose of obtaining "net" credits pursuant to § 122.45(g).

(8) Certification. Signature of certifying official under § 122.22.

(i) Application requirements for new and existing concentrated animal feeding operations and aquatic animal production facilities. New and existing concentrated animal feeding operations (defined in § 122.23) and concentrated aquatic animal production facilities (defined in § 122.24) shall provide the following information to the Director, using the application form provided by the Director:

(1) For concentrated animal feeding operations:

(i) The name of the owner or operator;

(ii) The facility location and mailing addresses;

(iii) Latitude and longitude of the production area (entrance to production area);

(iv) A topographic map of the geographic area in which the CAFO is located showing the specific location of the production area, in lieu of the requirements of paragraph (f)(7) of this section;

(v) Specific information about 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);

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(vi) The type of containment and storage (anaerobic lagoon, roofed storage shed, storage ponds, underfloor pits, above ground storage tanks, below ground storage tanks, concrete pad, impervious soil pad, other) and total capacity for manure, litter, and process wastewater storage (tons/gallons);

(vii) The total number of acres under control of the applicant available for land application of manure, litter, or process wastewater;

(viii) Estimated amounts of manure, litter, and process wastewater generated per year (tons/gallons);

(ix) Estimated amounts of manure, litter and process wastewater transferred to other persons per year (tons/gallons); and

(x) A nutrient management plan that at a minimum satisfies the requirements specified in § 122.42(e), including, for all CAFOs subject to 40 CFR part 412, subpart C or subpart D, the requirements of 40 CFR 412.4(c), as applicable.

(2) For concentrated aquatic animal production facilities:

(i) The maximum daily and average monthly flow from each outfall.

(ii) The number of ponds, raceways, and similar structures.

(iii) The name of the receiving water and the source of intake water.

(iv) For each species of aquatic animals, the total yearly and maximum harvestable weight.

(v) The calendar month of maximum feeding and the total mass of food fed during that month.

(j) Application requirements for new and existing POTWs. Unless otherwise indicated, all POTWs and other dischargers designated by the Director must provide, at a minimum, the information in this paragraph to the Director, using Form 2A or another application form provided by the Director. Permit applicants must submit all information available at the time of permit application. The information may be provided by referencing information previously submitted to the Director. The Director may waive any requirement of this paragraph if he or she has access to substantially identical information. The Director may also waive any requirement of this paragraph that is not of material concern for a specific permit, if approved by the Regional Administrator. The waiver request to the Regional Administrator must include the State's justification for the waiver. A Regional Administrator's disapproval of a State's proposed waiver does not constitute final Agency action, but does provide notice to the State and permit applicant(s) that EPA may object to any State-issued permit issued in the absence of the required information.

(1) Basic application information. All applicants must provide the following information:

(i) Facility information. Name, mailing address, and location of the facility for which the application is submitted;

(ii) Applicant information. Name, mailing address, and telephone number of the applicant, and indication as to whether the applicant is the facility's owner, operator, or both;

(iii) Existing environmental permits. Identification of all environmental permits or construction approvals received or applied for (including dates) under any of the following programs:

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- (A) Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), Subpart C;
 - (B) Underground Injection Control program under the Safe Drinking Water Act (SDWA);
 - (C) NPDES program under Clean Water Act (CWA);
 - (D) Prevention of Significant Deterioration (PSD) program under the Clean Air Act;
 - (E) Nonattainment program under the Clean Air Act;
 - (F) National Emission Standards for Hazardous Air Pollutants (NESHAPS) preconstruction approval under the Clean Air Act;
 - (G) Ocean dumping permits under the Marine Protection Research and Sanctuaries Act;
 - (H) Dredge or fill permits under section 404 of the CWA; and
 - (I) Other relevant environmental permits, including State permits;
- (iv) Population. The name and population of each municipal entity served by the facility, including unincorporated connector districts. Indicate whether each municipal entity owns or maintains the collection system and whether the collection system is separate sanitary or combined storm and sanitary, if known;
- (v) Indian country. Information concerning whether the facility is located in Indian country and whether the facility discharges to a receiving stream that flows through Indian country;
- (vi) Flow rate. The facility's design flow rate (the wastewater flow rate the plant was built to handle), annual average daily flow rate, and maximum daily flow rate for each of the previous 3 years;
- (vii) Collection system. Identification of type(s) of collection system(s) used by the treatment works (i.e., separate sanitary sewers or combined storm and sanitary sewers) and an estimate of the percent of sewer line that each type comprises; and
- (viii) Outfalls and other discharge or disposal methods. The following information for outfalls to waters of the United States and other discharge or disposal methods:
- (A) For effluent discharges to waters of the United States, the total number and types of outfalls (e.g., treated effluent, combined sewer overflows, bypasses, constructed emergency overflows);
 - (B) For wastewater discharged to surface impoundments:
 - (1) The location of each surface impoundment;
 - (2) The average daily volume discharged to each surface impoundment; and
 - (3) Whether the discharge is continuous or intermittent;
 - (C) For wastewater applied to the land:
 - (1) The location of each land application site;
 - (2) The size of each land application site, in acres;

(3)The average daily volume applied to each land application site, in gallons per day; and

(4)Whether land application is continuous or intermittent;

(D)For effluent sent to another facility for treatment prior to discharge:

(1)The means by which the effluent is transported;

(2)The name, mailing address, contact person, and phone number of the organization transporting the discharge, if the transport is provided by a party other than the applicant;

(3)The name, mailing address, contact person, phone number, and NPDES permit number (if any) of the receiving facility; and

(4)The average daily flow rate from this facility into the receiving facility, in millions of gallons per day; and

(E)For wastewater disposed of in a manner not included in paragraphs (j)(1)(viii)(A) through (D) of this section (e.g., underground percolation, underground injection):

(1)A description of the disposal method, including the location and size of each disposal site, if applicable;

(2)The annual average daily volume disposed of by this method, in gallons per day; and

(3)Whether disposal through this method is continuous or intermittent;

(2)Additional Information. All applicants with a design flow greater than or equal to 0.1 mgd must provide the following information:

(i)Inflow and infiltration. The current average daily volume of inflow and infiltration, in gallons per day, and steps the facility is taking to minimize inflow and infiltration;

(ii)Topographic map. A topographic map (or other map if a topographic map is unavailable) extending at least one mile beyond property boundaries of the treatment plant, including all unit processes, and showing:

(A)Treatment plant area and unit processes;

(B)The major pipes or other structures through which wastewater enters the treatment plant and the pipes or other structures through which treated wastewater is discharged from the treatment plant. Include outfalls from bypass piping, if applicable;

(C)Each well where fluids from the treatment plant are injected underground;

(D)Wells, springs, and other surface water bodies listed in public records or otherwise known to the applicant within 1/4 mile of the treatment works' property boundaries;

(E)Sewage sludge management facilities (including on-site treatment, storage, and disposal sites); and

(F)Location at which waste classified as hazardous under RCRA enters the treatment plant by truck, rail, or dedicated pipe;

(iii)Process flow diagram or schematic.

(A) A diagram showing the processes of the treatment plant, including all bypass piping and all backup power sources or redundancy in the system. This includes a water balance showing all treatment units, including disinfection, and showing daily average flow rates at influent and discharge points, and approximate daily flow rates between treatment units; and

(B) A narrative description of the diagram; and

(iv) Scheduled improvements, schedules of implementation. The following information regarding scheduled improvements:

(A) The outfall number of each outfall affected;

(B) A narrative description of each required improvement;

(C) Scheduled or actual dates of completion for the following:

(1) Commencement of construction;

(2) Completion of construction;

(3) Commencement of discharge; and

(4) Attainment of operational level;

(D) A description of permits and clearances concerning other Federal and/or State requirements;

(3) Information on effluent discharges. Each applicant must provide the following information for each outfall, including bypass points, through which effluent is discharged, as applicable:

(i) Description of outfall. The following information about each outfall:

(A) Outfall number;

(B) State, county, and city or town in which outfall is located;

(C) Latitude and longitude, to the nearest second;

(D) Distance from shore and depth below surface;

(E) Average daily flow rate, in million gallons per day;

(F) The following information for each outfall with a seasonal or periodic discharge:

(1) Number of times per year the discharge occurs;

(2) Duration of each discharge;

(3) Flow of each discharge; and

(4) Months in which discharge occurs; and

(G) Whether the outfall is equipped with a diffuser and the type (e.g., high-rate) of diffuser used;

(ii) Description of receiving waters. The following information (if known) for each outfall through which effluent is discharged to waters of the United States:

(A) Name of receiving water;

(B)Name of watershed/river/stream system and United States Soil Conservation Service 14-digit watershed code;

(C)Name of State Management/River Basin and United States Geological Survey 8-digit hydrologic cataloging unit code; and

(D)Critical flow of receiving stream and total hardness of receiving stream at critical low flow (if applicable);

(iii)Description of treatment. The following information describing the treatment provided for discharges from each outfall to waters of the United States:

(A)The highest level of treatment (e.g., primary, equivalent to secondary, secondary, advanced, other) that is provided for the discharge for each outfall and:

(1)Design biochemical oxygen demand (BOD[5] or CBOD[5]) removal (percent);

(2)Design suspended solids (SS) removal (percent); and, where applicable,

(3)Design phosphorus (P) removal (percent);

(4)Design nitrogen (N) removal (percent); and

(5)Any other removals that an advanced treatment system is designed to achieve.

(B)A description of the type of disinfection used, and whether the treatment plant dechlorinates (if disinfection is accomplished through chlorination);

(4)Effluent monitoring for specific parameters.

(i)As provided in paragraphs (j)(4)(ii) through (x) of this section, all applicants must submit to the Director effluent monitoring information for samples taken from each outfall through which effluent is discharged to waters of the United States, except for CSOs. The Director may allow applicants to submit sampling data for only one outfall on a case-by-case basis, where the applicant has two or more outfalls with substantially identical effluent. The Director may also allow applicants to composite samples from one or more outfalls that discharge into the same mixing zone;

(ii)All applicants must sample and analyze for the pollutants listed in Appendix J, Table 1A of this part;

(iii)All applicants with a design flow greater than or equal to 0.1 mgd must sample and analyze for the pollutants listed in Appendix J, Table 1 of this part. Facilities that do not use chlorine for disinfection, do not use chlorine elsewhere in the treatment process, and have no reasonable potential to discharge chlorine in their effluent may delete chlorine from Table 1;

(iv)The following applicants must sample and analyze for the pollutants listed in Appendix J, Table 2 of this part, and for any other pollutants for which the State or EPA have established water quality standards applicable to the receiving waters:

(A)All POTWs with a design flow rate equal to or greater than one million gallons per day;

(B)All POTWs with approved pretreatment programs or POTWs required to develop a pretreatment program;

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(C)Other POTWs, as required by the Director;

(v)The Director should require sampling for additional pollutants, as appropriate, on a case-by-case basis;

(vi)Applicants must provide data from a minimum of three samples taken within four and one-half years prior to the date of the permit application. Samples must be representative of the seasonal variation in the discharge from each outfall. Existing data may be used, if available, in lieu of sampling done solely for the purpose of this application. The Director should require additional samples, as appropriate, on a case-by-case basis.

(vii)All existing data for pollutants specified in paragraphs (j)(4)(ii) through (v) of this section that is collected within four and one-half years of the application must be included in the pollutant data summary submitted by the applicant. If, however, the applicant samples for a specific pollutant on a monthly or more frequent basis, it is only necessary, for such pollutant, to summarize all data collected within one year of the application.

(viii)Applicants must collect samples of effluent and analyze such samples for pollutants in accordance with analytical methods approved under 40 CFR Part 136 unless an alternative is specified in the existing NPDES permit. When analysis of pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform (including E. coli), or volatile organics is required in paragraphs (j)(4)(ii) through (iv) of this section, grab samples must be collected for those pollutants. For all other pollutants, 24-hour composite samples must be used. For a composite sample, only one analysis of the composite of aliquots is required.

(ix)The effluent monitoring data provided must include at least the following information for each parameter:

(A)Maximum daily discharge, expressed as concentration or mass, based upon actual sample values;

(B)Average daily discharge for all samples, expressed as concentration or mass, and the number of samples used to obtain this value;

(C)The analytical method used; and

(D)The threshold level (i.e., method detection limit, minimum level, or other designated method endpoints) for the analytical method used.

(x)Unless otherwise required by the Director, metals must be reported as total recoverable.

(5)Effluent monitoring for whole effluent toxicity.

(i)All applicants must provide an identification of any whole effluent toxicity tests conducted during the four and one-half years prior to the date of the application on any of the applicant's discharges or on any receiving water near the discharge.

(ii)As provided in paragraphs (j)(5)(iii)-(ix) of this section, the following applicants must submit to the Director the results of valid whole effluent toxicity tests for acute or chronic toxicity for samples taken from each outfall through which effluent is discharged to surface waters, except for combined sewer overflows:

(A)All POTWs with design flow rates greater than or equal to one million gallons per day;

(B)All POTWs with approved pretreatment programs or POTWs required to develop a pretreatment program;

(C)Other POTWs, as required by the Director, based on consideration of the following factors:

(1)The variability of the pollutants or pollutant parameters in the POTW effluent (based on chemical-specific information, the type of treatment plant, and types of industrial contributors);

(2)The ratio of effluent flow to receiving stream flow;

(3)Existing controls on point or non-point sources, including total maximum daily load calculations for the receiving stream segment and the relative contribution of the POTW;

(4)Receiving stream characteristics, including possible or known water quality impairment, and whether the POTW discharges to a coastal water, one of the Great Lakes, or a water designated as an outstanding natural resource water; or

(5)Other considerations (including, but not limited to, the history of toxic impacts and compliance problems at the POTW) that the Director determines could cause or contribute to adverse water quality impacts.

(iii)Where the POTW has two or more outfalls with substantially identical effluent discharging to the same receiving stream segment, the Director may allow applicants to submit whole effluent toxicity data for only one outfall on a case-by-case basis. The Director may also allow applicants to composite samples from one or more outfalls that discharge into the same mixing zone.

(iv)Each applicant required to perform whole effluent toxicity testing pursuant to paragraph (j)(5)(ii) of this section must provide:

(A)Results of a minimum of four quarterly tests for a year, from the year preceding the permit application; or

(B)Results from four tests performed at least annually in the four and one half year period prior to the application, provided the results show no appreciable toxicity using a safety factor determined by the permitting authority.

(v)Applicants must conduct tests with multiple species (no less than two species; e.g., fish, invertebrate, plant), and test for acute or chronic toxicity, depending on the range of receiving water dilution. EPA recommends that applicants conduct acute or chronic testing based on the following dilutions:

(A)Acute toxicity testing if the dilution of the effluent is greater than 1000:1 at the edge of the mixing zone;

(B)Acute or chronic toxicity testing if the dilution of the effluent is between 100:1 and 1000:1 at the edge of the mixing zone. Acute testing may be more appropriate at the higher end of this range (1000:1), and chronic testing may be more appropriate at the lower end of this range (100:1); and

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(C)Chronic testing if the dilution of the effluent is less than 100:1 at the edge of the mixing zone.

(vi)Each applicant required to perform whole effluent toxicity testing pursuant to paragraph (j)(5)(ii) of this section must provide the number of chronic or acute whole effluent toxicity tests that have been conducted since the last permit reissuance.

(vii)Applicants must provide the results using the form provided by the Director, or test summaries if available and comprehensive, for each whole effluent toxicity test conducted pursuant to paragraph (j)(5)(ii) of this section for which such information has not been reported previously to the Director.

(viii)Whole effluent toxicity testing conducted pursuant to paragraph (j)(5)(ii) of this section must be conducted using methods approved under 40 CFR part 136. West coast facilities in Washington, Oregon, California, Alaska, Hawaii, and the Pacific Territories are exempted from 40 CFR part 136 chronic methods and must use alternative guidance as directed by the permitting authority.

(ix)For whole effluent toxicity data submitted to the Director within four and one-half years prior to the date of the application, applicants must provide the dates on which the data were submitted and a summary of the results.

(x)Each POTW required to perform whole effluent toxicity testing pursuant to paragraph (j)(5)(ii) of this section must provide any information on the cause of toxicity and written details of any toxicity reduction evaluation conducted, if any whole effluent toxicity test conducted within the past four and one-half years revealed toxicity.

(6)Industrial discharges. Applicants must submit the following information about industrial discharges to the POTW:

(i)Number of significant industrial users (SIUs) and categorical industrial users (CIUs) discharging to the POTW; and

(ii)POTWs with one or more SIUs shall provide the following information for each SIU, as defined at 40 CFR 403.3(v), that discharges to the POTW:

(A)Name and mailing address;

(B)Description of all industrial processes that affect or contribute to the SIU's discharge;

(C)Principal products and raw materials of the SIU that affect or contribute to the SIU's discharge;

(D)Average daily volume of wastewater discharged, indicating the amount attributable to process flow and non-process flow;

(E)Whether the SIU is subject to local limits;

(F)Whether the SIU is subject to categorical standards, and if so, under which category(ies) and subcategory(ies); and

(G)Whether any problems at the POTW (e.g., upsets, pass through, interference) have been attributed to the SIU in the past four and one-half years.

(iii)The information required in paragraphs (j)(6)(i) and (ii) of this section may be waived by the Director for POTWs with pretreatment programs if the applicant has submitted either of the following that contain information substantially identical to that required in paragraphs (j)(6)(i) and (ii) of this section.

(A)An annual report submitted within one year of the application; or

(B)A pretreatment program;

(7)Discharges from hazardous waste generators and from waste cleanup or remediation sites. POTWs receiving Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or RCRA Corrective Action wastes or wastes generated at another type of cleanup or remediation site must provide the following information:

(i)If the POTW receives, or has been notified that it will receive, by truck, rail, or dedicated pipe any wastes that are regulated as RCRA hazardous wastes pursuant to 40 CFR part 261, the applicant must report the following:

(A)The method by which the waste is received (i.e., whether by truck, rail, or dedicated pipe); and

(B)The hazardous waste number and amount received annually of each hazardous waste;

(ii)If the POTW receives, or has been notified that it will receive, wastewaters that originate from remedial activities, including those undertaken pursuant to CERCLA and sections 3004(u) or 3008(h) of RCRA, the applicant must report the following:

(A)The identity and description of the site(s) or facility(ies) at which the wastewater originates;

(B)The identities of the wastewater's hazardous constituents, as listed in Appendix VIII of part 261 of this chapter; if known; and

(C)The extent of treatment, if any, the wastewater receives or will receive before entering the POTW;

(iii)Applicants are exempt from the requirements of paragraph (j)(7)(ii) of this section if they receive no more than fifteen kilograms per month of hazardous wastes, unless the wastes are acute hazardous wastes as specified in 40 CFR 261.30(d) and 261.33(e).

(8)Combined sewer overflows. Each applicant with combined sewer systems must provide the following information:

(i)Combined sewer system information. The following information regarding the combined sewer system:

(A)System map. A map indicating the location of the following:

(1)All CSO discharge points;

(2)Sensitive use areas potentially affected by CSOs (e.g., beaches, drinking water supplies, shellfish beds, sensitive aquatic ecosystems, and outstanding national resource waters); and

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- (3) Waters supporting threatened and endangered species potentially affected by CSOs; and
- (B) System diagram. A diagram of the combined sewer collection system that includes the following information:
- (1) The location of major sewer trunk lines, both combined and separate sanitary;
 - (2) The locations of points where separate sanitary sewers feed into the combined sewer system;
 - (3) In-line and off-line storage structures;
 - (4) The locations of flow-regulating devices; and
 - (5) The locations of pump stations;
- (ii) Information on CSO outfalls. The following information for each CSO discharge point covered by the permit application:
- (A) Description of outfall. The following information on each outfall:
- (1) Outfall number;
 - (2) State, county, and city or town in which outfall is located;
 - (3) Latitude and longitude, to the nearest second; and
 - (4) Distance from shore and depth below surface;
 - (5) Whether the applicant monitored any of the following in the past year for this CSO:
 - (i) Rainfall;
 - (ii) CSO flow volume;
 - (iii) CSO pollutant concentrations;
 - (iv) Receiving water quality;
 - (v) CSO frequency; and
 - (6) The number of storm events monitored in the past year;
- (B) CSO events. The following information about CSO overflows from each outfall:
- (1) The number of events in the past year;
 - (2) The average duration per event, if available;
 - (3) The average volume per CSO event, if available; and
 - (4) The minimum rainfall that caused a CSO event, if available, in the last year;
- (C) Description of receiving waters. The following information about receiving waters:
- (1) Name of receiving water;
 - (2) Name of watershed/stream system and the United States Soil Conservation Service watershed (14-digit) code (if known); and

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(3) Name of State Management/River Basin and the United States Geological Survey hydrologic cataloging unit (8-digit) code (if known); and

(D) CSO operations. A description of any known water quality impacts on the receiving water caused by the CSO (e.g., permanent or intermittent beach closings, permanent or intermittent shellfish bed closings, fish kills, fish advisories, other recreational loss, or exceedance of any applicable State water quality standard);

(9) Contractors. All applicants must provide the name, mailing address, telephone number, and responsibilities of all contractors responsible for any operational or maintenance aspects of the facility; and

(10) Signature. All applications must be signed by a certifying official in compliance with § 122.22.

(k) Application requirements for new sources and new discharges. New manufacturing, commercial, mining and silvicultural dischargers applying for NPDES permits (except for new discharges of facilities subject to the requirements of paragraph (h) of this section or new discharges of storm water associated with industrial activity which are subject to the requirements of § 122.26(c)(1) and this section (except as provided by § 122.26(c)(1)(ii)) shall provide the following information to the Director, using the application forms provided by the Director:

(1) Expected outfall location. The latitude and longitude to the nearest 15 seconds and the name of the receiving water.

(2) Discharge dates. The expected date of commencement of discharge.

(3) Flows, sources of pollution, and treatment technologies --

(i) Expected treatment of wastewater. Description of the treatment that the wastewater will receive, along with all operations contributing wastewater to the effluent, average flow contributed by each operation, and the ultimate disposal of any solid or liquid wastes not discharged.

(ii) Line drawing. A line drawing of the water flow through the facility with a water balance as described in § 122.21(g)(2).

(iii) Intermittent flows. If any of the expected discharges will be intermittent or seasonal, a description of the frequency, duration and maximum daily flow rate of each discharge occurrence (except for stormwater runoff, spillage, or leaks).

(4) Production. If a new source performance standard promulgated under section 306 of CWA or an effluent limitation guideline applies to the applicant and is expressed in terms of production (or other measure of operation), a reasonable measure of the applicant's expected actual production reported in the units used in the applicable effluent guideline or new source performance standard as required by § 122.45(b)(2) for each of the first three years. Alternative estimates may also be submitted if production is likely to vary.

(5) Effluent characteristics. The requirements in paragraphs (h)(4)(i), (ii), and (iii) of this section that an applicant must provide estimates of certain pollutants expected to be present do not apply to pollutants present in a discharge solely as a result of their presence in intake water; however, an applicant must report such pollutants as present. Net credits may be provided for the presence of pollutants in intake water if the requirements of § 122.45(g) are

met. All levels (except for discharge flow, temperature, and pH) must be estimated as concentration and as total mass.

(i) Each applicant must report estimated daily maximum, daily average, and source of information for each outfall for the following pollutants or parameters. The Director may waive the reporting requirements for any of these pollutants and parameters if the applicant submits a request for such a waiver before or with his application which demonstrates that information adequate to support issuance of the permit can be obtained through less stringent reporting requirements.

(A) Biochemical Oxygen Demand (BOD).

(B) Chemical Oxygen Demand (COD).

(C) Total Organic Carbon (TOC).

(D) Total Suspended Solids (TSS).

(E) Flow.

(F) Ammonia (as N).

(G) Temperature (winter and summer).

(H) pH.

(ii) Each applicant must report estimated daily maximum, daily average, and source of information for each outfall for the following pollutants, if the applicant knows or has reason to believe they will be present or if they are limited by an effluent limitation guideline or new source performance standard either directly or indirectly through limitations on an indicator pollutant: all pollutants in table IV of appendix D of part 122 (certain conventional and nonconventional pollutants).

(iii) Each applicant must report estimated daily maximum, daily average and source of information for the following pollutants if he knows or has reason to believe that they will be present in the discharges from any outfall:

(A) The pollutants listed in table III of appendix D (the toxic metals, in the discharge from any outfall: Total cyanide, and total phenols);

(B) The organic toxic pollutants in table II of appendix D (except bis (chloromethyl) ether, dichlorofluoromethane and trichlorofluoromethane). This requirement is waived for applicants with expected gross sales of less than \$ 100,000 per year for the next three years, and for coal mines with expected average production of less than 100,000 tons of coal per year.

(iv) The applicant is required to report that 2,3,7,8 Tetrachlorodibenzo-P-Dioxin (TCDD) may be discharged if he uses or manufactures one of the following compounds, or if he knows or has reason to believe that TCDD will or may be present in an effluent:

(A) 2,4,5-trichlorophenoxy acetic acid (2,4,5-T) (CAS #93-76-5);

(B)

2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 2,4,5-TP) (CAS #93-72-1);

(C)

2-(2,4,5-trichlorophenoxy) ethyl 2,2-dichloropropionate (Erbon) (CAS #136-25-4);

(D)0,0-dimethyl 0-(2,4,5-trichlorophenyl) phosphorothioate (Ronnell) (CAS #299-84-3);

(E)2,4,5-trichlorophenol (TCP) (CAS #95-95-4); or

(F)Hexachlorophene (HCP) (CAS #70-30-4);

(v)Each applicant must report any pollutants listed in table V of appendix D (certain hazardous substances) if he believes they will be present in any outfall (no quantitative estimates are required unless they are already available).

(vi)No later than two years after the commencement of discharge from the proposed facility, the applicant is required to complete and submit Items V and VI of NPDES application Form 2c (see § 122.21(g)). However, the applicant need not complete those portions of Item V requiring tests which he has already performed and reported under the discharge monitoring requirements of his NPDES permit.

(6)Engineering Report. Each applicant must report the existence of any technical evaluation concerning his wastewater treatment, along with the name and location of similar plants of which he has knowledge.

(7)Other information. Any optional information the permittee wishes to have considered.

(8)Certification. Signature of certifying official under § 122.22.

(I) Special provisions for applications from new sources.

(1)The owner or operator of any facility which may be a new source (as defined in § 122.2) and which is located in a State without an approved NPDES program must comply with the provisions of this paragraph (1)(1).

(2)

(i)Before beginning any on-site construction as defined in § 122.29, the owner or operator of any facility which may be a new source must submit information to the Regional Administrator so that he or she can determine if the facility is a new source. The Regional Administrator may request any additional information needed to determine whether the facility is a new source.

(ii)The Regional Administrator shall make an initial determination whether the facility is a new source within 30 days of receiving all necessary information under paragraph (1)(2)(i) of this section.

(3)The Regional Administrator shall issue a public notice in accordance with § 124.10 of this chapter of the new source determination under paragraph (1)(2) of this section. If the Regional Administrator has determined that the facility is a new source, the notice shall state that the applicant must comply with the environmental review requirements of 40 CFR 6.600 through 6.607.

(4)Any interested party may challenge the Regional Administrator's initial new source determination by requesting review of the determination under § 124.19 of this chapter within

30 days of the public notice of the initial determination. If all interested parties agree, the Environmental Appeals Board may defer review until after a final permit decision is made, and consolidate review of the determination with any review of the permit decision.

(m) Variance requests by non-POTWs. A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified in this paragraph:

(1) Fundamentally different factors. **(i)** A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be filed as follows:

(A) For a request from best practicable control technology currently available (BPT), by the close of the public comment period under § 124.10.

(B) For a request from best available technology economically achievable (BAT) and/or best conventional pollutant control technology (BCT), by no later than:

(1) July 3, 1989, for a request based on an effluent limitation guideline promulgated before February 4, 1987, to the extent July 3, 1989 is not later than that provided under previously promulgated regulations; or

(2) 180 days after the date on which an effluent limitation guideline is published in the FEDERAL REGISTER for a request based on an effluent limitation guideline promulgated on or after February 4, 1987.

(ii) The request shall explain how the requirements of the applicable regulatory and/or statutory criteria have been met.

(2) Non-conventional pollutants. A request for a variance from the BAT requirements for CWA section 301(b)(2)(F) pollutants (commonly called "non-conventional" pollutants) pursuant to section 301(c) of CWA because of the economic capability of the owner or operator, or pursuant to section 301(g) of the CWA (provided however that a § 301(g) variance may only be requested for ammonia; chlorine; color; iron; total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by section 301(b)(2)(F)) and any other pollutant which the Administrator lists under section 301(g)(4) of the CWA) must be made as follows:

(i) For those requests for a variance from an effluent limitation based upon an effluent limitation guideline by:

(A) Submitting an initial request to the Regional Administrator, as well as to the State Director if applicable, stating the name of the discharger, the permit number, the outfall number(s), the applicable effluent guideline, and whether the discharger is requesting a section 301(c) or section 301(g) modification or both. This request must have been filed not later than:

(1) September 25, 1978, for a pollutant which is controlled by a BAT effluent limitation guideline promulgated before December 27, 1977; or

(2) 270 days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977; and

(B) Submitting a completed request no later than the close of the public comment period under § 124.10 demonstrating that the requirements of § 124.13 and the applicable requirements of part 125 have been met. Notwithstanding this provision, the complete application for a request under section 301(g) shall be filed 180 days before EPA must make a decision (unless the Regional Division Director establishes a shorter or longer period).

(ii) For those requests for a variance from effluent limitations not based on effluent limitation guidelines, the request need only comply with paragraph (m)(2)(i)(B) of this section and need not be preceded by an initial request under paragraph (m)(2)(i)(A) of this section.

(3)-(4) [Reserved]

(5) Water quality related effluent limitations. A modification under section 302(b)(2) of requirements under section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.

(6) Thermal discharges. A variance under CWA section 316(a) for the thermal component of any discharge must be filed with a timely application for a permit under this section, except that if thermal effluent limitations are established under CWA section 402(a)(1) or are based on water quality standards the request for a variance may be filed by the close of the public comment period under § 124.10. A copy of the request as required under 40 CFR part 125, subpart H, shall be sent simultaneously to the appropriate State or interstate certifying agency as required under 40 CFR part 125. (See § 124.65 for special procedures for section 316(a) thermal variances.)

(n) Variance requests by POTWs. A discharger which is a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory provisions as specified in this paragraph:

(1) Discharges into marine waters. A request for a modification under CWA section 301(h) of requirements of CWA section 301(b)(1)(B) for discharges into marine waters must be filed in accordance with the requirements of 40 CFR part 125, subpart G.

(2) [Reserved]

(3) Water quality based effluent limitation. A modification under CWA section 302(b)(2) of the requirements under section 302(a) for achieving water quality based effluent limitations shall be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.

(o) Expedited variance procedures and time extensions.

(1) Notwithstanding the time requirements in paragraphs (m) and (n) of this section, the Director may notify a permit applicant before a draft permit is issued under § 124.6 that the draft permit will likely contain limitations which are eligible for variances. In the notice the Director may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of part 125 applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted.

The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance.

(2)A discharger who cannot file a timely complete request required under paragraph (m)(2)(i)(B) or (m)(2)(ii) of this section may request an extension. The extension may be granted or denied at the discretion of the Director. Extensions shall be no more than 6 months in duration.

(p)Recordkeeping. Except for information required by paragraph (d)(3)(ii) of this section, which shall be retained for a period of at least five years from the date the application is signed (or longer as required by 40 CFR part 503), applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under this section for a period of at least 3 years from the date the application is signed.

(q)Sewage sludge management. All TWTDS subject to paragraph (c)(2)(i) of this section must provide the information in this paragraph to the Director, using Form 2S or another application form approved by the Director. New applicants must submit all information available at the time of permit application. The information may be provided by referencing information previously submitted to the Director. The Director may waive any requirement of this paragraph if he or she has access to substantially identical information. The Director may also waive any requirement of this paragraph that is not of material concern for a specific permit, if approved by the Regional Administrator. The waiver request to the Regional Administrator must include the State's justification for the waiver. A Regional Administrator's disapproval of a State's proposed waiver does not constitute final Agency action, but does provide notice to the State and permit applicant(s) that EPA may object to any State-issued permit issued in the absence of the required information.

(1)Facility information. All applicants must submit the following information:

- (i)The name, mailing address, and location of the TWTDS for which the application is submitted;
- (ii)Whether the facility is a Class I Sludge Management Facility;
- (iii)The design flow rate (in million gallons per day);
- (iv)The total population served; and
- (v)The TWTDS's status as Federal, State, private, public, or other entity;

(2)Applicant information. All applicants must submit the following information:

- (i)The name, mailing address, and telephone number of the applicant; and
- (ii)Indication whether the applicant is the owner, operator, or both;

(3)Permit information. All applicants must submit the facility's NPDES permit number, if applicable, and a listing of all other Federal, State, and local permits or construction approvals received or applied for under any of the following programs:

- (i)Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA);
- (ii)UIC program under the Safe Drinking Water Act (SDWA);
- (iii)NPDES program under the Clean Water Act (CWA);

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- (iv) Prevention of Significant Deterioration (PSD) program under the Clean Air Act;
 - (v) Nonattainment program under the Clean Air Act;
 - (vi) National Emission Standards for Hazardous Air Pollutants (NESHAPS) preconstruction approval under the Clean Air Act;
 - (vii) Dredge or fill permits under section 404 of CWA;
 - (viii) Other relevant environmental permits, including State or local permits;
- (4) Indian country. All applicants must identify any generation, treatment, storage, land application, or disposal of sewage sludge that occurs in Indian country;
- (5) Topographic map. All applicants must submit a topographic map (or other map if a topographic map is unavailable) extending one mile beyond property boundaries of the facility and showing the following information:
- (i) All sewage sludge management facilities, including on-site treatment, storage, and disposal sites; and
 - (ii) Wells, springs, and other surface water bodies that are within 1/4 mile of the property boundaries and listed in public records or otherwise known to the applicant;
- (6) Sewage sludge handling. All applicants must submit a line drawing and/or a narrative description that identifies all sewage sludge management practices employed during the term of the permit, including all units used for collecting, dewatering, storing, or treating sewage sludge, the destination(s) of all liquids and solids leaving each such unit, and all processes used for pathogen reduction and vector attraction reduction;
- (7) Sewage sludge quality. The applicant must submit sewage sludge monitoring data for the pollutants for which limits in sewage sludge have been established in 40 CFR part 503 for the applicant's use or disposal practices on the date of permit application.
- (i) The Director may require sampling for additional pollutants, as appropriate, on a case-by-case basis;
 - (ii) Applicants must provide data from a minimum of three samples taken within four and one-half years prior to the date of the permit application. Samples must be representative of the sewage sludge and should be taken at least one month apart. Existing data may be used in lieu of sampling done solely for the purpose of this application;
 - (iii) Applicants must collect and analyze samples in accordance with analytical methods approved under SW-846 unless an alternative has been specified in an existing sewage sludge permit;
 - (iv) The monitoring data provided must include at least the following information for each parameter:
 - (A) Average monthly concentration for all samples (mg/kg dry weight), based upon actual sample values;
 - (B) The analytical method used; and
 - (C) The method detection level.

(8)Preparation of sewage sludge. If the applicant is a "person who prepares" sewage sludge, as defined at 40 CFR 503.9(r), the applicant must provide the following information:

(i)If the applicant's facility generates sewage sludge, the total dry metric tons per 365-day period generated at the facility;

(ii)If the applicant's facility receives sewage sludge from another facility, the following information for each facility from which sewage sludge is received:

(A)The name, mailing address, and location of the other facility;

(B)The total dry metric tons per 365-day period received from the other facility; and

(C)A description of any treatment processes occurring at the other facility, including blending activities and treatment to reduce pathogens or vector attraction characteristics;

(iii)If the applicant's facility changes the quality of sewage sludge through blending, treatment, or other activities, the following information:

(A)Whether the Class A pathogen reduction requirements in 40 CFR 503.32(a) or the Class B pathogen reduction requirements in 40 CFR 503.32(b) are met, and a description of any treatment processes used to reduce pathogens in sewage sludge;

(B)Whether any of the vector attraction reduction options of 40 CFR 503.33(b)(1) through (b)(8) are met, and a description of any treatment processes used to reduce vector attraction properties in sewage sludge; and

(C)A description of any other blending, treatment, or other activities that change the quality of sewage sludge;

(iv)If sewage sludge from the applicant's facility meets the ceiling concentrations in 40 CFR 503.13(b)(1), the pollutant concentrations in § 503.13(b)(3), the Class A pathogen requirements in § 503.32(a), and one of the vector attraction reduction requirements in § 503.33(b)(1) through (b)(8), and if the sewage sludge is applied to the land, the applicant must provide the total dry metric tons per 365-day period of sewage sludge subject to this paragraph that is applied to the land;

(v)If sewage sludge from the applicant's facility is sold or given away in a bag or other container for application to the land, and the sewage sludge is not subject to paragraph (q)(8)(iv) of this section, the applicant must provide the following information:

(A)The total dry metric tons per 365-day period of sewage sludge subject to this paragraph that is sold or given away in a bag or other container for application to the land; and

(B)A copy of all labels or notices that accompany the sewage sludge being sold or given away;

(vi)If sewage sludge from the applicant's facility is provided to another "person who prepares," as defined at 40 CFR 503.9(r), and the sewage sludge is not subject to paragraph (q)(8)(iv) of this section, the applicant must provide the following information for each facility receiving the sewage sludge:

(A)The name and mailing address of the receiving facility;

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(B)The total dry metric tons per 365-day period of sewage sludge subject to this paragraph that the applicant provides to the receiving facility;

(C)A description of any treatment processes occurring at the receiving facility, including blending activities and treatment to reduce pathogens or vector attraction characteristic;

(D)A copy of the notice and necessary information that the applicant is required to provide the receiving facility under 40 CFR 503.12(g); and

(E)If the receiving facility places sewage sludge in bags or containers for sale or give-away to application to the land, a copy of any labels or notices that accompany the sewage sludge;

(9)Land application of bulk sewage sludge. If sewage sludge from the applicant's facility is applied to the land in bulk form, and is not subject to paragraphs (q)(8)(iv), (v), or (vi) of this section, the applicant must provide the following information:

(i)The total dry metric tons per 365-day period of sewage sludge subject to this paragraph that is applied to the land;

(ii)If any land application sites are located in States other than the State where the sewage sludge is prepared, a description of how the applicant will notify the permitting authority for the State(s) where the land application sites are located;

(iii)The following information for each land application site that has been identified at the time of permit application:

(A)The name (if any), and location for the land application site;

(B)The site's latitude and longitude to the nearest second, and method of determination;

(C)A topographic map (or other map if a topographic map is unavailable) that shows the site's location;

(D)The name, mailing address, and telephone number of the site owner, if different from the applicant;

(E)The name, mailing address, and telephone number of the person who applies sewage sludge to the site, if different from the applicant;

(F)Whether the site is agricultural land, forest, a public contact site, or a reclamation site, as such site types are defined under 40 CFR 503.11;

(G)The type of vegetation grown on the site, if known, and the nitrogen requirement for this vegetation;

(H)Whether either of the vector attraction reduction options of 40 CFR 503.33(b)(9) or (b)(10) is met at the site, and a description of any procedures employed at the time of use to reduce vector attraction properties in sewage sludge; and

(I)Other information that describes how the site will be managed, as specified by the permitting authority.

(iv)The following information for each land application site that has been identified at the time of permit application, if the applicant intends to apply bulk sewage sludge subject to the cumulative pollutant loading rates in 40 CFR 503.13(b)(2) to the site:

(A)Whether the applicant has contacted the permitting authority in the State where the bulk sewage sludge subject to § 503.13(b)(2) will be applied, to ascertain whether bulk sewage sludge subject to § 503.13(b)(2) has been applied to the site on or since July 20, 1993, and if so, the name of the permitting authority and the name and phone number of a contact person at the permitting authority;

(B)Identification of facilities other than the applicant's facility that have sent, or are sending, sewage sludge subject to the cumulative pollutant loading rates in § 503.13(b)(2) to the site since July 20, 1993, if, based on the inquiry in paragraph (q)(iv)(A), bulk sewage sludge subject to cumulative pollutant loading rates in § 503.13(b)(2) has been applied to the site since July 20, 1993;

(v)If not all land application sites have been identified at the time of permit application, the applicant must submit a land application plan that, at a minimum:

(A)Describes the geographical area covered by the plan;

(B)Identifies the site selection criteria;

(C)Describes how the site(s) will be managed;

(D)Provides for advance notice to the permit authority of specific land application sites and reasonable time for the permit authority to object prior to land application of the sewage sludge; and

(E)Provides for advance public notice of land application sites in the manner prescribed by State and local law. When State or local law does not require advance public notice, it must be provided in a manner reasonably calculated to apprise the general public of the planned land application.

(10)Surface disposal. If sewage sludge from the applicant's facility is placed on a surface disposal site, the applicant must provide the following information:

(i)The total dry metric tons of sewage sludge from the applicant's facility that is placed on surface disposal sites per 365-day period;

(ii)The following information for each surface disposal site receiving sewage sludge from the applicant's facility that the applicant does not own or operate:

(A)The site name or number, contact person, mailing address, and telephone number for the surface disposal site; and

(B)The total dry metric tons from the applicant's facility per 365-day period placed on the surface disposal site;

(iii)The following information for each active sewage sludge unit at each surface disposal site that the applicant owns or operates:

(A)The name or number and the location of the active sewage sludge unit;

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- (B)The unit's latitude and longitude to the nearest second, and method of determination;
- (C)If not already provided, a topographic map (or other map if a topographic map is unavailable) that shows the unit's location;
- (D)The total dry metric tons placed on the active sewage sludge unit per 365-day period;
- (E)The total dry metric tons placed on the active sewage sludge unit over the life of the unit;
- (F)A description of any liner for the active sewage sludge unit, including whether it has a maximum permeability of 1×10^{-7} cm/sec;
- (G)A description of any leachate collection system for the active sewage sludge unit, including the method used for leachate disposal, and any Federal, State, and local permit number(s) for leachate disposal;
- (H)If the active sewage sludge unit is less than 150 meters from the property line of the surface disposal site, the actual distance from the unit boundary to the site property line;
- (I)The remaining capacity (dry metric tons) for the active sewage sludge unit;
- (J)The date on which the active sewage sludge unit is expected to close, if such a date has been identified;
- (K)The following information for any other facility that sends sewage sludge to the active sewage sludge unit:
- (1)The name, contact person, and mailing address of the facility; and
 - (2)Available information regarding the quality of the sewage sludge received from the facility, including any treatment at the facility to reduce pathogens or vector attraction characteristics;
- (L)Whether any of the vector attraction reduction options of 40 CFR 503.33(b)(9) through (b)(11) is met at the active sewage sludge unit, and a description of any procedures employed at the time of disposal to reduce vector attraction properties in sewage sludge;
- (M)The following information, as applicable to any ground-water monitoring occurring at the active sewage sludge unit:
- (1)A description of any ground-water monitoring occurring at the active sewage sludge unit;
 - (2)Any available ground-water monitoring data, with a description of the well locations and approximate depth to ground water;
 - (3)A copy of any ground-water monitoring plan that has been prepared for the active sewage sludge unit;
 - (4)A copy of any certification that has been obtained from a qualified ground-water scientist that the aquifer has not been contaminated; and

(N) If site-specific pollutant limits are being sought for the sewage sludge placed on this active sewage sludge unit, information to support such a request;

(11) Incineration. If sewage sludge from the applicant's facility is fired in a sewage sludge incinerator, the applicant must provide the following information:

(i) The total dry metric tons of sewage sludge from the applicant's facility that is fired in sewage sludge incinerators per 365-day period;

(ii) The following information for each sewage sludge incinerator firing the applicant's sewage sludge that the applicant does not own or operate:

(A) The name and/or number, contact person, mailing address, and telephone number of the sewage sludge incinerator; and

(B) The total dry metric tons from the applicant's facility per 365-day period fired in the sewage sludge incinerator;

(iii) The following information for each sewage sludge incinerator that the applicant owns or operates:

(A) The name and/or number and the location of the sewage sludge incinerator;

(B) The incinerator's latitude and longitude to the nearest second, and method of determination;

(C) The total dry metric tons per 365-day period fired in the sewage sludge incinerator;

(D) Information, test data, and documentation of ongoing operating parameters indicating that compliance with the National Emission Standard for Beryllium in 40 CFR part 61 will be achieved;

(E) Information, test data, and documentation of ongoing operating parameters indicating that compliance with the National Emission Standard for Mercury in 40 CFR part 61 will be achieved;

(F) The dispersion factor for the sewage sludge incinerator, as well as modeling results and supporting documentation;

(G) The control efficiency for parameters regulated in 40 CFR 503.43, as well as performance test results and supporting documentation;

(H) Information used to calculate the risk specific concentration (RSC) for chromium, including the results of incinerator stack tests for hexavalent and total chromium concentrations, if the applicant is requesting a chromium limit based on a site-specific RSC value;

(I) Whether the applicant monitors total hydrocarbons (THC) or Carbon Monoxide (CO) in the exit gas for the sewage sludge incinerator;

(J) The type of sewage sludge incinerator;

(K) The maximum performance test combustion temperature, as obtained during the performance test of the sewage sludge incinerator to determine pollutant control efficiencies;

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(L)The following information on the sewage sludge feed rate used during the performance test:

- (1)**Sewage sludge feed rate in dry metric tons per day;
- (2)**Identification of whether the feed rate submitted is average use or maximum design; and
- (3)**A description of how the feed rate was calculated;

(M)The incinerator stack height in meters for each stack, including identification of whether actual or creditable stack height was used;

(N)The operating parameters for the sewage sludge incinerator air pollution control device(s), as obtained during the performance test of the sewage sludge incinerator to determine pollutant control efficiencies;

(O)Identification of the monitoring equipment in place, including (but not limited to) equipment to monitor the following:

- (1)**Total hydrocarbons or Carbon Monoxide;
- (2)**Percent oxygen;
- (3)**Percent moisture; and
- (4)**Combustion temperature; and

(P)A list of all air pollution control equipment used with this sewage sludge incinerator;

(12)Disposal in a municipal solid waste landfill. If sewage sludge from the applicant's facility is sent to a municipal solid waste landfill (MSWLF), the applicant must provide the following information for each MSWLF to which sewage sludge is sent:

- (i)**The name, contact person, mailing address, location, and all applicable permit numbers of the MSWLF;
- (ii)**The total dry metric tons per 365-day period sent from this facility to the MSWLF;
- (iii)**A determination of whether the sewage sludge meets applicable requirements for disposal of sewage sludge in a MSWLF, including the results of the paint filter liquids test and any additional requirements that apply on a site-specific basis; and
- (iv)**Information, if known, indicating whether the MSWLF complies with criteria set forth in 40 CFR part 258;

(13)Contractors. All applicants must provide the name, mailing address, telephone number, and responsibilities of all contractors responsible for any operational or maintenance aspects of the facility related to sewage sludge generation, treatment, use, or disposal;

(14)Other information. At the request of the permitting authority, the applicant must provide any other information necessary to determine the appropriate standards for permitting under 40 CFR part 503, and must provide any other information necessary to assess the sewage sludge use and disposal practices, determine whether to issue a permit, or identify appropriate permit requirements; and

(15)Signature. All applications must be signed by a certifying official in compliance with § 122.22.

[Note 1: At 46 FR 2046, Jan. 8, 1981, the Environmental Protection Agency suspended until further notice § 122.21(g)(7)(v)(A) and the corresponding portions of Item V-C of the NPDES application Form 2C as they apply to coal mines. This suspension continues in effect.]

[Note 2: At 46 FR 22585, Apr. 20, 1981, the Environmental Protection Agency suspended until further notice § 122.21(g)(7)(v)(A) and the corresponding portions of Item V-C of the NPDES application Form 2C as they apply to:

a.Testing and reporting for all four organic fractions in the Greige Mills Subcategory of the Textile Mills industry (subpart C -- Low water use processing of 40 CFR part 410), and testing and reporting for the pesticide fraction in all other subcategories of this industrial category.

b.Testing and reporting for the volatile, base eutral and pesticide fractions in the Base and Precious Metals Subcategory of the Ore Mining and Dressing industry (subpart B of 40 CFR part 440), and testing and reporting for all four fractions in all other subcategories of this industrial category.

c.Testing and reporting for all four GC/MS fractions in the Porcelain Enameling industry. This revision continues that suspension.] n1

[Note 3: At 46 FR 35090, July 1, 1981, the Environmental Protection Agency suspended until further notice § 122.21(g)(7)(v)(A) and the corresponding portions of Item V-C of the NPDES application Form 2C as they apply to:

a.Testing and reporting for the pesticide fraction in the Tall Oil Rosin Subcategory (subpart D) and Rosin-Based Derivatives Subcategory (subpart F) of the Gum and Wood Chemicals industry (40 CFR part 454), and testing and reporting for the pesticide and base-neutral fractions in all other subcategories of this industrial category.

b.Testing and reporting for the pesticide fraction in the Leather Tanning and Finishing, Paint and Ink Formulation, and Photographic Supplies industrial categories.

c.Testing and reporting for the acid, base eutral and pesticide fractions in the Petroleum Refining industrial category.

d.Testing and reporting for the pesticide fraction in the Papergrade Sulfite subcategories (subparts J and U) of the Pulp and Paper industry (40 CFR part 430); testing and reporting for the base eutral and pesticide fractions in the following subcategories: Deink (subpart Q), Dissolving Kraft (subpart F), and Paperboard from Waste Paper (subpart E); testing and reporting for the volatile, base eutral and pesticide fractions in the following subcategories: BCT Bleached Kraft (subpart H), Semi-Chemical (subparts B and C), and Nonintegrated-Fine Papers (subpart R); and testing and reporting for the acid, base eutral, and pesticide fractions in the following subcategories: Fine Bleached Kraft (subpart I), Dissolving Sulfite Pulp (subpart K), Groundwood-Fine Papers (subpart O), Market Bleached Kraft (subpart G), Tissue from Wastepaper (subpart T), and Nonintegrated-Tissue Papers (subpart S).

e. Testing and reporting for the base neutral fraction in the Once-Through Cooling Water, Fly Ash and Bottom Ash Transport Water process wastestreams of the Steam Electric Power Plant industrial category.

This revision continues that suspension.] n1

n1 EDITORIAL NOTE: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.

(r) Application requirements for facilities with cooling water intake structures -- (1)(i) New facilities with new or modified cooling water intake structures. New facilities (other than offshore oil and gas extraction facilities) with cooling water intake structures as defined in part 125, subpart I of this chapter, must submit to the Director for review the information required under paragraphs (r)(2) (except (r)(2)(iv)), (3), and (4) (except (r)(4)(ix), (x), (xi), and (xii)) of this section and § 125.86 of this chapter as part of the permit application. New offshore oil and gas extraction facilities with cooling water intake structures as defined in part 125, subpart N, of this chapter that are fixed facilities must submit to the Director for review the information required under paragraphs (r)(2) (except (r)(2)(iv)), (3), and (4) (except (r)(4)(ix), (x), (xi), and (xii)) of this section and § 125.136 of this chapter as part of their permit application.

(ii) Existing facilities. (A) All existing facilities. The owner or operator of an existing facility defined at 40 CFR 125.92(k) must submit to the Director for review the information required under paragraphs (r)(2) and (3) of this section and applicable provisions of paragraphs (r)(4), (5), (6), (7), and (8) of this section.

(B) Existing facilities greater than 125 mgd AIF. In addition, the owner or operator of an existing facility that withdraws greater than 125 mgd actual intake flow (AIF), as defined at 40 CFR 125.92(a), of water for cooling purposes must also submit to the Director for review the information required under paragraphs (r)(9), (10), (11), (12), and (13) of this section. If the owner or operator of an existing facility intends to comply with the BTA (best technology available) standards for entrainment using a closed-cycle recirculating system as defined at 40 CFR 125.92(c), the Director may reduce or waive some or all of the information required under paragraphs (r)(9) through (13) of this section.

(C) Additional information. The owner or operator of an existing facility must also submit such additional information as the Director determines is necessary pursuant to 40 CFR 125.98(i).

(D) New units at existing facilities. The owner or operator of a new unit at an existing facility, as defined at 40 CFR 125.92(u), must submit or update any information previously provided to the Director by submitting the information required under paragraphs (r)(2), (3), (5), (8), and (14) of this section and applicable provisions of paragraphs (r)(4), (6), and (7) of this section. Requests for and approvals of alternative requirements sought under 40 CFR 125.94(e)(2) or 125.98(b)(7) must be submitted with the permit application.

(E) New units at existing facilities not previously subject to Part 125. The owner or operator of a new unit as defined at 40 CFR 125.92(u) at an existing facility not previously subject to part 125 of this chapter that increases the total capacity of the existing facility to more than 2 mgd DIF must submit the information required under paragraphs (r)(2), (3), (5), and (8) of this section and applicable provisions of paragraphs (r)(4), (6), and (7) of this section at the time of the permit application for the new unit. Requests for alternative

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requirements under 40 CFR 125.94(e)(2) or 125.98(b)(7) must be submitted with the permit application. If the total capacity of the facility will increase to more than 125 mgd AIF, the owner or operator must also submit the information required in paragraphs (r)(9) through (13) of this section. If the owner or operator of an existing facility intends to comply with the BTA (best technology available) standards for entrainment using a closed-cycle recirculating system as defined at 40 CFR 125.92(c), the Director may reduce or waive some or all of the information required under paragraphs (r)(9) through (13) of this section.

(F)If the owner or operator of an existing facility plans to retire the facility before the current permit expires, then the requirements of paragraphs (r)(1)(ii)(A), (B), (C), (D), and (E) of this section do not apply.

(G)If the owner or operator of an existing facility plans to retire the facility after the current permit expires but within one permit cycle, then the Director may waive the requirements of paragraphs (r)(7), (9), (10), (11), (12), and (13) of this section pending a signed certification statement from the owner or operator of the facility specifying the last operating date of the facility.

(H)All facilities. The owner or operator of any existing facility or new unit at any existing facility must also submit with its permit application all information received as a result of any communication with a Field Office of the Fish and Wildlife Service and/or Regional Office of the National Marine Fisheries Service.

(2)Source water physical data. These include:

(i)A narrative description and scaled drawings showing the physical configuration of all source water bodies used by your facility, including areal dimensions, depths, salinity and temperature regimes, and other documentation that supports your determination of the water body type where each cooling water intake structure is located;

(ii)Identification and characterization of the source waterbody's hydrological and geomorphological features, as well as the methods you used to conduct any physical studies to determine your intake's area of influence within the waterbody and the results of such studies;

(iii)Locational maps; and

(iv)For new offshore oil and gas facilities that are not fixed facilities, a narrative description and/or locational maps providing information on predicted locations within the waterbody during the permit term in sufficient detail for the Director to determine the appropriateness of additional impingement requirements under § 125.134(b)(4).

(3)Cooling water intake structure data. These include:

(i)A narrative description of the configuration of each of your cooling water intake structures and where it is located in the water body and in the water column;

(ii)Latitude and longitude in degrees, minutes, and seconds for each of your cooling water intake structures;

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(iii) A narrative description of the operation of each of your cooling water intake structures, including design intake flows, daily hours of operation, number of days of the year in operation and seasonal changes, if applicable;

(iv) A flow distribution and water balance diagram that includes all sources of water to the facility, recirculating flows, and discharges; and

(v) Engineering drawings of the cooling water intake structure.

(4) Source water baseline biological characterization data. This information is required to characterize the biological community in the vicinity of the cooling water intake structure and to characterize the operation of the cooling water intake structures. The Director may also use this information in subsequent permit renewal proceedings to determine if your Design and Construction Technology Plan as required in § 125.86(b)(4) or § 125.136(b)(3) of this chapter should be revised. This supporting information must include existing data (if they are available). However, you may supplement the data using newly conducted field studies if you choose to do so. The information you submit must include:

(i) A list of the data in paragraphs (r)(4)(ii) through (vi) of this section that are not available and efforts made to identify sources of the data;

(ii) A list of species (or relevant taxa) for all life stages and their relative abundance in the vicinity of the cooling water intake structure;

(iii) Identification of the species and life stages that would be most susceptible to impingement and entrainment. Species evaluated should include the forage base as well as those most important in terms of significance to commercial and recreational fisheries;

(iv) Identification and evaluation of the primary period of reproduction, larval recruitment, and period of peak abundance for relevant taxa;

(v) Data representative of the seasonal and daily activities (e.g., feeding and water column migration) of biological organisms in the vicinity of the cooling water intake structure;

(vi) Identification of all threatened, endangered, and other protected species that might be susceptible to impingement and entrainment at your cooling water intake structures;

(vii) Documentation of any public participation or consultation with Federal or State agencies undertaken in development of the plan; and

(viii) If you supplement the information requested in paragraph (r)(4)(i) of this section with data collected using field studies, supporting documentation for the Source Water Baseline Biological Characterization must include a description of all methods and quality assurance procedures for sampling, and data analysis including a description of the study area; taxonomic identification of sampled and evaluated biological assemblages (including all life stages of fish and shellfish); and sampling and data analysis methods. The sampling and/or data analysis methods you use must be appropriate for a quantitative survey and based on consideration of

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methods used in other biological studies performed within the same source water body. The study area should include, at a minimum, the area of influence of the cooling water intake structure.

(ix)In the case of the owner or operator of an existing facility or new unit at an existing facility, the Source Water Baseline Biological Characterization Data is the information in paragraphs (r)(4)(i) through (xii) of this section.

(x)For the owner or operator of an existing facility, identification of protective measures and stabilization activities that have been implemented, and a description of how these measures and activities affected the baseline water condition in the vicinity of the intake.

(xi)For the owner or operator of an existing facility, a list of fragile species, as defined at 40 CFR 125.92(m), at the facility. The applicant need only identify those species not already identified as fragile at 40 CFR 125.92(m). New units at an existing facility are not required to resubmit this information if the cooling water withdrawals for the operation of the new unit are from an existing intake.

(xii)For the owner or operator of an existing facility that has obtained incidental take exemption or authorization for its cooling water intake structure(s) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, any information submitted in order to obtain that exemption or authorization may be used to satisfy the permit application information requirement of paragraph 40 CFR 125.95(f) if included in the application.

(5)Cooling Water System Data. The owner or operator of an existing facility must submit the following information for each cooling water intake structure used or intended to be used:

(i)A narrative description of the operation of the cooling water system and its relationship to cooling water intake structures; the proportion of the design intake flow that is used in the system; the number of days of the year the cooling water system is in operation and seasonal changes in the operation of the system, if applicable; the proportion of design intake flow for contact cooling, non-contact cooling, and process uses; a distribution of water reuse to include cooling water reused as process water, process water reused for cooling, and the use of gray water for cooling; a description of reductions in total water withdrawals including cooling water intake flow reductions already achieved through minimized process water withdrawals; a description of any cooling water that is used in a manufacturing process either before or after it is used for cooling, including other recycled process water flows; the proportion of the source waterbody withdrawn (on a monthly basis);

(ii)Design and engineering calculations prepared by a qualified professional and supporting data to support the description required by paragraph (r)(5)(i) of this section; and

(iii)Description of existing impingement and entrainment technologies or operational measures and a summary of their performance, including but not

limited to reductions in impingement mortality and entrainment due to intake location and reductions in total water withdrawals and usage.

(6) Chosen Method(s) of Compliance with Impingement Mortality Standard. The owner or operator of the facility must identify the chosen compliance method for the entire facility; alternatively, the applicant must identify the chosen compliance method for each cooling water intake structure at its facility. The applicant must identify any intake structure for which a BTA determination for Impingement Mortality under 40 CFR 125.94 (c)(11) or (12) is requested. In addition, the owner or operator that chooses to comply via 40 CFR 125.94 (c)(5) or (6) must also submit an impingement technology performance optimization study as described below:

(i) If the applicant chooses to comply with 40 CFR 125.94(c)(5), subject to the flexibility for timing provided in 40 CFR 125.95(a)(2), the impingement technology performance optimization study must include two years of biological data collection measuring the reduction in impingement mortality achieved by the modified traveling screens as defined at 40 CFR 125.92(s) and demonstrating that the operation has been optimized to minimize impingement mortality. A complete description of the modified traveling screens and associated equipment must be included, including, for example, type of mesh, mesh slot size, pressure sprays and fish return mechanisms. A description of any biological data collection and data collection approach used in measuring impingement mortality must be included:

(A) Collecting data no less frequently than monthly. The Director may establish more frequent data collection;

(B) Biological data collection representative of the impingement and the impingement mortality at the intakes subject to this provision;

(C) A taxonomic identification to the lowest taxon possible of all organisms collected;

(D) The method in which naturally moribund organisms are identified and taken into account;

(E) The method in which mortality due to holding times is taken into account;

(F) If the facility entraps fish or shellfish, a count of entrapment, as defined at 40 CFR 125.92(j), as impingement mortality; and

(G) The percent impingement mortality reflecting optimized operation of the modified traveling screen and all supporting calculations.

(ii) If the applicant chooses to comply with 40 CFR 125.94(c)(6), the impingement technology performance optimization study must include biological data measuring the reduction in impingement mortality achieved by operation of the system of technologies, operational measures and best management practices, and demonstrating that operation of the system has been optimized to minimize impingement mortality. This system of technologies, operational measures and best management practices may include flow reductions, seasonal operation, unit closure, credit for intake location, and behavioral deterrent systems. The applicant must document how each system element contributes to the system's performance.

The applicant must include a minimum of two years of biological data measuring the reduction in impingement mortality achieved by the system. The applicant must also include a description of any sampling or data collection approach used in measuring the rate of impingement, impingement mortality, or flow reductions.

(A)Rate of Impingement. If the demonstration relies in part on a credit for reductions in the rate of impingement in the system, the applicant must provide an estimate of those reductions to be used as credit towards reducing impingement mortality, and any relevant supporting documentation, including previously collected biological data, performance reviews, and previously conducted performance studies not already submitted to the Director. The submission of studies more than 10 years old must include an explanation of why the data are still relevant and representative of conditions at the facility and explain how the data should be interpreted using the definitions of impingement and entrapment at 40 CFR 125.92(n) and (j), respectively. The estimated reductions in rate of impingement must be based on a comparison of the system to a once-through cooling system with a traveling screen whose point of withdrawal from the surface water source is located at the shoreline of the source waterbody. For impoundments that are waters of the United States in whole or in part, the facility's rate of impingement must be measured at a location within the cooling water intake system that the Director deems appropriate. In addition, the applicant must include two years of biological data collection demonstrating the rate of impingement resulting from the system. For this demonstration, the applicant must collect data no less frequently than monthly. The Director may establish more frequent data collection.

(B)Impingement Mortality. If the demonstration relies in part on a credit for reductions in impingement mortality already obtained at the facility, the applicant must include two years of biological data collection demonstrating the level of impingement mortality the system is capable of achieving. The applicant must submit any relevant supporting documentation, including previously collected biological data, performance reviews, and previously conducted performance studies not already submitted to the Director. The applicant must provide a description of any sampling or data collection approach used in measuring impingement mortality. In addition, for this demonstration the applicant must:

- (1)**Collect data no less frequently than monthly. The Director may establish more frequent data collection;
- (2)**Conduct biological data collection that is representative of the impingement and the impingement mortality at an intake subject to this provision. In addition, the applicant must describe how the location of the cooling water intake structure in the waterbody and the water column are accounted for in the points of data collection;
- (3)**Include a taxonomic identification to the lowest taxon possible of all organisms to be collected;

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(4) Describe the method in which naturally moribund organisms are identified and taken into account;

(5) Describe the method in which mortality due to holding times is taken into account; and

(6) If the facility entraps fish or shellfish, a count of the entrapment, as defined at 40 CFR 125.92(j), as impingement mortality.

(C) Flow reduction. If the demonstration relies in part on flow reduction to reduce impingement, the applicant must include two years of intake flows, measured daily, as part of the demonstration, and describe the extent to which flow reductions are seasonal or intermittent. The applicant must document how the flow reduction results in reduced impingement. In addition, the applicant must describe how the reduction in impingement has reduced impingement mortality.

(D) Total system performance. The applicant must document the percent impingement mortality reflecting optimized operation of the total system of technologies, operational measures, and best management practices and all supporting calculations. The total system performance is the combination of the impingement mortality performance reflected in paragraphs (r)(6)(ii)(A), (B), and (C) of this section.

(7) Entrainment Performance Studies. The owner or operator of an existing facility must submit any previously conducted studies or studies obtained from other facilities addressing technology efficacy, through-facility entrainment survival, and other entrainment studies. Any such submittals must include a description of each study, together with underlying data, and a summary of any conclusions or results. Any studies conducted at other locations must include an explanation as to why the data from other locations are relevant and representative of conditions at your facility. In the case of studies more than 10 years old, the applicant must explain why the data are still relevant and representative of conditions at the facility and explain how the data should be interpreted using the definition of entrainment at 40 CFR 125.92(h).

(8) Operational Status. The owner or operator of an existing facility must submit a description of the operational status of each generating, production, or process unit that uses cooling water, including but not limited to:

(i) For power production or steam generation, descriptions of individual unit operating status including age of each unit, capacity utilization rate (or equivalent) for the previous 5 years, including any extended or unusual outages that significantly affect current data for flow, impingement, entrainment, or other factors, including identification of any operating unit with a capacity utilization rate of less than 8 percent averaged over a 24-month block contiguous period, and any major upgrades completed within the last 15 years, including but not limited to boiler replacement, condenser replacement, turbine replacement, or changes to fuel type;

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(ii) Descriptions of completed, approved, or scheduled updates and Nuclear Regulatory Commission relicensing status of each unit at nuclear facilities;

(iii) For process units at your facility that use cooling water other than for power production or steam generation, if you intend to use reductions in flow or changes in operations to meet the requirements of 40 CFR 125.94(c), descriptions of individual production processes and product lines, operating status including age of each line, seasonal operation, including any extended or unusual outages that significantly affect current data for flow, impingement, entrainment, or other factors, any major upgrades completed within the last 15 years, and plans or schedules for decommissioning or replacement of process units or production processes and product lines;

(iv) For all manufacturing facilities, descriptions of current and future production schedules; and

(v) Descriptions of plans or schedules for any new units planned within the next 5 years.

(9) **Entrainment Characterization Study.** The owner or operator of an existing facility that withdraws greater than 125 mgd AIF, where the withdrawal of cooling water is measured at a location within the cooling water intake structure that the Director deems appropriate, must develop for submission to the Director an Entrainment Characterization Study that includes a minimum of two years of entrainment data collection. The Entrainment Characterization Study must include the following components:

(i) **Entrainment Data Collection Method.** The study should identify and document the data collection period and frequency. The study should identify and document organisms collected to the lowest taxon possible of all life stages of fish and shellfish that are in the vicinity of the cooling water intake structure(s) and are susceptible to entrainment, including any organisms identified by the Director, and any species protected under Federal, State, or Tribal law, including threatened or endangered species with a habitat range that includes waters in the vicinity of the cooling water intake structure. Biological data collection must be representative of the entrainment at the intakes subject to this provision. The owner or operator of the facility must identify and document how the location of the cooling water intake structure in the waterbody and the water column are accounted for by the data collection locations;

(ii) **Biological Entrainment Characterization.** Characterization of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal law (including threatened or endangered species), including a description of their abundance and their temporal and spatial characteristics in the vicinity of the cooling water intake structure(s), based on sufficient data to characterize annual, seasonal, and diel variations in entrainment, including but not limited to variations related to climate and weather differences, spawning, feeding, and water column migration. This characterization may include historical data that are representative of the current operation of the facility and of biological conditions at the site.

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Identification of all life stages of fish and shellfish must include identification of any surrogate species used, and identification of data representing both motile and non-motile life-stages of organisms;

(iii) Analysis and Supporting Documentation. Documentation of the current entrainment of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal law (including threatened or endangered species). The documentation may include historical data that are representative of the current operation of the facility and of biological conditions at the site. Entrainment data to support the facility's calculations must be collected during periods of representative operational flows for the cooling water intake structure, and the flows associated with the data collection must be documented. The method used to determine latent mortality along with data for specific organism mortality or survival that is applied to other life-stages or species must be identified. The owner or operator of the facility must identify and document all assumptions and calculations used to determine the total entrainment for that facility together with all methods and quality assurance/quality control procedures for data collection and data analysis. The proposed data collection and data analysis methods must be appropriate for a quantitative survey.

(10) Comprehensive Technical Feasibility and Cost Evaluation Study. The owner or operator of an existing facility that withdraws greater than 125 mgd AIF must develop for submission to the Director an engineering study of the technical feasibility and incremental costs of candidate entrainment control technologies. In addition, the study must include the following:

(i) Technical feasibility. An evaluation of the technical feasibility of closed-cycle recirculating systems as defined at 40 CFR 125.92(c), fine mesh screens with a mesh size of 2 millimeters or smaller, and water reuse or alternate sources of cooling water. In addition, this study must include:

(A) A description of all technologies and operational measures considered (including alternative designs of closed-cycle recirculating systems such as natural draft cooling towers, mechanical draft cooling towers, hybrid designs, and compact or multi-cell arrangements);

(B) A discussion of land availability, including an evaluation of adjacent land and acres potentially available due to generating unit retirements, production unit retirements, other buildings and equipment retirements, and potential for repurposing of areas devoted to ponds, coal piles, rail yards, transmission yards, and parking lots;

(C) A discussion of available sources of process water, grey water, waste water, reclaimed water, or other waters of appropriate quantity and quality for use as some or all of the cooling water needs of the facility; and

(D) Documentation of factors other than cost that may make a candidate technology impractical or infeasible for further evaluation.

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(ii)Other entrainment control technologies. An evaluation of additional technologies for reducing entrainment may be required by the Director.

(iii)Cost evaluations. The study must include engineering cost estimates of all technologies considered in paragraphs (r)(10)(i) and (ii) of this section. Facility costs must also be adjusted to estimate social costs. All costs must be presented as the net present value (NPV) and the corresponding annual value. Costs must be clearly labeled as compliance costs or social costs. The applicant must separately discuss facility level compliance costs and social costs, and provide documentation as follows:

(A)Compliance costs are calculated as after-tax, while social costs are calculated as pre-tax. Compliance costs include the facility's administrative costs, including costs of permit application, while the social cost adjustment includes the Director's administrative costs. Any outages, downtime, or other impacts to facility net revenue, are included in compliance costs, while only that portion of lost net revenue that does not accrue to other producers can be included in social costs. Social costs must also be discounted using social discount rates of 3 percent and 7 percent. Assumptions regarding depreciation schedules, tax rates, interest rates, discount rates and related assumptions must be identified;

(B)Costs and explanation of any additional facility modifications necessary to support construction and operation of technologies considered in paragraphs (r)(10)(i) and (ii) of this section, including but not limited to relocation of existing buildings or equipment, reinforcement or upgrading of existing equipment, and additional construction and operating permits. Assumptions regarding depreciation schedules, interest rates, discount rates, useful life of the technology considered, and any related assumptions must be identified; and

(C)Costs and explanation for addressing any non-water quality environmental and other impacts identified in paragraph (r)(12) of this section. The cost evaluation must include a discussion of all reasonable attempts to mitigate each of these impacts.

(11)Benefits Valuation Study. The owner or operator of an existing facility that withdraws greater than 125 mgd AIF must develop for submission to the Director an evaluation of the benefits of the candidate entrainment reduction technologies and operational measures evaluated in paragraph (r)(10) of this section including using the Entrainment Characterization Study completed in paragraph (r)(9) of this section. Each category of benefits must be described narratively, and when possible, benefits should be quantified in physical or biological units and monetized using appropriate economic valuation methods. The benefits valuation study must include, but is not limited to, the following elements:

(i)Incremental changes in the numbers of individual fish and shellfish lost due to impingement mortality and entrainment as defined in 40 CFR 125.92, for all life stages of each exposed species;

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(ii) Description of basis for any estimates of changes in the stock sizes or harvest levels of commercial and recreational fish or shellfish species or forage fish species;

(iii) Description of basis for any monetized values assigned to changes in the stock size or harvest levels of commercial and recreational fish or shellfish species, forage fish, and to any other ecosystem or non use benefits;

(iv) A discussion of mitigation efforts completed prior to October 14, 2014 including how long they have been in effect and how effective they have been;

(v) Discussion, with quantification and monetization, where possible, of any other benefits expected to accrue to the environment and local communities, including but not limited to improvements for mammals, birds, and other organisms and aquatic habitats;

(vi) Discussion, with quantification and monetization, where possible, of any benefits expected to result from any reductions in thermal discharges from entrainment technologies.

(12) Non-water Quality Environmental and Other Impacts Study. The owner or operator of an existing facility that withdraws greater than 125 mgd AIF must develop for submission to the Director a detailed facility-specific discussion of the changes in non-water quality environmental and other impacts attributed to each technology and operational measure considered in paragraph (r)(10) of this section, including both impacts increased and impacts decreased. The study must include the following:

(i) Estimates of changes to energy consumption, including but not limited to auxiliary power consumption and turbine backpressure energy penalty;

(ii) Estimates of air pollutant emissions and of the human health and environmental impacts associated with such emissions;

(iii) Estimates of changes in noise;

(iv) A discussion of impacts to safety, including documentation of the potential for plumes, icing, and availability of emergency cooling water;

(v) A discussion of facility reliability, including but not limited to facility availability, production of steam, impacts to production based on process unit heating or cooling, and reliability due to cooling water availability;

(vi) Significant changes in consumption of water, including a facility-specific comparison of the evaporative losses of both once-through cooling and closed-cycle recirculating systems, and documentation of impacts attributable to changes in water consumption; and

(vii) A discussion of all reasonable attempts to mitigate each of these factors.

(13) Peer Review. If the applicant is required to submit studies under paragraphs (r)(10) through (12) of this section, the applicant must conduct an external peer review of each report to be submitted with the permit application. The applicant must select peer reviewers and notify the Director in advance of the peer review. The Director may

disapprove of a peer reviewer or require additional peer reviewers. The Director may confer with EPA, Federal, State and Tribal fish and wildlife management agencies with responsibility for fish and wildlife potentially affected by the cooling water intake structure, independent system operators, and state public utility regulatory agencies, to determine which peer review comments must be addressed. The applicant must provide an explanation for any significant reviewer comments not accepted. Peer reviewers must have appropriate qualifications and their names and credentials must be included in the peer review report.

(14)New Units. The applicant must identify the chosen compliance method for the new unit. In addition, the owner or operator that selects the BTA standards for new units at 40 CFR 125.94 (e)(2) as its route to compliance must submit information to demonstrate entrainment reductions equivalent to 90 percent or greater of the reduction that could be achieved through compliance with 40 CFR 125.94(e)(1). The demonstration must include the Entrainment Characterization Study at paragraph (r)(9) of this section. In addition, if data specific to your facility indicates that compliance with the requirements of § 125.94 of this chapter for each new unit would result in compliance costs wholly out of proportion to the costs EPA considered in establishing the requirements at issue, or would result in significant adverse impacts on local air quality, significant adverse impacts on local water resources other than impingement or entrainment, or significant adverse impacts on local energy markets, you must submit all supporting data as part of paragraph (r)(14) of this section. The Director may determine that additional data and information, including but not limited to monitoring, must be included as part of paragraph (r)(14) of this section.

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 31842, Aug. 8, 1984; 49 FR 38046, Sept. 26, 1984; 50 FR 6940, 6941, Feb. 19, 1985; 50 FR 35203, Aug. 29, 1985; 51 FR 26991, July 28, 1986; 53 FR 4158, Feb. 12, 1988; 53 FR 33007, Sept. 6, 1988; 54 FR 254, Jan. 4, 1989; 54 FR 18782, May 2, 1989; 55 FR 30128, July 24, 1990; 55 FR 48062, Nov. 16, 1990; 60 FR 17956, Apr. 7, 1995, as withdrawn at 60 FR 40235, Aug. 7, 1995; 60 FR 33931, June 29, 1995; 60 FR 40235, Aug. 7, 1995; 64 FR 42434, 42462, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 64 FR 68722, 68838, Dec. 8, 1999; 65 FR 30886, 30905, May 15, 2000; 66 FR 65256, 65337, Dec. 18, 2001; 68 FR 7176, 7265, Feb. 12, 2003; 69 FR 41576, 41682, July 9, 2004; 70 FR 60134, 60191, Oct. 14, 2005; 71 FR 6978, 6983, Feb. 10, 2006; 71 FR 35006, 35039, June 16, 2006; 72 FR 11200, 11211, Mar. 12, 2007; suspended in part at 72 FR 37107, 37109, July 9, 2007; 72 FR 40245, 40250, July 24, 2007; 73 FR 70418, 70480, Nov. 20, 2008; 79 FR 48300, 48424, Aug. 15, 2014; 79 FR 49001, 49013, Aug. 19, 2014, as corrected at 79 FR 56274, 56275, Sept. 19, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE 72 FR 37107, 37109, July 9, 2007, suspended paragraphs (r)(1)(ii) and (r)(5) for an indefinite period of time, effective July 9, 2007; 79 FR 48300, 48424, Aug. 15, 2014, lifted the suspension affecting paragraphs (r)(1)(ii) and (r)(5) published at 72 FR 37107, July 9, 2007, and amended paragraph (r), effective Oct. 14, 2014; 79 FR 49001, 49013, Aug. 19, 2014, added paragraph (e)(3), effective Sept. 18, 2014.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part

Administrative Law : Informal Agency Actions

Contracts Law : Negotiable Instruments : General Overview

Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances

Environmental Law : Hazardous Wastes & Toxic Substances : Treatment, Storage & Disposal

Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure

Environmental Law : National Environmental Policy Act : Environmental Assessments

Environmental Law : Water Quality : General Overview

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

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

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Environmental Law : Water Quality : Clean Water Act : Water Quality Standards

Real Property Law : Zoning & Land Use : Special Permits & Variances

Transportation Law : Air Transportation : Charters

Case Notes Applicable to Entire Part

Part Note

Administrative Law : Informal Agency Actions

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This document is current through the December 11, 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.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART C -- PERMIT CONDITIONS

§ 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

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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).

40 CFR 123.25

This document is current through the December 11, 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.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 123 -- STATE PROGRAM REQUIREMENTS > SUBPART B -- STATE PROGRAM SUBMISSIONS

§ 123.25 Requirements for permitting.

(a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.4 -- (Prohibitions):

(2) § 122.5(a) and (b) -- (Effect of permit);

(3) § 122.7(b) and (c) -- (Confidential information);

(4) § 122.21 (a)-(b), (c)(2), (e)-(k), (m)-(p), (q), and (r) -- (Application for a permit);

(5) § 122.22 -- (Signatories);

(6) § 122.23 -- (Concentrated animal feeding operations);

(7) § 122.24 -- (Concentrated aquatic animal production facilities);

(8) § 122.25 -- (Aquaculture projects);

(9) § 122.26 -- (Storm water discharges);

(10) § 122.27 -- (Silviculture);

(11) § 122.28 -- (General permits), Provided that States which do not seek to implement the general permit program under § 122.28 need not do so.

(12) Section 122.41 (a)(1) and (b) through (n) -- (Applicable permit conditions) (Indian Tribes can satisfy enforcement authority requirements under § 123.34);

(13) § 122.42 -- (Conditions applicable to specified categories of permits);

(14) § 122.43 -- (Establishing permit conditions);

(15) § 122.44 -- (Establishing NPDES permit conditions);

(16) § 122.45 -- (Calculating permit conditions);

(17) § 122.46 -- (Duration);

(18) § 122.47(a) -- (Schedules of compliance);

(19) § 122.48 -- (Monitoring requirements);

40 CFR 123.25

- (20)§ 122.50 -- (Disposal into wells);
- (21)§ 122.61 -- (Permit transfer);
- (22)§ 122.62 -- (Permit modification);
- (23)§ 122.64 -- (Permit termination);
- (24)§ 124.3(a) -- (Application for a permit);
- (25)§ 124.5 (a), (c), (d), and (f) -- (Modification of permits);
- (26)§ 124.6 (a), (c), (d), and (e) -- (Draft permit);
- (27)§ 124.8 -- (Fact sheets);
- (28)§ 124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e) -- (Public notice);
- (29)§ 124.11 -- (Public comments and requests for hearings);
- (30)§ 124.12(a) -- (Public hearings); and
- (31)§ 124.17 (a) and (c) -- (Response to comments);
- (32)§ 124.56 -- (Fact sheets);
- (33)§ 124.57(a) -- (Public notice);
- (34)§ 124.59 -- (Comments from government agencies);
- (35)§ 124.62 -- (Decision on variances);
- (36)Subparts A, B, D, H, I, J, and N of part 125 of this chapter;
- (37)40 CFR parts 129, 133, and subchapter N;
- (38)For a Great Lakes State or Tribe (as defined in 40 CFR 132.2), 40 CFR part 132 (NPDES permitting implementation procedures only);
- (39)§ 122.30 (What are the objectives of the storm water regulations for small MS4s?);
- (40)§ 122.31 (For Indian Tribes only) (As a Tribe, what is my role under the NPDES storm water program?);
- (41)§ 122.32 (As an operator of a small MS4, am I regulated under the NPDES storm water program?);
- (42)§ 122.33 (If I am an operator of a regulated small MS4, how do I apply for an NPDES permit? When do I have to apply?);
- (43)§ 122.34 (As an operator of a regulated small MS4, what will my NPDES MS4 storm water permit require?);
- (44)§ 122.35 (As an operator of a regulated small MS4, may I share the responsibility to implement the minimum control measures with other entities?);
- (45)§ 122.36 (As an operator of a regulated small MS4, what happens if I don't comply with the application or permit requirements in §§ 122.33 through 122.35?); and
- (46)40 CFR part 3 (Cross-Media Electronic Reporting Regulation) and 40 CFR part 127 (NPDES Electronic Reporting Requirements).

40 CFR 123.25

Note to paragraph (a): Except for paragraph (a)(46) of this section, states need not implement provisions identical to the above listed provisions. Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions. While States may impose more stringent requirements, they may not make one requirement more lenient as a tradeoff for making another requirement more stringent; for example, by requiring that public hearings be held prior to issuing any permit while reducing the amount of advance notice of such a hearing.

State programs may, if they have adequate legal authority, implement any of the provisions of parts 122 and 124. See, for example, §§ 122.5(d) (continuation of permits) and 124.4 (consolidation of permit processing) of this chapter.

For example, a State may impose more stringent requirements in an NPDES program by omitting the upset provision of § 122.41 of this chapter or by requiring more prompt notice of an upset.

(b) State NPDES programs shall have an approved continuing planning process under 40 CFR 130.5 and shall assure that the approved planning process is at all times consistent with the CWA.

(c) State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For the purposes of this paragraph:

(i) Board or body includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(ii) Significant portion of income means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(iii) Permit holders or applicants for a permit does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(iv) Income includes retirement benefits, consultant fees, and stock dividends.

(2) For the purposes of paragraph (c) of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

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; 50 FR 7912, Feb. 27, 1985, as amended at 54 FR 18784, May 2, 1989; 55 FR 48075, Nov. 16, 1990; 58 FR 67981, Dec. 22, 1993; 60 FR 15386, Mar. 23, 1995; 63 FR 45114, 45122, Aug. 24, 1998; 64 FR 42434, 42470, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 64 FR 68722, 68849, Dec. 8, 1999; 65 FR 30886, 30909, May 15, 2000; 66 FR 65256, 65338, Dec. 18, 2001; 69 FR 41576, 41682, July 9, 2004; 70 FR 59848, 59888, Oct. 13, 2005; 71 FR 35006, 35040, June 16, 2006; 80 FR 64064, 64099, Oct. 22, 2015]

Annotations

Notes

[EFFECTIVE DATE NOTE:

70 FR 59848, 59888, Oct. 13, 2005, amended paragraph (a), effective Jan. 11, 2006; 71 FR 35006, 35040, June 16, 2006, revised paragraph (a)(36), effective July 17, 2006; 80 FR 64064, 64099, Oct. 22, 2015, revised paragraph (a)(46) and the note immediately following it, effective Dec. 21, 2015.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part

Administrative Law : Judicial Review : Administrative Record : General Overview

Business & Corporate Law : Corporations : Governing Documents & Procedures : Records & Inspection Rights :

Civil Procedure : Federal & State Interrelationships : General Overview

Constitutional Law : Supremacy Clause : General Overview

Environmental Law : Assessment & Information Access : Public Participation

Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances

Environmental Law : Hazardous Wastes & Toxic Substances : Treatment, Storage & Disposal

Environmental Law : Litigation & Administrative Proceedings : Nuisances, Trespasses & Strict Liability

Environmental Law : Water Quality : General Overview

Environmental Law : Water Quality : Clean Water Act : General Overview

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

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

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 : General Permits

40 CFR 124.8

This document is current through the December 11, 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.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 124 -- PROCEDURES FOR DECISIONMAKING > SUBPART A -- GENERAL PROGRAM REQUIREMENTS

§ 124.8 Fact sheet.

(Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).)

(a) A fact sheet shall be prepared for every draft permit for a major HWM, UIC, 404, or NPDES facility or activity, for every Class I sludge management facility, for every 404 and NPDES general permit (§§ 237.37 and 122.28), for every NPDES draft permit that incorporates a variance or requires an explanation under § 124.56(b), for every draft permit that includes a sewage sludge land application plan under 40 CFR 501.15(a)(2)(ix), and for every draft permit which the Director finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

(b) The fact sheet shall include, when applicable:

(1) A brief description of the type of facility or activity which is the subject of the draft permit;

(2) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged.

(3) For a PSD permit, the degree of increment consumption expected to result from operation of the facility or activity.

(4) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by § 124.9 (for EPA-issued permits);

(5) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(6) A description of the procedures for reaching a final decision on the draft permit including:

(i) The beginning and ending dates of the comment period under § 124.10 and the address where comments will be received;

- (ii) Procedures for requesting a hearing and the nature of that hearing; and
 - (iii) Any other procedures by which the public may participate in the final decision.
- (7) Name and telephone number of a person to contact for additional information.
- (8) For NPDES permits, provisions satisfying the requirements of § 124.56.
- (9) Justification for waiver of any application requirements under § 122.21(j) or (q) of this chapter.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.; Safe Drinking Water Act, 42 U.S.C. 300f et seq.; Clean Water Act, 33 U.S.C. 1251 et seq.; Clean Air Act, 42 U.S.C. 7401 et seq.

History

[48 FR 14264, Apr. 1, 1983, as amended at 54 FR 18786, May 2, 1989; 64 FR 42434, 42470, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 65 FR 43586, 43661, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001]

Annotations

Case Notes

LexisNexis® Notes

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview
 Administrative Law : Judicial Review : Administrative Record : General Overview
 Contracts Law : Negotiable Instruments : General Overview
 Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure
 Environmental Law : Water Quality : General Overview
 Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview

United States v. Metropolitan Dist. Com., 1985 U.S. Dist. LEXIS 16232 (D Mass Sept. 5, 1985).

53 FR 49416

December 7, 1988

Proposed Regulations

Reporter

53 FR 49416

Federal Register > 1988 > December > December 7, 1988 > Proposed Regulations

Title: ENVIRONMENTAL PROTECTION AGENCY

National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges

Action: Proposed rule.

Identifier: [FRL 3376-8]

Administrative Code Citation

40 CFR Parts 122, 123, 124 and 504

Synopsis

SUMMARY: Section 405 of the Water Quality Act of 1987 (WQA) added Section 402(p) of the Clean Water Act (CWA) to require 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 a municipal separate storm sewer system serving a population of 100,000 or more, but less than 250,000. Today's notice requests comments on proposed permit application requirements for these discharges and for storm water discharges which are designated on a case-by-case basis for a permit for which the Administrator, or State, as the case may be, determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

Section 401 of the WQA amended 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, 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. Today's notice requests comments on regulations proposed to clarify and implement this provision.

Text

remain in place after the construction activity is completed, as continued maintenance, after the permit has expired, is more feasible.

EPA requests comments on the use of no limit or other limits such as 2, 10 or 20 acres. In addition, limitations could be based on or modified by other factors. Time limitations which consider the length of the construction activity or the season during which the activity occurs may provide a more workable administrative system while still addressing the major water quality impacts associated with construction activities. Other factors, such as steep slopes at the site, which affect the nature of the runoff, may be appropriate for defining special cases which would be addressed in this rulemaking. EPA also requests comments on other factors, such as the intensity of the development within the watershed, which affect the water quality impacts in receiving waters. Such site specific factors may be difficult to define in federal regulations. For example, a definition based on relatively easily interpreted criteria such as Census designated urban areas may not provide adequate protection for rapidly developing areas which are located outside the urban area. EPA requests comments on other factors which can be used to develop a limit on storm water discharges from construction sites which are classified as storm water discharges associated with industrial activity.

Proposed 122.26(a) would specify that storm water discharges, including construction site runoff, that discharge to municipal storm sewers are not required to obtain individual or group permits unless specifically designated by the Director. Under today's proposal, municipal permittees will be responsible for developing a proposed management plan to control pollutants in runoff from construction sites which discharge to large and medium municipal separate storm sewer systems (see § VII.G.8.d of the preamble). The Agency believes that the majority of construction sites do not discharge storm water directly to waters of the United States, but rather discharge to a municipal storm sewer or manage storm water on-site. For example, construction site runoff from a new subdivision which discharges to the drainage system of an existing road or a road that is being built by a developer for a municipality is, under this proposal, discharging to a municipal storm sewer.

9. Application Requirements for New Sources and New Discharges

Today's proposed permit application requirements provide that new sources and new discharges which discharge storm water include estimates of pollutants or parameters for which other storm water discharges are required to submit data. Under the proposal, operators of such discharges are required to provide the quantitative data which is required for other similar existing storm water discharges within two years after the commencement of the discharge, unless the data has already been reported under the monitoring requirements of the NPDES permit for the discharge.

F. Municipal Separate Storm Sewer Systems

1. Municipal Separate Storm Sewers

Today's notice proposes to define "municipal separate storm sewer" at § 122.26(b)(8) as any conveyance or system of conveyances that is owned or operated by a State or local government entity and is used for collecting and conveying storm water which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

It is important to note that the proposed permit application requirements for discharges from municipal separate storm sewers do not apply to discharges from combined sewers that are designed as both a

sanitary sewer and a storm sewer. Discharges from combined sewer systems are not regulated under this proposed rule.

The Agency also wants to clarify that streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purpose of this rule. This use of the term "storm sewer" differs from the way that the term has often been used in the context of flood control, where natural streams and other water bodies are sometimes considered storm sewers. Activities such as stream channelization, and stream bed stabilization, which occur in waters of the United States would generally not be subject to permits issued under § 402 of the CWA. However, such activities occurring within waters of the United States may be subject to dredge and fill permits required under section 404 of the CWA by the Corps of Engineers. Applicants should consult the regulatory definition of "waters of the United States" at 40 CFR 122.2 to distinguish between storm sewers and waters of the United States.

Some municipalities have maintained in previous comments that difficulties may arise with determining owners or operators of municipal storm sewers as clear title to the storm sewer may not exist. Often, where the ownership of such conveyances is in question, the storm sewer is not maintained and hence an "operator" criteria is not particularly useful. EPA requests comments on different wording for the definition of municipal separate storm sewer to clarify responsibility under the NPDES permit system. Do legal classifications such as storm sewers that are not private (e.g., public, district or joint district sewers) provide a clearer definition than an owner or operator criteria? Does the definition need to be clarified by explicitly stating that municipal streets and roads with drainage systems (curb and gutter, ditches, etc.) are part of the municipal storm sewer system, and the owners or operators of such roads are responsible for such discharges? To what extent should the owner or operator concept apply to municipal governments with land-use authority over lands which contribute storm water runoff to the municipal storm sewer system, and how should this responsibility be clarified?

2. Effective Prohibition on Non-Storm Water Discharges

Section 402(p)(3)(B)(ii) of the amended CWA requires that permits for discharges from municipal storm sewers shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers.

EPA does not interpret the effective prohibition on non-storm water discharges to municipal separate storm sewers to apply to discharges that are not composed entirely of storm water, as long as such discharge has been issued a separate NPDES permit. Rather, an "effective prohibition" would require separate NPDES permits for non-storm water discharges to municipal storm sewers. In many cases in the past, applicants for NPDES permits for process wastewaters and other non-storm water discharges have been granted approval to discharge into municipal separate storm sewers, provided that the permit conditions for the discharge are met at the point where the discharge enters into the separate storm sewer. Permits for such discharges must meet applicable technology-based and water-quality based requirements of Sections 402 and 301 of the CWA. If the permit for a non-storm water discharge to a municipal separate storm sewer contains water-quality based limitations, then such limitations should generally be based on meeting applicable water quality standards at the boundary of a State mixing zone (for States with mixing zones) located in a water of the United States. Water-quality based limitations would also generally be established during dry weather conditions, when the discharge would not be mixed with storm water in the municipal separate storm sewer (unless receiving water conditions during wet weather dictate more stringent water-quality based limitations).

TAB 3

Cal Evid Code § 452

Deering's California Codes are current with all legislation of the 2017 Regular Session (Chapters 1-859).

Deering's California Codes Annotated > EVIDENCE CODE > Division 4 Judicial Notice

§ 452. Matters which may be judicially noticed

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

- (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.
- (b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.
- (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.
- (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (f) The law of an organization of nations and of foreign nations and public entities in foreign nations.
- (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
- (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

History

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

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Cal Gov Code § 11515

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 3 Executive Department > Part 1 State Departments and Agencies > Chapter 5 Administrative Adjudication: Formal Hearing

§ 11515. Official notice

In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

History

Added Stats 1945 ch 867 § 1.

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End of Document

Cal Wat Code § 13000

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Deering's California Codes Annotated > WATER CODE > Division 7 Water Quality > Chapter 1 Policy

§ 13000. Legislative findings and declarations

The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

The Legislature further finds and declares that the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state; that the waters of the state are increasingly influenced by interbasin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970.

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Cal Wat Code § 13050

Deering's California Codes are current with all legislation of the 2017 Regular Session (Chapters 1-859).

**Deering's California Codes Annotated > WATER CODE > Division 7 Water Quality > Chapter 2
Definitions**

§ 13050. Terms used in this division

As used in this division:

- (a) "State board" means the State Water Resources Control Board.
- (b) "Regional board" means any California regional water quality control board for a region as specified in Section 13200.
- (c) "Person" includes any city, county, district, the state, and the United States, to the extent authorized by federal law.
- (d) "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.
- (e) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.
- (f) "Beneficial uses" of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.
- (g) "Quality of the water" refers to chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use.
- (h) "Water quality objectives" means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.
- (i) "Water quality control" means the regulation of any activity or factor which may affect the quality of the waters of the state and includes the prevention and correction of water pollution and nuisance.
- (j) "Water quality control plan" consists of a designation or establishment for the waters within a specified area of all of the following:
 - (1) Beneficial uses to be protected.
 - (2) Water quality objectives.
 - (3) A program of implementation needed for achieving water quality objectives.

(k) “Contamination” means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. “Contamination” includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

(l)

(1) “Pollution” means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

(2) “Pollution” may include “contamination.”

(m) “Nuisance” means anything which meets all of the following requirements:

(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(3) Occurs during, or as a result of, the treatment or disposal of wastes.

(n) “Recycled water” means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefor considered a valuable resource.

(o) “Citizen or domiciliary” of the state includes a foreign corporation having substantial business contacts in the state or which is subject to service of process in this state.

(p)

(1) “Hazardous substance” means either of the following:

(A) For discharge to surface waters, any substance determined to be a hazardous substance pursuant to Section 311(b)(2) of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.).

(B) For discharge to groundwater, any substance listed as a hazardous waste or hazardous material pursuant to Section 25140 of the Health and Safety Code, without regard to whether the substance is intended to be used, reused, or discarded, except that “hazardous substance” does not include any substance excluded from Section 311(b)(2) of the Federal Water Pollution Control Act because it is within the scope of Section 311(a)(1) of that act.

(2) “Hazardous substance” does not include any of the following:

(A) Nontoxic, nonflammable, and noncorrosive stormwater runoff drained from underground vaults, chambers, or manholes into gutters or storm sewers.

(B) Any pesticide which is applied for agricultural purposes or is applied in accordance with a cooperative agreement authorized by Section 116180 of the Health and Safety

Code, and is not discharged accidentally or for purposes of disposal, the application of which is in compliance with all applicable state and federal laws and regulations.

- (C) Any discharge to surface water of a quantity less than a reportable quantity as determined by regulations issued pursuant to Section 311(b)(4) of the Federal Water Pollution Control Act.
- (D) Any discharge to land which results, or probably will result, in a discharge to groundwater if the amount of the discharge to land is less than a reportable quantity, as determined by regulations adopted pursuant to Section 13271, for substances listed as hazardous pursuant to Section 25140 of the Health and Safety Code. No discharge shall be deemed a discharge of a reportable quantity until regulations set a reportable quantity for the substance discharged.

(q)

- (1) “Mining waste” means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in Section 2732 of the Public Resources Code, and tailings, slag, and other processed waste materials, including cementitious materials that are managed at the cement manufacturing facility where the materials were generated.
- (2) For the purposes of this subdivision, “cementitious material” means cement, cement kiln dust, clinker, and clinker dust.
- (r) “Master recycling permit” means a permit issued to a supplier or a distributor, or both, of recycled water, that includes waste discharge requirements prescribed pursuant to Section 13263 and water recycling requirements prescribed pursuant to Section 13523.1.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1969 ch 800 § 2.5; Stats 1970 ch 202 § 1; Stats 1980 ch 877 § 1; Stats 1989 ch 642 § 2; Stats 1991 ch 187 § 1 (AB 673); Stats 1992 ch 211 § 1 (AB 3012); Stats 1995 ch 28 § 17 (AB 1247), ch 847 § 2 (SB 206); Stats 1996 ch 1023 § 429 (SB 1497), effective September 29, 1996.

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Cal Wat Code § 13170.2

Deering's California Codes are current with all legislation of the 2017 Regular Session (Chapters 1-859).

Deering's California Codes Annotated > WATER CODE > Division 7 Water Quality > Chapter 3 State Water Quality Control > Article 4 Other Powers and Duties of the State Board

§ 13170.2. California Ocean Plan

- (a) The state board shall formulate and adopt a water quality control plan for ocean waters of the state which shall be known as the California Ocean Plan.
- (b) The plan shall be reviewed at least every three years to guarantee that the current standards are adequate and are not allowing degradation to indigenous marine species or posing a threat to human health.
- (c) In formulating the plan, the state board shall develop bioassay protocols to evaluate the effect of municipal and industrial waste discharges on the marine environment.
- (d) The state board shall adopt the bioassay protocols and complementary chemical testing methods and shall require their use in the monitoring of complex effluent ocean discharges. For purposes of this section, "complex effluent" means an effluent in which all chemical constituents are not known or monitored. The state board shall adopt bioassay protocols and complementary chemical testing methods for complex effluent ocean monitoring by January 1, 1990, and shall require their use in monitoring complex effluent ocean discharges by entities discharging 100 million gallons per day or more by January 1, 1991. The state board shall also adopt a schedule for requiring the use of these protocols for complex effluent ocean discharges of under 100 million gallons per day by January 1, 1992.

History

Added Stats 1986 ch 1478 § 2.

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Cal Wat Code § 13240

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**Deering's California Codes Annotated > WATER CODE > Division 7 Water Quality > Chapter 4
Regional Water Quality Control > Article 3 Regional Water Quality Control Plans**

§ 13240. Formulation, adoption, and revision of plans

Each regional board shall formulate and adopt water quality control plans for all areas within the region. Such plans shall conform to the policies set forth in Chapter 1 (commencing with Section 13000) of this division and any state policy for water quality control. During the process of formulating such plans the regional boards shall consult with and consider the recommendations of affected state and local agencies. Such plans shall be periodically reviewed and may be revised.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970.

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Cal Wat Code § 13376

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**Deering's California Codes Annotated > WATER CODE > Division 7 Water Quality > Chapter 5.5
Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972**

§ 13376. Reports as to discharge of pollutants to navigable waters

A person who discharges pollutants or proposes to discharge pollutants to the navigable waters of the United States within the jurisdiction of this state or a person who discharges dredged or fill material or proposes to discharge dredged or fill material into the navigable waters 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](#). Unless required by the state board or a regional board, a report need not be filed under this section for discharges that are not subject to the permit application requirements of the Federal Water Pollution Control Act, as amended. A person who proposes to discharge pollutants or dredged or fill material or to operate a publicly owned treatment works or other treatment works treating domestic sewage shall file a report at least 180 days in advance of the date on which it is desired to commence the discharge of pollutants or dredged or fill material or the operation of the treatment works. A person who owns or operates a publicly owned treatment works or other treatment works treating domestic sewage, which treatment works commenced operation before January 1, 1988, and does not discharge to navigable waters of the United States, shall file a report within 45 days of a written request by a regional board or the state board, or within 45 days after the state has an approved permit program for the use and disposal of sewage sludge, whichever occurs earlier. The discharge of pollutants or dredged or fill material or the operation of a publicly owned treatment works or other treatment works treating domestic sewage by any person, except as authorized by waste discharge requirements or dredged or fill material permits, is prohibited. This prohibition does not apply to discharges or operations if a state or federal permit is not required under the Federal Water Pollution Control Act, as amended.

History

Added [Stats 1987 ch 1189 § 6](#). Amended [Stats 2010 ch 288 § 32 \(SB 1169\)](#), effective January 1, 2011.

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Cal Wat Code § 13377

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**Deering's California Codes Annotated > WATER CODE > Division 7 Water Quality > Chapter 5.5
Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972**

§ 13377. Boards' issuance of requirements pursuant to federal act

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

History

Added Stats 1972 ch 1256 § 1, effective December 19, 1972. Amended Stats 1978 ch 746 § 3.

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Cal Wat Code § 13383

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**Deering's California Codes Annotated > WATER CODE > Division 7 Water Quality > Chapter 5.5
Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972**

§ 13383. Monitoring, inspection, entry, reporting, and recordkeeping requirements

- (a) The state board or a regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements, as authorized by Section 13160, 13376, or 13377 or by subdivisions (b) and (c) of this section, for any person who discharges, or proposes to discharge, to navigable waters, any person who introduces pollutants into a publicly owned treatment works, any person who owns or operates, or proposes to own or operate, a publicly owned treatment works or other treatment works treating domestic sewage, or any person who uses or disposes, or proposes to use or dispose, of sewage sludge.
- (b) The state board or the regional boards may require any person subject to this section to establish and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods, sample effluent as prescribed, and provide other information as may be reasonably required.
- (c) The state board or a regional board may inspect the facilities of any person subject to this section pursuant to the procedure set forth in subdivision (c) of Section 13267.

History

Added Stats 1987 ch 1189 § 8. Amended Stats 2003 ch 683 § 6 (AB 897).

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2006 Cal AB 1881

Enacted, September 28, 2006

Reporter

2006 Cal ALS 559; 2006 Cal AB 1881; 2006 Cal Stats. ch. 559

DEERING'S CALIFORNIA ADVANCE LEGISLATIVE SERVICE > 2006 REGULAR SESSION > CHAPTER 559 > (ASSEMBLY BILL NO. 1881)

Notice

▮ Urgency legislation is effective immediately, Non-urgency legislation will become effective January 1, 2007

[A> Uppercase text within these symbols is added <A]

* * * indicates deleted text

Digest

Water conservation.

(1) Existing law, the Davis-Sterling Common Interest Development Act, defines and regulates common interest developments, which include community apartment projects, condominium projects, planned developments, and stock cooperatives.

This bill would provide that the architectural guidelines of a common interest development shall not prohibit or include conditions that have the effect of prohibiting the use of low water-using plants as a group.

(2) The Water Conservation in Landscaping Act requires the Department of Water Resources to appoint an advisory task force to work with the department to draft a model local water efficient landscape ordinance that local agencies may adopt, requires the task force to submit the ordinance to the department on or before May 1, 1991, and requires the task force to cease to exist on the date the department adopts the model ordinance or January 1, 1992, whichever occurs first. The act requires the department, not later than January 1, 1992, to adopt a model local water efficient landscape ordinance which each local agency may adopt. The act makes the model local water efficient landscape ordinance adopted by the department applicable within the jurisdiction of a local agency if that local agency, by January 1, 1993, has not adopted a water efficient landscape ordinance or has not adopted certain findings that the adoption of the ordinance is unnecessary.

This bill would specify that the provision making the model ordinance applicable to a local agency on and after January 1, 1993, does not apply to chartered cities. The bill would require the department, to the extent funds are appropriated, not later than January 1, 2009, by regulation, to update the model ordinance in accordance with specified requirements. The bill would require the department to prepare and submit to

the Legislature a prescribed report before the adoption of the updated model ordinance. The bill would require a local agency, not later than January 1, 2010, to adopt the updated model ordinance or other water efficient landscape ordinance that is at least as effective in conserving water as the updated model ordinance. The bill would make the updated model ordinance applicable within the jurisdiction of a local agency, including a chartered city, if, by January 1, 2010, the local agency has not adopted its own water efficient landscape ordinance or the updated model ordinance. The bill would require each local agency, not later than January 31, 2010, to notify the department as to whether the local agency is subject to the department's updated model ordinance and, if not, to submit to the department a copy of the water efficient landscape ordinance adopted by the local agency, among other documents. The bill would require the department, to the extent funds are appropriated, not later than January 31, 2011, to prepare and submit a report to the Legislature relating to the status of water efficient landscape ordinances adopted by local agencies.

By imposing requirements on local agencies in connection with the adoption of water efficient landscape ordinances, the bill would impose a state-mandated local program.

(3) Existing law requires the State Energy Resources Conservation and Development Commission (Energy Commission), after one or more public hearings, to take specified action to reduce the wasteful, uneconomic, inefficient, or unnecessary consumption of energy. Existing law requires the Energy Commission, by January 1, 2004, to amend specified regulations to require that residential clothes washers manufactured on or after January 1, 2007, be at least as water efficient as commercial clothes washers, and to take certain other related action.

This bill would require the Energy Commission, in consultation with the department, to adopt, to the extent funds are available, by regulation performance standards and labeling requirements for landscape irrigation equipment, including irrigation controllers, moisture sensors, emission devices, and valves to reduce the wasteful, uneconomic, inefficient, or unnecessary consumption of energy or water. The bill would require the Energy Commission to adopt those requirements for landscape irrigation controllers and moisture sensors by January 1, 2010, and, on and after January 1, 2012, would prohibit the sale or installation of an irrigation controller or moisture sensor for landscape use unless the controller or sensor meets those adopted requirements. The bill would require the Energy Commission, on or before January 1, 2010, to prepare and submit to the Legislature a report that sets forth a proposed schedule for adopting performance standards and labeling requirements for emission devices and valves.

(4) Existing law generally requires an urban water supplier to install water meters on all municipal and industrial service connections located within its service area on or before January 1, 2025.

This bill would require a water purveyor as defined, to require as a condition of new retail water service on and after January 1, 2008, the installation of separate water meters to measure the volume of water used exclusively for landscape purposes. The bill would make this requirement applicable to specified service connections.

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Synopsis

An act to add Section 1353.8 to the Civil Code, to repeal and add Article 10.8 (commencing with Section 65591) of Chapter 3 of Division 1 of Title 7 of the Government Code, to add Section 25401.9 to the Public Resources Code, and to add Article 4.5 (commencing with Section 535) to Chapter 8 of Division 1 of the Water Code, relating to water conservation.

Text

The people of the State of California do enact as follows:

SECTION 1.

Section 1353.8 is added to the Civil Code, to read:

§ 1353.8.

The architectural guidelines of a common interest development shall not prohibit or include conditions that have the effect of prohibiting the use of low water-using plants as a group.

SEC. 2.

Article 10.8 (commencing with Section 65591) of Chapter 3 of Division 1 of Title 7 of the Government Code is repealed.

Article 10.8

SEC. 3.

Article 10.8 (commencing with Section 65591) is added to Chapter 3 of Division 1 of Title 7 of the Government Code, to read:

Article 10.8 Water Conservation in Landscaping

§ 65591.

This article shall be known and may be cited as the Water Conservation in Landscaping Act.

§ 65592.

Unless the context requires otherwise, the following definitions govern the construction of this article:

- (a) "Department" means the Department of Water Resources.
- (b) "Local agency" means any city, county, or city and county, including a charter city or charter county.
- (c) "Water efficient landscape ordinance" means an ordinance or resolution adopted by a local agency, or prepared by the department, to address the efficient use of water in landscaping.

§ 65593.

The Legislature finds and declares all of the following:

(a) The waters of the state are of limited supply and are subject to ever increasing demands.

(b) The continuation of California's economic prosperity is dependent on adequate supplies of water being available for future uses.

(c) It is the policy of the state to promote the conservation and efficient use of water and to prevent the waste of this valuable resource.

(d) Landscapes are essential to the quality of life in California by providing areas for active and passive recreation and as an enhancement to the environment by cleaning air and water, preventing erosion, offering fire protection, and replacing ecosystems lost to development.

(e) Landscape design, installation, maintenance, and management can and should be water efficient.

(f) Section 2 of Article X of the California Constitution specifies that the right to use water is limited to the amount reasonably required for the beneficial use to be served and the right does not and shall not extend to waste or unreasonable use or unreasonable method of use.

(g) (1) The Legislature, pursuant to Chapter 682 of the Statutes of 2004, requested the California Urban Water Conservation Council to convene a stakeholders work group to develop recommendations for improving the efficiency of water use in urban irrigated landscapes.

(2) The work group report includes a recommendation to update the model water efficient landscape ordinance adopted by the department pursuant to Chapter 1145 of the Statutes of 1990.

(3) It is the intent of the Legislature that the department promote the use of this updated model ordinance.

(h) Notwithstanding Article 13 (commencing with Section 65700), this article addresses a matter that is of statewide concern and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution. Accordingly, it is the intent of the Legislature that this article, except as provided in Section 65594, apply to all cities and counties, including charter cities and charter counties.

§ 65594.

(a) Except as provided in Section 65595, if by January 1, 1993, a local agency did not adopt a water efficient landscape ordinance and did not adopt findings based on climatic, geological, or topographical conditions, or water availability that state that a water efficient landscape ordinance is unnecessary, the model water efficient landscape ordinance adopted by the department pursuant to Chapter 1145 of the Statutes of 1990 shall apply within the jurisdiction of the local agency as of that date, shall be enforced by the local agency, and shall have the same force and effect as if adopted by the local agency.

(b) Notwithstanding subdivision (b) of Section 65592, subdivision (a) does not apply to chartered cities.

(c) This section shall apply only until the department updates the model ordinance.

§ 65595.

(a) (1) To the extent funds are appropriated, not later than January 1, 2009, by regulation, the department shall update the model water efficient landscape ordinance adopted pursuant to Chapter 1145 of the Statutes of 1990, after holding one or more public hearings. The updated model ordinance shall be based on the recommendations set forth in the report prepared pursuant to Chapter 682 of the Statutes of 2004 and shall meet the requirements of Section 65596.

(2) Before the adoption of the updated model ordinance pursuant to paragraph (1), the department shall prepare and submit to the Legislature a report relating to both of the following:

(A) The extent to which local agencies have complied with the model water efficient landscape ordinance adopted pursuant to Chapter 1145 of the Statutes of 1990.

(B) The department's recommendations regarding the landscape water budget component of the updated model ordinance described in subdivision (b) of Section 65596.

(b) Not later than January 31, 2009, the department shall distribute the updated model ordinance adopted pursuant to subdivision (a) to all local agencies and other interested parties.

(c) On or before January 1, 2010, a local agency shall adopt one of the following:

(1) A water efficient landscape ordinance that is, based on evidence in the record, at least as effective in conserving water as the updated model ordinance adopted by the department pursuant to subdivision (a).

(2) The updated model ordinance described in paragraph (1).

(d) If the local agency has not adopted, on or before January 1, 2010, a water efficient landscape ordinance pursuant to subdivision (c), the updated model ordinance adopted by the department pursuant to subdivision (a) shall apply within the jurisdiction of the local agency as of that date, shall be enforced by the local agency, and shall have the same force and effect as if adopted by the local agency.

(e) Nothing in this article shall be construed to require the local agency's water efficient landscape ordinance to duplicate, or to conflict with, a water efficiency program or measure implemented by a public water system, as defined in Section 116275 of the Health and Safety Code, within the jurisdictional boundaries of the local agency.

§ 65596.

The updated model ordinance adopted pursuant to Section 65595 shall do all the following in order to reduce water use:

(a) Include provisions for water conservation and the appropriate use and groupings of plants that are well-adapted to particular sites and to particular climatic, soil, or topographic conditions. The model ordinance shall not prohibit or require specific plant species, but it may include conditions for the use of plant species or encourage water conserving plants. However, the model ordinance shall not include conditions that have the effect of prohibiting or requiring specific plant species.

(b) Include a landscape water budget component that establishes the maximum amount of water to be applied through the irrigation system, based on climate, landscape size, irrigation efficiency, and plant needs.

(c) Promote the benefits of consistent local ordinances in neighboring areas.

(d) Encourage the capture and retention of stormwater onsite to improve water use efficiency or water quality.

(e) Include provisions for the use of automatic irrigation systems and irrigation schedules based on climatic conditions, specific terrains and soil types, and other environmental conditions. The model ordinance shall include references to local, state, and federal laws and regulations regarding standards for water-conserving irrigation equipment. The model ordinance may include climate information for irrigation scheduling based on the California Irrigation Management Information System.

(f) Include provisions for onsite soil assessment and soil management plans that include grading and drainage to promote healthy plant growth and to prevent excessive erosion and runoff, and the use of mulches in shrub areas, garden beds, and landscaped areas where appropriate.

(g) Promote the use of recycled water consistent with Article 4 (commencing with Section 13520) of Chapter 7 of Division 7 of the Water Code.

(h) Seek to educate water users on the efficient use of water and the benefits of doing so.

(i) Address regional differences, including fire prevention needs.

(j) Exempt landscaping that is part of a registered historical site.

(k) Encourage the use of economic incentives to promote the efficient use of water.

(l) Include provisions for landscape maintenance practices that foster long-term landscape water conservation. Landscape maintenance practices may include, but are not limited to, performing routine irrigation system repair and adjustments, conducting water audits, and prescribing the amount of water applied per landscaped acre.

(m) Include provisions to minimize landscape irrigation overspray and runoff.

§ 65597.

Not later than January 31, 2010, each local agency shall notify the department as to whether the local agency is subject to the department's updated model ordinance adopted pursuant to Section 65595, and if not, shall submit to the department a copy of the water efficient landscape ordinance adopted by the local agency, and a copy of the local agency's findings and evidence in the record that its water efficient landscape ordinance is at least as effective in conserving water as the department's updated model ordinance. Not later than January 31, 2011, the department shall, to the extent funds are appropriated, prepare and submit a report to the Legislature summarizing the status of water efficient landscape ordinances adopted by local agencies.

§ 65598.

Any model ordinance adopted pursuant to this article shall exempt cemeteries from all provisions of the ordinance except those set forth in subdivisions (h), (k), and (l) of Section 65596. In adopting language specific to cemeteries, the department shall recognize the special landscape management needs of cemeteries.

§ 65599.

Any actions or proceedings to attach, review, set aside, void, or annul the act, decision, or findings of a local agency on the ground of noncompliance with this article shall be brought pursuant to Section 1085 of the Code of Civil Procedure.

SEC. 4.

Section 25401.9 is added to the Public Resources Code, to read:

§ 25401.9.

(a) To the extent that funds are available, the commission, in consultation with the Department of Water Resources, shall adopt by regulation, after holding one or more public hearings, performance standards and labeling requirements for landscape irrigation equipment, including, but not limited to, irrigation controllers, moisture sensors, emission devices, and valves, for the purpose of reducing the wasteful, uneconomic, inefficient, or unnecessary consumption of energy or water.

(b) For the purposes of complying with subdivision (a), the commission shall do all of the following:

(1) Adopt performance standards and labeling requirements for landscape irrigation controllers and moisture sensors on or before January 1, 2010.

(2) Consider the Irrigation Association's Smart Water Application Technology Program testing protocols when adopting performance standards for landscape irrigation equipment, including, but not limited to, irrigation controllers, moisture sensors, emission devices, and valves.

(3) Prepare and submit a report to the Legislature, on or before January 1, 2010, that sets forth on a proposed schedule for adopting performance standards and labeling requirements for emission devices and valves.

(c) On and after January 1, 2012, an irrigation controller or moisture sensor for landscape irrigation uses may not be sold or installed in the state unless the controller or sensor meets the performance standards and labeling requirements established pursuant to this section.

SEC. 5.

Article 4.5 (commencing with Section 535) is added to Chapter 8 of Division 1 of the Water Code, to read:

Article 4.5 Irrigated Landscape

§ 535.

(a) A water purveyor shall require as a condition of new retail water service on and after January 1, 2008, the installation of separate water meters to measure the volume of water used exclusively for landscape purposes.

(b) Subdivision (a) does not apply to either of the following:

(1) Single-family residential connections.

- (2) Connections used to supply water for the commercial production of agricultural crops or livestock.
- (c) Subdivision (a) applies only to a service connection for which both of the following apply:
 - (1) The connection serves property with more than 5,000 square feet of irrigated landscape.
 - (2) The connection is supplied by a water purveyor that serves 15 or more service connections.
- (d) For the purposes of this section, "new retail water service" means the installation of a new water meter where water service has not been previously provided, and does not include applications for new water service submitted before January 1, 2007.

SEC. 6.

If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

History

Approved by Governor September 28, 2006.

Filed with Secretary of State September 28, 2006.

DEERING'S CALIFORNIA ADVANCE LEGISLATIVE SERVICE

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TAB 4

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

10-TC-12

Water Code Division 6, Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4;

Filed on June 30, 2011;

By, South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, Biggs-West Gridley Water District, Claimants;

Consolidated with

12-TC-01

Filed on February 28, 2013;

California Code of Regulations, title 23, sections 597, 597.1 597.2, 597.3, and 597.4, Register 2012, No. 28;

By, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, Glenn-Colusa Irrigation District, Claimants.

Case Nos.: 10-TC-12 and 12-TC-01

Water Conservation

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

(Adopted December 5, 2014)

(Served December 12, 2014)

DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 5, 2014. Dustin Cooper, Peter Harman, and Alexis Stevens appeared on behalf of the claimants. Donna Ferebee and Lee Scott appeared on behalf of the Department of Finance. Spencer Kenner appeared on behalf of the Department of Water Resources. Dorothy Holzem of the California Special Districts Association and Geoffrey Neill of the California State Association of Counties also appeared on behalf of interested persons and parties.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed decision to deny the test claim by a vote of six to zero.

Summary of the Findings

The Commission finds that the two original agricultural water supplier claimants named in each test claim, Richvale Irrigation District and Biggs-West Gridley Water District, are not eligible to claim reimbursement under article XIII B, section 6, because they do not collect or expend tax revenue, and are therefore not subject to the limitations of articles XIII A and XIII B. However, two substitute agricultural water supplier claimants, Oakdale Irrigation District and Glenn-Colusa Irrigation District, are subject to articles XIII A and XIII B and are therefore claimants eligible to seek reimbursement under article XIII B, section 6. As a result, the Commission has jurisdiction to hear and determine test claims 10-TC-12 and 12-TC-01.

The Commission finds that the Water Conservation Act of 2009 (Act), and the Agricultural Water Measurement regulations promulgated by the Department of Water Resources (DWR) to implement the Act, impose some new required activities on urban water suppliers and agricultural water suppliers, including measurement requirements, conservation and efficient water management requirements, notice and hearing requirements, and documentation requirements, with specified exceptions and limitations.

However, the Commission finds that several agricultural water suppliers are either exempted from the requirements of the test claim statutes and regulations or are subject to alternative and less expensive compliance alternatives because the activities were already required by a regime of federal statutes and regulations, which apply to most agricultural water suppliers within the state.¹

Additionally, to the extent that the test claim statute and regulations impose any new state-mandated activities, they do not impose costs mandated by the state because the Commission finds that urban water suppliers and agricultural water suppliers possess fee authority, sufficient as a matter of law to cover the costs of any new required activities. Therefore, the test claim statute and regulations do not impose costs mandated by the state pursuant to Government Code section 17556(d), and are not reimbursable under article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

I. Chronology

- | | |
|------------|---|
| 06/30/2011 | Co-claimants, South Feather Water and Power Agency (South Feather), Paradise Irrigation District (Paradise), Biggs-West Gridley Water District (Biggs), and Richvale Irrigation District (Richvale) filed test claim 10-TC-12 with the Commission. ² |
| 10/07/2011 | Department of Finance (Finance) requested an extension of time to file comments, which was approved. |

¹ See Public Law 102-565 and the Reclamation Reform Act of 1982 and the specific exceptions and alternate compliance provisions in the test claim statutes for those subject to these federal requirements, as discussed in greater detail in the analysis below.

² Exhibit A, *Water Conservation Act* Test Claim, 10-TC-12.

12/06/2011 Department of Water Resources (DWR) requested an extension of time to file comments, which was approved.

02/01/2012 DWR requested an extension of time to file comments, which was approved.

03/30/2012 DWR requested an extension of time to file comments, which was approved.

05/30/2012 DWR requested an extension of time to file comments, which was approved.

08/02/2012 DWR requested an extension of time to file comments, which was approved.

10/02/2012 DWR requested an extension of time to file comments, which was approved.

12/03/2012 DWR requested an extension of time to file comments, which was approved.

12/07/2012 Finance requested an extension of time to file comments, which was approved.

02/04/2013 DWR requested an extension of time to file comments, which was approved.

02/06/2013 Finance requested an extension of time to file comments, which was approved.

02/28/2013 Richvale and Biggs filed test claim 12-TC-01 with the Commission.³

03/06/2013 The executive director consolidated the test claims for analysis and hearing, and renamed them *Water Conservation*.

03/29/2013 DWR requested an extension of time to file comments, which was approved.

06/07/2013 Finance submitted written comments on the consolidated test claims.⁴

06/07/2013 DWR submitted written comments on the consolidated test claims.⁵

07/09/2013 Claimants requested an extension of time to file rebuttal comments, which was approved.

08/07/2013 Claimants filed rebuttal comments.⁶

08/22/2013 Commission staff issued a request for additional information regarding the eligibility status of the claimants.⁷

09/19/2013 Finance submitted comments in response to staff's request.⁸

09/20/2013 The State Controller's Office (SCO) submitted a request for extension of time to comments, which was approved for good cause.

09/23/2013 DWR submitted comments in response to staff's request.⁹

³ Exhibit B, *Agricultural Water Measurement* Test Claim, 12-TC-01.

⁴ Exhibit C, Finance Comments on Consolidated Test Claims.

⁵ Exhibit D, DWR Comments on Consolidated Test Claims.

⁶ Exhibit E, Claimant Rebuttal Comments.

⁷ Exhibit F, Request for Additional Information.

⁸ Exhibit G, Finance Response to Commission Request for Comments.

09/23/2013 The claimants submitted comments in response to staff's request.¹⁰

10/07/2013 SCO submitted comments in response to staff's request.¹¹

11/12/2013 Commission staff issued a Notice of Pending Dismissal of 12-TC-01, and a Notice of Opportunity for a Local Agency, Subject to the Tax and Spend Limitations of Articles XIII A and B of the California Constitution and Subject to the Requirements of the Alleged Mandate to Take Over the Test Claim by a Substitution of Parties.¹²

11/22/2013 Co-claimants Richvale and Biggs filed an appeal of the executive director's decision to dismiss test claim 12-TC-01.¹³

11/25/2013 The executive director issued notice that the appeal would be heard on March 28, 2014.¹⁴

01/13/2014 Oakdale Irrigation District (Oakdale) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Dustin C. Cooper, of Minasian, Meith, Soares, Sexton & Cooper, LLP, as its representative.¹⁵

01/13/2014 Glenn-Colusa Irrigation District (Glenn-Colusa) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Andrew M. Hitchings and Alexis K. Stevens of Somach, Simmons & Dunn as its representative.¹⁶

01/15/2014 Commission staff issued a Notice of Substitution of Parties and Notice of Hearing which mooted the appeal.¹⁷

07/31/2014 Commission staff issued a draft proposed statement of decision.¹⁸

08/13/2014 South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, and Biggs West Gridley Water District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.

⁹ Exhibit H, DWR Response to Commission Request for Comments.

¹⁰ Exhibit I, Claimant Response to Commission Request for Comments.

¹¹ Exhibit J, SCO Response to Commission Request for Comments.

¹² Exhibit K, Notice of Pending Dismissal.

¹³ Exhibit L, Appeal of Executive Director's Decision.

¹⁴ Exhibit M, Appeal of Executive Director Decision and Notice of Hearing.

¹⁵ Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District.

¹⁶ Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

¹⁷ Exhibit P, Notice of Substitution of Parties and Notice of Hearing. Note that matters are only tentatively set for hearing until the draft staff analysis is issued which actually sets the matter for hearing pursuant to section 1187(b) of the Commission's regulations. Staff inadvertently omitted the word "tentative" in this notice.

¹⁸ Exhibit Q, Draft Proposed Decision.

- 08/14/2014 Glenn Colusa Irrigation District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.
- 10/16/2014 Claimant filed comments on the draft proposed decision.¹⁹
- 10/17/2014 California Special Districts Association (CSDA) filed comments on the draft proposed decision.²⁰
- 10/17/2014 Environmental Law Foundation (ELF) filed comments on the draft proposed decision.²¹
- 10/17/2014 DWR filed comments on the draft proposed decision.²²
- 10/22/2014 Northern California Water Association (NCWA) filed late comments on the draft proposed decision.²³
- 11/07/2014 Claimants filed late comments.²⁴

II. Background

These consolidated test claims allege that Water Code Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] enacted by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) (10-TC-12) impose reimbursable state-mandated increased costs resulting from activities required of urban water suppliers and agricultural water suppliers. The claimants also allege that the Agricultural Water Measurement regulations issued by DWR (12-TC-01), codified at California Code of Regulations, title 23, sections 597-597.4, impose additional reimbursable state-mandated increased costs on agricultural water suppliers only.

The Water Conservation Act of 2009, pled in test claim 10-TC-12, calls for a 20 percent reduction in urban per capita water use on or before December 31, 2020, and an interim reduction of at least 10 percent on or before December 31, 2015.²⁵ In order to achieve these reductions, the Act requires urban retail water suppliers, both publicly and privately owned, to develop urban water use targets and interim targets that cumulatively result in the desired 20 percent reduction by December 31, 2020.²⁶ Prior to adopting its urban water use targets, each supplier is required to conduct at least one public hearing to allow community input regarding the supplier's implementation plan to meet the desired reductions, and to consider the economic

¹⁹ Exhibit R, Claimant Comments on Draft Proposed Decision.

²⁰ Exhibit S, CSDA Comments on Draft Proposed Decision.

²¹ Exhibit T, Environmental Law Foundation Comments on Draft Proposed Decision.

²² Exhibit U, DWR Comments on Draft Proposed Decision.

²³ Exhibit V, NCWA Comments on Draft Proposed Decision.

²⁴ Exhibit W, Claimants Late Rebuttal Comments.

²⁵ Water Code section 10608.16 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

²⁶ Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

impacts of the implementation plan.²⁷ This hearing may be combined with the hearing required under prior law (Water Code 10631) for adoption of the urban water management plan (UWMP).²⁸ An urban retail water supplier is also required to include in its UWMP, which is required to be updated every five years in accordance with pre-existing Water Code section 10621, information describing the baseline per capita water use; interim and final urban water use targets;²⁹ and a report on the supplier's progress in meeting urban water use targets.³⁰

With respect to agricultural water suppliers, the Act requires implementation of specified critical efficient water management practices, including measuring the volume of water delivered to customers and adopting a volume-based pricing structure; and additional efficient water management practices that are locally cost effective and technically feasible.³¹ In addition, the Act requires agricultural water suppliers (with specified exceptions)³² to prepare and adopt, and every five years update, an agricultural water management plan (AWMP),³³ describing the service area, water sources and supplies, water uses within the service area, previous water management activities; and including a report on which efficient water management practices have been implemented or are planned to be implemented, and information documenting any determination that a specified efficient water management practice was not locally cost effective or technically feasible.³⁴

Prior to preparing and adopting or updating an AWMP, the Act requires an agricultural water supplier to notify the city or county within which the supplier provides water that it will be preparing or considering changes to the AWMP,³⁵ and to make the proposed plan available for

²⁷ Water Code section 10608.26 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

²⁸ Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

²⁹ Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁰ Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³¹ Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³² See Water Code sections 10608.8(d) (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [agricultural water suppliers that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617 are exempt from the requirements of Part 2.55 (Water Code sections 10608-10608.64)]; 10608.48(f); 10828 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [an agricultural water supplier may meet requirements of AWMPs by submitting its water conservation plan approved by United States Bureau of Reclamation]; 10827 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [members of Agricultural Water Management Council and submit water management plans to council pursuant to the Memorandum of Understanding may rely on those plans to satisfy AWMP requirements]; 10829 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [adoption of an urban water management plan or participation in an areawide, regional, watershed, or basinwide water management plan will satisfy the AWMP requirements].

³³ Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁴ Water Code sections 10608.48; 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁵ Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

public inspection and hold a noticed public hearing.³⁶ An agricultural water supplier is then required to implement the AWMP in accordance with the schedule set forth in the AWMP,³⁷ and to submit a copy of the AWMP to DWR and a number of specified local entities, and make the plan available on the internet, within 30 days of adoption.³⁸

Finally, to aid agricultural water suppliers in complying with their measurement requirements and developing a volume-based pricing structure as required by section 10608.48, DWR adopted in 2012 the Agricultural Water Measurement Regulations,³⁹ which are the subject of test claim 12-TC-01. These regulations provide a range of options for agricultural water suppliers to implement accurate measurement of the volume of water delivered to customers. The regulations provide for measurement at the delivery point or farm gate of an individual customer, or at a point upstream of the delivery point where necessary, and provide for specified accuracy standards for measurement devices employed by the supplier, whether existing or new, as well as field testing protocols and recordkeeping requirements, to ensure ongoing accuracy of volume measurements.

To provide some context for how the the test claim statute and implementing regulations fit into the state's water conservation planning efforts, a brief discussion of the history of water conservation law in California follows.

A. Prior California Conservation and Water Supply Planning Requirements.

1. Constitutional and Statutory Framework of Water Conservation.

Article X, section 2 of the California Constitution prohibits the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. It also declares that the conditions in the state require “that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.” Moreover, article X, section 2 provides that “[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and *such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.*”⁴⁰ Although article X, section 2 provides that it is self-executing; it also provides that the Legislature may enact statutes to advance its policy.

The Legislature has implemented these constitutional provisions in a number of enactments over the course of many years, which authorize water conservation programs by water suppliers, including metered pricing. For example:

³⁶ Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁷ Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁸ Water Code sections 10843; 10844 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁹ Code of Regulations, title 23, sections 597-597.4 (Register 2012, No. 28).

⁴⁰ Adopted June 8, 1976. Derivation, former article 14, section 3, added November 6, 1928 and amended November 5, 1974 [emphasis added].

- Water Code section 1009 provides that water conservation programs are an authorized water supply function for all municipal water providers in the state.⁴¹
- Water Code section 1011 furthers the water conservation policies of the state by providing that a water appropriator does not lose an appropriative water right because of water conservation programs.⁴²
- Water Code sections 520 -529.7 require water meters and recognize that metered water rates are an important conservation tool.⁴³
- Water Code section 375(b) provides that public water suppliers may encourage conservation through “rate structure design.” The bill amending the Water Code to add this authority was adopted during the height of a statewide drought. In an uncodified portion of the bill, the Legislature specifically acknowledged that conservation is an important part of the state’s water policy and that water conservation pricing is a best management practice.⁴⁴
- Water Code sections 370-374 provide additional, alternate authority (in addition to a water supplier’s general authority to set rates) for public entities to encourage conservation rate structure design consistent with the proportionality requirements of Proposition 218.⁴⁵
- Water Code section 10631(f)(1)(K) establishes water conservation pricing as a recognized water demand management measure for purposes of UWMPs, and other conservation measures including metering, leak detection and retrofits for pipes and plumbing fixtures.⁴⁶

In addition, the Legislature has long vested water districts with broad authority to manage water to furnish a sustained, reliable supply. For example:

⁴¹ Statutes 1976, chapter 709, p. 1725, section 1.

⁴² Added by statutes 1979, chapter 1112, p. 4047, section 2, amended by Statutes, 1982, chapter 876, p. 3223, section 4, Statutes 1996, chapter 408, section 1, and Statutes 1999, chapter 938, section 2.

⁴³ Added by Statutes 1991, chapter 407 and amended by Statutes 2004, chapter 884, section 3 and Statutes 2005, chapter 22. See especially, Water Code section 521 (b) and (c).

⁴⁴ Statutes 1993, chapter 313, section 1.

⁴⁵ Statutes 2008, chapter 610 (AB 2882). See Exhibit X, Senate Floor Analysis AB 2882; Assembly Floor Analysis AB 2882.

⁴⁶ Water Code section 10631(f)(1)(K) (Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 712 (SB 553); Stats. 2001, ch. 643 (SB 610); Stats. 2001, ch. 644 (AB 901); Stats. 2002, ch. 664 (AB 3034); Stats. 2002, ch. 969 (SB 1384); Stats. 2004, ch. 688 (SB 318); Stats. 2006, ch. 538 (SB 1852)).

- Irrigation Districts have the power to take any act necessary to furnish sufficient water for beneficial uses and to control water.⁴⁷ They have general authority to fix and collect charges for any service of the district.⁴⁸
- County Water Districts have similar power to take any act necessary to furnish sufficient water and express authority to conserve.⁴⁹
- Municipal Water Districts also have broad power to control water for beneficial uses and express power to conserve.⁵⁰

2. Existing Requirements to Prepare, Adopt, and Update Urban Water Management Plans.

The Urban Water Management Act of 1983 required urban water suppliers to prepare and update an UWMP every five years.⁵¹ This Act has been amended numerous times between its original enactment in 1983 and the enactment of the test claim statute in 2009.⁵² The law pertaining to UWMPs in effect immediately prior to the enactment of the test claim statute consisted of sections 10610 through 10657 of the California Water Code, which detail the information that must be included in UWMPs, as well as who must file them.

According to the Act, as amended prior to the test claim statute, “[t]he conservation and efficient use of urban water supplies are of statewide concern; however, the planning for that use and the implementation of those plans can best be accomplished at the local level.”⁵³ The Legislature declared as state policy that:

- (a) The management of urban water demands and efficient use of water shall be actively pursued to protect both the people of the state and their water resources.
- (b) The management of urban water demands and efficient use of urban water supplies shall be a guiding criterion in public decisions.

⁴⁷ Water Code section 22075 added by Statutes 1943, chapter 372 and section 22078 added by Statutes 1953, chapter 719, p. 187, section 1.

⁴⁸ Water Code section 22280, as amended by statutes 2007, chapter 27, section 19.

⁴⁹ Water Code sections 31020 and 31021 added by Statutes 1949, chapter 274, p. 509, section 1.

⁵⁰ Water Code sections 71610 as amended by Statutes 1995, chapter 28 and 71610.5 as added by Statutes 1975, chapter 893, p. 1976, section 1.

⁵¹ Statutes 1983, chapter 1009 added Part 2.6 to Division 6 of the Water Code, commencing at section 10610.

⁵² Enacted, Statutes 1983, chapter 1009; Amended, Statutes 1990, chapter 355 (AB 2661); Statutes 1991-92, 1st Extraordinary Session, chapter 13 (AB 11); Statutes 1991, chapter 938 (AB 1869) Statutes 1993, chapter 589 (AB 2211); Statutes 1993, chapter 720 (AB 892); Statutes 1994, chapter 366 (AB 2853); Statutes 1995, chapter 28 (AB 1247); Statutes 1995, chapter 854 (SB 1011); Statutes 2000, chapter 712 (SB 553); Statutes 2001, chapter 643 (SB 610); Statutes 2001, chapter 644 (AB 901); Statutes 2002, chapter 664 (AB 3034); Statutes 2002, chapter 969 (SB 1384); Statutes 2004, chapter 688 (SB 318); Statutes 2006, chapter 538 (SB 1852); Statutes 2009, chapter 534 (AB 1465).

⁵³ Water Code section 10610.2 (Stats. 2002, ch. 664 (AB 3034)).

(c) Urban water suppliers shall be required to develop water management plans to actively pursue the efficient use of available supplies.⁵⁴

The Act specified that each urban water supplier that provides water for municipal purposes either directly or indirectly to more than 3,000 customers or supplies more than 3,000 acre feet of water annually shall prepare, update, and adopt its urban water management plan at least once every five years on or before December 31, in years ending in five and zero.⁵⁵

a. Contents of Plans

The required contents of an UWMP are provided in sections 10631 through 10635. These statutes are prior law and have not been pled in this test claim. As last amended by Statutes 2009, chapter 534 (AB 1465), section 10631 requires that an adopted UWMP contain information describing the service area of the supplier, reliability of supply, water uses over five year increments, water demand management measures currently being implemented or being considered or scheduled for implementation, and opportunities for development of desalinated water.⁵⁶ Section 10631 further provides that urban water suppliers that are members of the California Urban Water Conservation Council and submit annual reports in accordance with the “Memorandum of Understanding Regarding Urban Water Conservation in California,” may submit those annual reports to satisfy the requirements of section 10631(f) and (g), pertaining to current, proposed, and future demand management measures.⁵⁷

Section 10632 requires that an UWMP provide an urban water shortage contingency analysis, which includes actions to be taken in response to a supply shortage; an estimate of minimum supply available during the next three years; actions to be taken in the event of a “catastrophic interruption of water supplies,” such as a natural disaster; additional prohibitions employed during water shortages; penalties or charges for excessive use; an analysis of impacts on revenues and expenditures; a draft water shortage contingency resolution or ordinance; and a mechanism for determining actual reductions in water use.⁵⁸

Section 10633, as amended by Statutes 2002, chapter 261, specifies that the plan shall provide, to the extent available, information on recycled water and its potential for use as a water source in the service area of the urban water supplier. The preparation of the plan shall be coordinated with local water, wastewater, groundwater, and planning agencies that operate within the supplier's service area, and shall include: a description of wastewater collection and treatment systems; a description of the quantity of treated wastewater that meets recycled water standards; a description of recycled water currently used in the supplier's service area; a description and quantification of the potential uses of recycled water; projected use of recycled water over five year increments for the next 20 years; a description of actions that may be taken to encourage the

⁵⁴ Water Code section 10610.4 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

⁵⁵ Water Code sections 10617 (Stats. 1996, ch. 1023(SB 1497)); 10621(a) (Stats. 2007, ch. 64 (AB 1376)).

⁵⁶ Water Code section 10631 (Statutes 2009, chapter 534 (AB 1465)).

⁵⁷ Water Code section 10631(i) (Statutes 2009, chapter 534 (AB 1465)).

⁵⁸ Water Code section 10632 (Stats. 1995, ch. 854 (SB 1011)).

use of recycled water; and a plan for optimizing the use of recycled water in the supplier's service area.⁵⁹

As added by Statutes 2001, chapter 644, and continuously in law up to the adoption of the test claim statute, section 10634 requires the UWMP to include, to the extent practicable, information relating to the quality of existing sources of water available to the supplier over the same five-year increments as described in Section 10631(a); and to describe the manner in which water quality affects water management strategies and supply reliability.⁶⁰

And finally, section 10635, added by Statutes 1995, chapter 330, requires an urban water supplier to include in its UWMP an assessment of the reliability of its water service to customers during normal and dry years, projected over the next 20 years, in five year increments.⁶¹

b. Adoption and Implementation of Plans

Sections 10640 through 10645, as added by Statutes 1983, chapter 1009 and Statutes 1990, chapter 355, provide the requirements for adoption and implementation of UWMPs, including public notice and recordkeeping requirements associated with the adoption of each update of the UWMP.

Section 10640 provides that every urban water supplier required to prepare an UWMP pursuant to this part shall prepare its UWMP pursuant to Article 2 (commencing with Section 10630), and shall "periodically review the plan ... and any amendments or changes required as a result of that review shall be adopted pursuant to this article."⁶² Section 10641 provides that an urban water supplier required to prepare an UWMP may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water demand management methods and techniques.⁶³

Section 10642 provides that each urban water supplier shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the service area prior to and during the preparation of its UWMP. Prior to adopting an UWMP, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to section 6066 of the Government Code. A privately owned water supplier is required to provide a similar degree of notice, and the plan shall be adopted after the hearing either "as prepared or as modified..."⁶⁴

Section 10643 provides that an UWMP shall be implemented "in accordance with the schedule set forth in [the] plan."⁶⁵ As amended by Statutes 2007, chapter 628, section 10644 requires an

⁵⁹ Water Code section 10633 (Stats. 2002, ch. 261 (SB 1518)).

⁶⁰ Water Code section 10634 (Stats. 2001, ch. 644 (AB 901)).

⁶¹ Water Code section 10635 (Stats. 1995, ch. 330 (AB 1845)).

⁶² Water Code section 10640 (Stats. 1983, ch. 1009).

⁶³ Water Code section 10640 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

⁶⁴ Water Code section 10642 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552)).

⁶⁵ Water Code section 10643 (Stats. 1983, ch. 1009).

urban water supplier to submit to DWR, the State Library, and any city or county within which the supplier provides water supplies, a copy of its plan and copies of any changes or amendments to the plans no later than 30 days after adoption. Section 10644 also requires DWR to prepare and submit to the Legislature, on or before December 31, in the years ending in six and one, a report summarizing the status of the UWMPs adopted pursuant to this part. The report is required to identify the outstanding elements of the individual UWMPs. DWR is also required to provide a copy of the report to each urban water supplier that has submitted its UWMP to DWR.⁶⁶ And lastly, in accordance with section 10645, not later than 30 days after filing a copy of its UWMP with DWR, the urban water supplier and DWR shall make the plan available for public review during normal business hours.⁶⁷

c. Miscellaneous Provisions Pertaining to the UWMP Requirement

While sections 10631 through 10635 provide for the lengthy and technical content requirements of UWMPs, and sections 10640 through 10645 provide the requirements of a valid adoption of a UWMP, several remaining provisions of the Urban Water Management Planning Act provide for the satisfaction of the UWMP requirements by other means, and provide for the easing of certain other regulatory requirements and the recovery of costs.

- Section 10631, as amended by Statutes 2009, chapter 534 (AB 1465), provides that urban water suppliers that are members of the California Urban Water Conservation Council shall be deemed in compliance with the demand management provisions of the UWMP “by complying with all the provisions of the ‘Memorandum of Understanding Regarding Urban Water Conservation in California’ ... and by submitting the annual reports required by Section 6.2 of that memorandum.”⁶⁸ These suppliers, then, are not separately required to comply with sections 10631(f) and (g), which require a description and evaluation of the supplier’s “demand management measures” that are currently or could be implemented.⁶⁹
- Section 10652 streamlines the adoption of UWMPs by exempting plans from the California Environmental Quality Act (CEQA). However, section 10652 does not exempt any project (that might be contained in the plan) that would significantly affect water supplies for fish and wildlife.⁷⁰
- Section 10653 provides that the adoption of a plan shall satisfy any requirements of state law, regulation, or order, including those of the State Water Resources Control Board and the Public Utilities Commission, for the preparation of water

⁶⁶ Water Code section 10644 (Stats. 1983, ch. 1009; Stats. 1990, ch. 355 (AB 2661); Stats. 1992, ch. 711 (AB 2874); Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552); Stats. 2004, ch. 497 (AB 105); Stats. 2007, ch. 628 (AB 1420)).

⁶⁷ Water Code section 10645 (Stats. 1990, ch. 355 (AB 2661)).

⁶⁸ Water Code section 10631 (as amended, Stats. 2009, ch. 534 (AB 1465)).

⁶⁹ Water Code section 10631(f-g) (as amended, Stats. 2009, ch. 534 (AB 1465)).

⁷⁰ Water Code section 10652 (Stats. 1983, ch. 1009; Stats. 1991-1992, 1st Ex. Sess., ch. 13 (AB 11); Stats. 1995, ch. 854 (SB 1011)).

management plans or conservation plans; provided, that if the State Water Resources Control Board or the Public Utilities Commission requires additional information concerning water conservation to implement its existing authority, nothing in this part shall be deemed to limit the board or the commission in obtaining that information. In addition, section 10653 provides that “[t]he requirements of this part *shall be satisfied by any urban water demand management plan prepared to meet federal laws or regulations after the effective date of this part*, and which substantially meets the requirements of this part, or by any existing urban water management plan which includes the contents of a plan required under this part.”⁷¹ The plain language of section 10653 therefore exempts an urban retail water supplier that is already required to prepare a water demand management plan from any requirements of an UWMP added by the test claim statutes.

- Section 10654 provides expressly that an urban water supplier “may recover in its rates the costs incurred in preparing its plan and implementing the reasonable water conservation measures included in the plan.” Any best water management practice that is included in the plan that is identified in the “Memorandum of Understanding Regarding Urban Water Conservation in California” (discussed below) is deemed to be reasonable for the purposes of this section.⁷² Therefore, suppliers are expressly authorized to recover the costs of implementing “reasonable water conservation measures” or any “best water management practice...identified in [the MOU for Urban Water Conservation].”
3. Prior Requirements to Prepare, Adopt, and Update Agricultural Water Management Plans, Which Became Inoperative by their own Terms in 1993.

The Agricultural Water Management Planning Act was enacted in 1986 and became inoperative, by its own terms, in 1993.⁷³ The 1986 Act stated in its legislative findings and declarations that “[t]he Constitution requires that water in the state be used in a reasonable and beneficial way...” and that “[t]he conservation of agricultural water supplies are of great concern.” The findings and declarations further stated that “[a]gricultural water suppliers that receive water from the federal Central Valley Water Project are required by federal law to develop and implement water conservation plans,” as are “[a]gricultural water suppliers applying for a permit to appropriate water from the State Water Resources Control Board...” Therefore, the act stated that “it is the policy of the state as follows:”

- (a) The conservation of water shall be pursued actively to protect both the people of the state and their water resources.
- (b) The conservation of agricultural water supplies shall be an important criterion in public decisions on water.

⁷¹ Water Code section 10653 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)) [emphasis added].

⁷² Water Code section 10654 (Stats. 1983, ch. 1009; Stats. 1994, ch. 609 (SB 1017)).

⁷³ Statutes 1986, chapter 954 (AB1658). See Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

- (c) Agricultural water suppliers, who determine that a significant opportunity exists to conserve water or reduce the quantity of highly saline or toxic drainage water, shall be required to develop water management plans to achieve conservation of water.⁷⁴

Specifically, the 1986 Act provided that every agricultural water supplier serving water directly to customers “shall prepare an informational report based on information from the last three irrigation seasons on its water management and conservation practices...” That report “shall include a determination of whether the supplier has a significant opportunity to conserve water or reduce the quantity of highly saline or toxic drainage water through improved irrigation water management...” If a “significant opportunity exists” to conserve water or improve the quality of drainage water, the supplier “shall prepare and adopt an agricultural water management plan...” (AWMP).⁷⁵ The Act provided, however, that an agricultural water supplier “may satisfy the requirements of this part by participation in areawide, regional, watershed, or basinwide agricultural water management planning where those plans will reduce preparation costs and contribute to the achievement of conservation and efficient water use and where those plans satisfy the requirements of this part.” The requirements of an AWMP or an informational report, where required, included quantity and sources of water delivered to and by the supplier; other sources of water used within the service area, including groundwater; a general description of the delivery system and service area; total irrigated acreage within the service area; acreage of trees and vines within the service area; an identification of current water conservation practices being used, plans for implementation of water conservation practices, and conservation educational practices being used; and a determination of whether the supplier has a significant opportunity to save water by means of reduced evapotranspiration, evaporation, or reduction of flows to unusable water bodies, or to reduce the quantity of highly saline or toxic drainage water.⁷⁶ In addition, an AWMP “shall address all of the following:” quantity and source of surface and groundwater delivered to and by the supplier; a description of the water delivery system, the beneficial uses of the water supplied, conjunctive use programs, incidental and planned groundwater recharge, and the amounts of delivered water that are lost to evapotranspiration, evaporation, or surface flow or percolation; an identification of cost-effective and economically feasible measures for water conservation; an evaluation of other significant impacts; and a schedule to implement those water management practices that the supplier determines to be cost-effective and economically feasible.⁷⁷

The Act further provided that an agricultural water supplier required to prepare an AWMP “may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water conservation and management methods and techniques.”⁷⁸ And, “[p]rior to adopting a plan, the agricultural water supplier shall make the plan available for public inspection and shall hold a public hearing thereon.” This requirement

⁷⁴ Former Water Code section 10802 (Stats. 1986, ch. 954 (AB 1658)).

⁷⁵ Former Water Code section 10821 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁷⁶ Former Water Code section 10825 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁷⁷ Former Water Code section 10826 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁷⁸ Former Water Code section 10841 (as added, Stats. 1986, ch. 954 (AB 1658)).

applies also to privately owned water suppliers.⁷⁹ In addition, the Act states that an agricultural water supplier shall implement its AWMP in accordance with the schedule set forth in the plan, and “shall file with [DWR] a copy of its plan no later than 30 days after adoption.”⁸⁰ Finally, the 1986 Act provided for funds to be appropriated to prepare the informational reports and agricultural water management plans, as required, and provided that “[t]his part shall remain operative only until January 1, 1993, except that, if an agricultural water supplier fails to submit its information report or agricultural water management plan prior to January 1, 1993, this part shall remain operative with respect to that supplier until it has submitted its report or plan, or both.”⁸¹

As noted above, the AWMP requirements provided by the Agricultural Water Management Planning Act became inoperative as of January 1, 1993,⁸² and therefore do not constitute the law in effect immediately prior to the test claim statute, even though, as shown below, the test claim statute reenacted substantially similar plan requirements. However, the federal requirement to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the federal Central Valley Project Improvement Act (Public Law 102-565) or the federal Reclamation Reform Act of 1982, remained the law throughout and does constitute the law in effect immediately prior to the test claim statute, with respect to those suppliers subject to one or both federal requirements.⁸³

4. The Water Measurement Law, Statutes 1991, chapter 407, applicable to Urban and Agricultural Water Suppliers.

The Water Measurement Law (Water Code sections 510-535) requires standardized water management practices and water measurement, and is applicable to Urban and Agricultural Water Suppliers, as follows:⁸⁴

- Every water purveyor that provides potable water to 15 or more service connections or 25 or more yearlong residents must require meters as a condition of *new* water service.⁸⁵
- Urban water suppliers, except those that receive water from the federal Central Valley Project, must install meters on all municipal (i.e., residential and governmental) and industrial (i.e., commercial) service connections on or before January 1, 2025 and shall charge each customer that has a service connection for which a meter has been installed based on the actual volume of deliveries beginning on or before January 1, 2010 service. A water purveyor, including an

⁷⁹ Former Water Code section 10842(as added, Stats. 1986, ch. 954 (AB 1658)).

⁸⁰ Former Water Code sections 10843 and 10844 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁸¹ Former Water Code sections 10853; 10854; 10855 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁸² Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

⁸³ See Water Code section 10828 (added, Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

⁸⁴ The Water Measurement Law was added by Statutes 1991, chapter 407.

⁸⁵ Section 525 as amended by statutes 2005, chapter 22.

urban water supplier, may recover the cost of the purchase, installation, and operation of a water meter from rates, fees, or charges.⁸⁶

- Urban water suppliers receiving water from the federal Central Valley Project (CVP) shall install water meters on all residential and non-agricultural commercial service connections constructed prior to 1992 on or before January 1, 2013 and charge customers for water based on the actual volume of deliveries, as measured by a water meter, beginning March 1, 2013, or according to the CVP water contract. Urban water suppliers that receive water from the CVP are also specifically authorized to “recover the cost of providing services related to the purchase, installation, and operation and maintenance of water meters from rates, fees or charges.”⁸⁷
- Agricultural water providers shall report annually to DWR summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis. However, the Water Measurement Law does not require implementation of water measurement programs or practices that are not locally cost effective.⁸⁸

The test claim statute, as noted above, requires agricultural water suppliers to measure the volume of water delivered to customers and to adopt a volume-based pricing structure. However, the test claim statute also contemplates a water supplier that is both an agricultural and an urban water supplier, by definition: section 10829 provides that an agricultural water supplier may satisfy the AWMP requirements by adopting an UWMP pursuant to Part 2.6 of Division 6 of the Water Code; and the definitions of “agricultural” and “urban retail” water suppliers in section 10608.12 are not, based on their plain language, mutually exclusive. The record on this test claim is not sufficient to determine how many, if any, agricultural water suppliers are also urban retail water suppliers,⁸⁹ and consequently would be required to install water meters on new and existing service connections in accordance with Water Code sections 525-527, and to charge customers based on the volume of water delivered. In addition, the record is not sufficient to determine whether and to what extent some agricultural water suppliers may already have implemented water measurement programs which were locally cost effective, in accordance with section 531.10. However, to the extent that an agricultural water supplier is also an urban water supplier, sections 525-527 may constitute a prior law requirement to accurately measure water delivered and charge customers based on volume, and the test claim statute may not impose new requirements or costs on some entities. And, to the extent that water measurement programs or practices were previously implemented pursuant to section 531.10, some of the activities required by the test claim statute and regulations may not be newly required, with respect to certain agricultural suppliers. These caveats and limitations are noted where relevant in the analysis below.

⁸⁶ Section 527 as amended by statutes 2005, chapter 22.

⁸⁷ Section 526 as amended by Statutes 2004, chapter 884.

⁸⁸ Section 531.10 as added by Statutes 2007, chapter 675.

⁸⁹ See Water Code section 10608.12, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) for definitions of “agricultural water supplier” and “urban retail water supplier.”

III. Positions of the Parties

A. Claimants' Positions:

The four original claimants together alleged a total of \$72,194.48 in mandated costs for fiscal year 2009-2010 (although Paradise maintains a different fiscal year than the remaining claimants). In addition, claimants project that program costs for fiscal year 2010-2011, and for 2011-2012, will be "higher," but claimants allege that they are unable to reasonably estimate the amount.

South Feather Water and Power Agency and Paradise Irrigation District

South Feather and Paradise allege that they are urban retail water suppliers, as defined in Water Code section 10608.12. As such, they allege that they are required to establish urban water use targets "by July 1, 2011 by selecting one of four methods to achieve the mandated water conservation." South Feather and Paradise further allege that they are "mandated to adopt expanded and more detailed urban water management plans in 2010 that include the baseline daily per capita water use, urban water use target, interim urban water use target, compliance daily per capita water use, along with the bases for determining estimates, including supporting data."⁹⁰ South Feather and Paradise allege that thereafter, UWMPs are to be updated "in every year ending in 5 and 0," and the 2015 plan "must describe the urban retail water supplier's progress towards [*sic*] achieving the 20% reduction by 2020."⁹¹ Finally, South Feather and Paradise allege that they are required to conduct at least one noticed public hearing to allow community input, consider economic impacts, and adopt a method for determining a water use baseline "from which to measure the 20% reduction."⁹²

Prior to the Act, South Feather and Paradise allege that there was no requirement to achieve a 20 percent per capita reduction in water use by 2020. They allege that they were required to adopt UWMPs prior to the Act, but not to include "the baseline per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with bases for determining those estimates, including supporting data."⁹³ And they allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts...or to adopt a method for determining an urban water use target."⁹⁴

Biggs-West Gridley Water District and Richvale Irrigation District

Richvale and Biggs allege that they are required to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate," in accordance with regulations adopted by DWR pursuant to the Act.⁹⁵ They further allege that they are required to adopt a pricing structure for water customers

⁹⁰ Exhibit A, 10-TC-12, page 3.

⁹¹ *Ibid.*

⁹² Exhibit A, 10-TC-12, page 4.

⁹³ Exhibit A, 10-TC-12, pages 7-8.

⁹⁴ Exhibit A, 10-TC-12, page 8.

⁹⁵ Exhibit A, 10-TC-12, page 4.

based on the quantity of water delivered, and that “[b]ecause Richvale and Biggs are local public agencies, the change in pricing structure would have to be authorized and approved by its [sic] customers through the Proposition 218 process.”⁹⁶

In addition, Richvale and Biggs allege that “[i]f ‘locally cost effective’ and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices,” as specified. They additionally allege that on or before December 31, 2012, they are required to prepare AWMPs that include a report on the implementation and planned implementation of efficient water management practices, and documentation supporting any determination made that certain conservation measures were held to be not locally cost effective or technically feasible.⁹⁷ Finally, Richvale and Biggs allege that prior to adoption of an AWMP, they are required to notice and hold a public hearing; and that after adoption the plan must be distributed to “various entities” and posted on the internet for public review.⁹⁸

Prior to the Act, Richvale and Biggs assert, agricultural water suppliers “were not required to have a pricing structure based, at least in part, on the quantity of water delivered.” In addition, prior to the Act, “there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible.” And, Richvale and Biggs allege that prior to the Act the number of agricultural water suppliers subject to the requirement to develop an AWMP was significantly fewer, and now the “contents of the plans” are “more encompassing than plans required under the former law.”⁹⁹ Richvale and Biggs allege that “[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing prior to adopting the plan, make copies of it available for public inspection, or to publish the time and place of the hearing once per week for two successive weeks in a newspaper of general circulation.”¹⁰⁰

As discussed below, in the early stages of Commission staff’s review and analysis of these consolidated test claims, it became apparent that Richvale and Biggs, the two claimants representing agricultural water suppliers, are not subject to the revenue limits of article XIII B, and do not collect or expend “proceeds of taxes,” within the meaning of articles XIII A and XIII B.¹⁰¹ After additional briefing and further review, it was concluded that Richvale and Biggs are indeed not eligible for reimbursement under article XIII B, section 6. The Commission’s executive director therefore issued a notice of pending dismissal and offered an opportunity for another eligible local claimant, subject to the tax and spend limitations of articles XIII A and XIII B, to take over the test claim.¹⁰² Richvale and Biggs filed an appeal of that decision, and maintain that they are eligible local government claimants pursuant to Government Code section 17518, and that the fees or assessments that the districts would be required to establish or increase to comply with the requirements of the test claim statute and regulations would be

⁹⁶ *Ibid.*

⁹⁷ Exhibit A, 10-TC-12, pages 4-6.

⁹⁸ Exhibit A, 10-TC-12, page 6.

⁹⁹ Exhibit A, 10-TC-12, page 8.

¹⁰⁰ Exhibit A, 10-TC-12, page 9.

¹⁰¹ Exhibit F, Commission Request for Additional Information, page 1.

¹⁰² Exhibit K, Notice of Pending Dismissal.

characterized as taxes under article XIII B, section 8, because such fees or assessments would exceed the reasonable costs of providing water services.¹⁰³ This decision addresses these issues.

Glenn-Colusa Irrigation District and Oakdale Irrigation District

Glenn-Colusa and Oakdale requested to be substituted in as parties to these consolidated test claims, in place of Richvale and Biggs.¹⁰⁴ Both Glenn-Colusa and Oakdale submitted declarations asserting that they receive an annual share of property tax revenue, and therefore are subject to articles XIII A and XIII B of the California Constitution. Both additionally allege that they incur at least \$1000 in increased costs as a result of the test claim statute and regulations, and that they are subject to the requirements of the test claim statutes and regulations as described in the test claim narrative.¹⁰⁵

Claimants' Collective Response to the Draft Proposed Decision

In comments on the draft proposed decision, the claimants focus primarily on the findings regarding the ineligibility of Richvale and Biggs to claim reimbursement based on the evidence in the record indicating that neither agency collects or expends tax revenues subject to the limitations of articles XIII A and XIII B. The claimants also address the related findings that all claimants have sufficient fee authority under law to cover the costs of the mandate, and thus the Commission cannot find costs mandated by the state, pursuant to section 17556(d).

Specifically, the claimants argue that “[f]ees and charges for sewer, water, or refuse collection services are excused from the formal election process, but not from the majority protest process.”¹⁰⁶ Therefore, claimants conclude that “[a]gencies that provide water, sewer, or refuse collection services, including Claimants, lack sufficient authority to unilaterally impose new or increased fees or charges in light of Proposition 218’s majority protest procedure.”¹⁰⁷

In addition, claimants note the Commission’s analysis in 07-TC-09, *Discharge of Stormwater Runoff*, and argue that the Commission should not “ignore a prior Commission decision that is directly on point...” The claimants assert that “as this Commission has already recognized...” Proposition 218 “created a legal barrier to establishing or increasing fees or charges...” and as a result claimants “can do no more than merely propose new or increased fees for customer approval and the customers have the authority to then accept or reject...” a fee increase.¹⁰⁸

The claimants assert that the reasoning of the draft proposed decision “would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218...”¹⁰⁹ and “would create a class of local agencies that are per se ineligible for reimbursement under this test

¹⁰³ Exhibit L, Appeal of Executive Director’s Decision.

¹⁰⁴ Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

¹⁰⁵ *Ibid.*

¹⁰⁶ Exhibit R, Claimant Comments on Draft Proposed Decision, page 10.

¹⁰⁷ Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

¹⁰⁸ Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

¹⁰⁹ Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."¹¹⁰ The claimant calls this a "sea change in Constitutional interpretation..."¹¹¹

The claimants argue, based on this interpretation of the effect of Proposition 218, that the draft proposed decision inappropriately excluded Richvale and Biggs from subvention, "because they do not currently collect or expend tax revenues."¹¹² The claimants argue that "this additional 'requirement' [is] based on an outdated case that predates Proposition 218 and on an inapplicable line of cases that apply only to redevelopment agencies, while ignoring the strong policy underlying the voters' approval of the subvention requirement."¹¹³ The claimants argue that after articles XIII C and XIII D, "assessments and property-related fees and charges have joined tax revenues as among local entities' 'increasingly limited revenue sources..."¹¹⁴

The claimants further argue that: "Agencies like Richvale and Biggs that need additional revenue to pay for new mandates but are subject to the limitations of Proposition 218 are faced with three problematic options: (a) do not implement the mandates in light of revenue limitations; (b) implement the mandates with existing revenue; or (c) propose a new or increased fee or charge, assessment, or special tax to implement the mandates."¹¹⁵ The claimants argue for the Commission to take action to expand the scope of reimbursement: "the subvention provision should be read in harmony with later Constitutional enactments and protect not just tax revenue, but assessment and fee revenue as well."¹¹⁶

Finally, in late comments, the claimants challenge DWR's reasoning, including the figures cited by the department, that due to the existence of a substantial number of private water suppliers, the test claim statutes do not impose a "program" within the meaning of article XIII B, section 6.¹¹⁷

B. State Agency Positions:

Department of Finance

Finance maintains that "the Act and Regulations do not impose a reimbursable mandate on local agencies within the meaning of Article XIII B, section 6."¹¹⁸ Finance asserts that each of the claimants is a special district authorized to charge a fee for delivery of water to its users, and therefore has the ability to cover the costs of any new required activities.¹¹⁹ Finance further

¹¹⁰ Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

¹¹¹ Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

¹¹² Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

¹¹³ Exhibit R, Claimant Comments on Draft Proposed Decision, page 16.

¹¹⁴ Exhibit R, Claimant Comments on Draft Proposed Decision, page 17.

¹¹⁵ Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

¹¹⁶ Exhibit R, Claimant Comments on Draft Proposed Decision, page 21.

¹¹⁷ Exhibit W, Claimant Late Comments, pages 1-4.

¹¹⁸ Exhibit C, Finance Comments, page 1.

¹¹⁹ Exhibit C, Finance Comments, page 1.

asserts that the conservation efforts required by the test claim statute and regulations will result in surplus water accruing to the claimant districts, which are authorized to sell water. Finance concludes that “each district will likely have the opportunity to cover all or a portion of costs related to implementation of the Act or Regulations with revenue from surplus water sales.”¹²⁰ Moreover, Finance argues that “special districts are only entitled to reimbursement if they are subject to the tax and spend limitations under articles XIII A and XIII B...*and only when the mandated costs in question can be recovered solely from the proceeds of taxes.*”¹²¹ Finance argues that the claimants “should be directed to provide information that will enable the Commission on State Mandates to determine if they are subject to tax and spending limitations.”¹²² Finance did not submit comments on the draft proposed decision.

State Controller’s Office

In response to Commission staff’s request for additional information regarding the uncertain eligibility of the test claimants, the SCO submitted written comments confirming that the “Butte County Auditor-Controller has confirmed for fiscal years 2010-2011, 2011-2012, and 2012-2013,” that South Feather and Paradise both received proceeds of taxes, but Richvale and Biggs did not.¹²³ However, the SCO also noted that none of the four claimants reported an appropriations limit for fiscal years 2010-2011, 2011-2012, and 2012-2013. The SCO stated that “Government Code section 7910 requires each local government entity to annually establish its appropriations limit by resolution of its governing board,” and that “Government Code section 12463 requires the annual appropriations limit to be reported in the financial transactions report submitted to the SCO.” However, the SCO noted that it “has the responsibility to review each report for reasonableness, yet we are not required to audit any of the data reported.” The SCO concluded, therefore, that “we are unable to determine which special district is subject to report an annual appropriations limit.” The SCO did not comment on the draft proposed decision.

Department of Water Resources

DWR argues, in comments on the consolidated test claims, first, that the Water Conservation Act of 2009 applies to public and private entities alike, and is therefore not a “program” within the meaning of article XIII B, section 6. In addition, DWR argues that the Act is not a “new program,” because it is “a refinement of urban and agricultural water conservation requirements that have been part of the law for years.” DWR further asserts that even if the Act “were an unfunded state mandate, it would not be reimbursable since the water suppliers have sufficient non-tax sources to offset any implementation costs.” And, DWR asserts that the test claim regulations on agricultural water measurement do not impose any requirements on water suppliers because “they are free to choose alternative measurement methods.” And finally, DWR argues that the Act does not impose any new programs or higher levels of service “because what is required is compliance with general and evolving water conservation standards based on

¹²⁰ Exhibit C, Finance Comments, page 2.

¹²¹ Exhibit C, Finance Comments, page 2 [emphasis in original].

¹²² Exhibit C, Finance Comments, page 2.

¹²³ Exhibit J, SCO Comments, pages 1-2.

the foundational reasonable and beneficial water use principle dating from before the 1928 amendment – Article X, section 2 – to California’s Constitution revising water use standards.”¹²⁴

In comments on the draft proposed decision, DWR “concur[s] with and fully supports the ultimate conclusion reached...”, but reiterates and expands upon its earlier comments with respect to whether the alleged test claim requirements constitute a new program or higher level of service that is uniquely imposed upon local government.¹²⁵ DWR argues that “a law that governs private and public entities alike is not a ‘program’ for purposes of article XIII B...”¹²⁶ DWR continues:

Claimants, in their Rebuttal Comments, ignore DWR’s reference to the language of the Water Conservation Act, which by its plain terms is made applicable to both public and private entities. Instead, Claimants seek to shift attention away from the nature of the activity and focus instead on the number of entities engaged in that activity. Claimants concede that the law and regulations adopted pursuant to that law do in fact apply to both private and public entities, but argue that because (according to their calculation) “only 7.67%” of urban retail water suppliers are private, the requirements of the Water Conservation Act ought to be treated as reimbursable “programs” because those requirements “fall overwhelmingly on local governmental agencies.”¹²⁷

DWR maintains that “there are, in fact, 72 private wholesale and retail suppliers out of a total of 369...so the proportion of private water suppliers is actually 16.3 percent.” And, “based on data submitted in the 2010 urban water management plans, it turns out that private retail water suppliers serve 19.7 percent of the population and account for 17.3 percent of water delivered.”¹²⁸

DWR acknowledges that there are more public than private water suppliers, but asserts that “[u]nder the Supreme Court’s test in *County of Los Angeles v. State of California* the question is not whether an activity is more likely to be undertaken by a governmental entity, but whether the activity implements a state policy and imposes unique requirements on local governments, but is one that does not apply generally to all residents and entities in the state.”¹²⁹ DWR explains that “generally,” in this context, is not synonymous with “commonly,” and therefore the prevalence of public water suppliers as to private is not relevant to the issue; rather, “generally” refers to

¹²⁴ Exhibit D, DWR Comments, page 2.

¹²⁵ Exhibit U, DWR Comments on Draft Proposed Decision, page 1.

¹²⁶ Exhibit U, DWR Comments on Draft Proposed Decision, page 2 [citing Exhibit D, DWR Comments, filed June 7, 2013; *Carmel Valley Fire Protection District v. State* (1987) 190 Cal.App.3d 521, 537].

¹²⁷ Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [quoting Exhibit E, Claimant’s Rebuttal Comments, pages 3-4].

¹²⁸ Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

¹²⁹ Exhibit U, DWR Comments on Draft Proposed Decision, page 3. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

laws of general application, meaning “those that apply to all persons or entities of a particular class.”¹³⁰ The Water Conservation Act, DWR maintains, “does just that.”¹³¹

In addition, DWR disputes that the provision of water services is a “classic governmental function,” as asserted by the claimants.¹³² The California Supreme Court has held that reimbursement should be limited to new “programs” that carry out the governmental function of providing services to the public.¹³³ DWR maintains that there is an important distinction between public purposes, and private or corporate purposes, and that that distinction should control in the analysis of a new program or higher level of service. In particular, DWR identifies the provision of utilities to municipal customers as a corporate activity, rather than a governmental purpose:

Of the myriad services provided by government, although some may be difficult to categorize, at either end of the spectrum the categories are fairly clear. At one end, such things as police and fire protection have long been recognized as true governmental functions, those that implicate the notion of the “government as sovereign.” At the other end, however, are public utilities such as power generation, and, of particular significance to this claim, municipal water districts.¹³⁴

DWR argues that “California law thus draws a distinction between the many utilitarian services that could as easily be (and often are) undertaken by the private sector, and those that implicate the unique authority vested in the state and its political subdivisions.” DWR continues: “Maintaining a police force, for instance, is easily understood as something fundamental to the government *as government*.” “On the other hand,” DWR reasons, “there is nothing intrinsically governmental about a government entity operating a utility and providing services such as electricity, natural gas, sewer, garbage collection, or water delivery.”¹³⁵

DWR thus “urges the Commission to give full consideration to the fact that the Water Conservation Act is a law of general application that applies to private as well as public water

¹³⁰ Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [citing *McDonald v. Conniff* (1893) 99 Cal.386, 391].

¹³¹ Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

¹³² Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing Exhibit E, Claimant Rebuttal Comments, page 4].

¹³³ Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 50].

¹³⁴ Exhibit U, DWR Comments on Draft Proposed Decision, page 5 [citing *Chappelle v. City of Concord* (1956) 144 Cal.App.2d 822, 825; *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Davoust v. City of Alameda* (1906) 149 Cal. 69, 72; *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 593; *Nourse v. City of Los Angeles* (1914) 25 Cal.App. 384, 385; *Mann Water & Power Co. v. Town of Sausalito* (1920) 49 Cal.App. 78, 79; *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 58; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

¹³⁵ Exhibit U, DWR Comments on Draft Proposed Decision, page 6.

suppliers alike.” And, DWR reiterates: “contrary to Claimants’ suggestion, water delivery, while clearly an important service, is not a classic “governmental function” in the constitutional sense.”¹³⁶

C. Interested Person Positions:¹³⁷

California Special Districts Association

CSDA asserts that “the Proposed Decision fails to appropriately analyze the provisions of Article XIII B Section 6...as amended by Proposition 1A in 2004...”¹³⁸ CSDA argues that the draft proposed decision “rather analyzes the original language of Article XIII B Section 6 adopted as Proposition 4 in 1978, before the adoption of Proposition 218 adding articles XIII C and XIII D to the Constitution and before the adoption of Proposition 1A amending Article XIII B Section 6.”¹³⁹

CSDA argues that the plain language of article XIII B, section 6, as amended by Proposition 1A, “indicates that the mandate provisions are applicable to all cities, counties, cities and counties, and special districts without restriction.”¹⁴⁰ CSDA further asserts that “[t]he plain language also mandates the state to appropriate the ‘full payment amount’ of costs incurred by local government in complying with state mandated programs, without any qualification as to the types of revenues utilized by local governments in paying the costs of such compliance.”¹⁴¹ CSDA reasons that “there are no words of limitation indicating that suspension of mandates is only applicable to those local government agencies which receive proceeds of taxes and expend those proceeds of taxes in complying with state mandated programs.” Therefore, absent “such limiting language, the holding of the Proposed Decision which limits eligibility for claiming reimbursement...to those local agencies receiving proceeds of taxes is contradicted by the mandate provisions of Proposition 1A, and is therefore incorrect as a matter of law.”¹⁴²

CSDA also argues that the voters’ intent and understanding in adopting Proposition 1A is controlling, and can be determined by examining the LAO analysis in the ballot pamphlet.¹⁴³ CSDA argues that “[t]he LAO analysis of Proposition 1A in the ballot pamphlet fails to mention any restriction or limitation on state mandates to be reimbursed or suspended, and such analysis is totally silent as to any requirement that reimbursable mandates be limited to those mandates imposed on local governments which receive and expend proceeds of taxes...” In fact, CSDA argues, the LAO analysis indicates that Proposition 1A “expand(s) the circumstances under

¹³⁶ Exhibit U, DWR Comments on Draft Proposed Decision, page 7.

¹³⁷ “Interested person” is defined in the Commission’s regulations to mean “any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission.” (Cal. Code Regs., tit. 2, § 1181.2(j).)

¹³⁸ Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

¹³⁹ Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

¹⁴⁰ Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

¹⁴¹ Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

¹⁴² Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

¹⁴³ Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

which the state is responsible for reimbursing cities, counties and special districts for complying with state mandated programs by including all programs for which the state even had partial financial responsibility before such transfer.”¹⁴⁴ CSDA maintains that “[t]herefore the voters who approved Proposition 1A by 82% of the popular vote had no understanding of this limitation on reimbursement of state mandates to local governments which is the basic holding of the Proposed Decision.”¹⁴⁵ CSDA relies on the language of the ballot pamphlet, which states: “if the state does not fund a mandate within any year, the state must eliminate local government’s duty to implement it for that same time period.”¹⁴⁶ CSDA concludes that “[t]he plain words of Proposition 1A support this voter intent to require the state to fully reimburse the costs incurred by all cities, counties, cities and counties and special districts in implementing any state program in which the complete or partial financial responsibility for that program has been transferred from the state to local government, not just those cities, counties, cities and counties, and special districts which receive proceeds of taxes.”¹⁴⁷

In addition, CSDA argues that the Commission’s analysis must read together and harmonize articles XIII A, XIII B, XIII C, and XIII D.¹⁴⁸ Specifically, CSDA argues that pursuant to article XIII C, added by Proposition 218, property-related fees are subject to “majority protest procedures” and “may not be expended for general governmental services... which are available to the public at large in substantially the same manner as they are to property owners...”¹⁴⁹ And, revenues from property-related fees “may not be used for any purpose other than that for which the fee was imposed;” and “may not exceed the costs required to provide the property related service.”¹⁵⁰ In addition, CSDA asserts that the amount of a property-related fee must not exceed the proportional cost of providing the service to each individual parcel subject to the fee.¹⁵¹ CSDA also notes that “Article XIII D includes similar provisions restricting the ability of local governments to raise and expend assessment revenue.”¹⁵² CSDA argues that “[a]nalyzed together, all of these restrictions on the raising and expenditure of property related fees and charges by local government agencies specified in Articles XIII C and D of the Constitution severely limit the ability of local government agencies to utilize revenue for property related fees and charges to fund the costs of state mandated programs.”¹⁵³ CSDA goes on to argue that “[t]hose restrictions are more onerous and stringent than the restrictions imposed on local government agencies in expending proceeds of taxes by virtue of the appropriations limit in

¹⁴⁴ Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

¹⁴⁵ Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

¹⁴⁶ Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

¹⁴⁷ Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

¹⁴⁸ Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

¹⁴⁹ Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

¹⁵⁰ Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

¹⁵¹ Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

¹⁵² Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

¹⁵³ Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

Article XIII B.”¹⁵⁴ CSDA concludes that “[t]he Proposed Decision should be modified to recognize these restrictions imposed by Articles XIII C and D.”¹⁵⁵

Environmental Law Foundation Position

ELF states, in its comments, that it agrees with the draft proposed decision, however, “[t]o aid the Commission in developing its final decision, we would like to present an additional ground upon which the Commission could rely in denying the test claim...”¹⁵⁶ ELF asserts that “the Commission should find that charges for irrigation water are not ‘property-related fees’ for the purposes of Article XIII D of the California Constitution.”¹⁵⁷ Specifically, ELF agrees that the test claim statutes are exempt from the voter-approval requirements of article XIII D, section 6(c);¹⁵⁸ however, ELF also argues that “charges for irrigation water are not ‘property-related fees’ at all.” ELF reasons: “As a result, raising them does not trigger the substantive or procedural requirements contained in Article XIII D, and the claimant districts may increase them free of any constitutional obstacle.”¹⁵⁹

ELF continues: “Article XIII D, § 3 restricts local governments’ ability to levy a new ‘assessment, fee, or charge’ without complying with the substantive and procedural requirements of section 4 (assessments) and section 6 (property-related fees).” However, ELF asserts that “Section 2 of Article XIII D makes Proposition 218’s relatively limited reach abundantly clear.”¹⁶⁰ ELF notes that section 2 defines a fee or charge as “any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.”¹⁶¹ ELF therefore reasons that “[f]ees that are not ‘imposed upon a parcel’ or that are not imposed upon a ‘person as an incident of property ownership’ or that are not a ‘user fee or charge for a property related service’ are not subject to Article XIII D.”¹⁶² ELF notes that in *Apartment Association of Los Angeles County v. City of Los Angeles*¹⁶³ the court held that an inspection fee imposed upon landlords was not imposed upon them as property owners, but as business owners and, therefore the fee was not subject to article XIII D.¹⁶⁴ The court, ELF

¹⁵⁴ Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

¹⁵⁵ Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

¹⁵⁶ Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

¹⁵⁷ Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

¹⁵⁸ Exhibit T, ELF Comments on Draft Proposed Decision, page 3 [citing Exhibit Q, Draft Proposed Decision, page 80].

¹⁵⁹ Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

¹⁶⁰ Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

¹⁶¹ California Constitution, article XIII D, section 2; Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

¹⁶² Exhibit T, ELF Comments on Draft Proposed Decision, pages 3-4.

¹⁶³ (2001) 24 Cal.4th 830.

¹⁶⁴ Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

explains, found that this type of fee was “not ‘property related’ because it was dependent on the property’s use – it was not imposed on the property simply as an incident of ownership.”¹⁶⁵

ELF goes on to note that “no case has squarely addressed the issue...” but the courts have recognized that not all water service charges are necessarily subject to article XIII D. In *Pajaro Valley Water Management Agency v. Amrhein*,¹⁶⁶ the court held that a groundwater augmentation charge was a property-related fee, but “it rested that conclusion on the fact that the majority of users were residential users, not large-scale irrigators.”¹⁶⁷ And, ELF notes, other cases have found that domestic water use is “necessary for ‘normal ownership and use of property.’”¹⁶⁸ ELF concludes that these cases, and others, “present no obstacle to the conclusion that irrigation water is not a property-related service.”¹⁶⁹ ELF concludes that fees for irrigation water are not “property-related” but a business-related fee, and that therefore the Commission should deny this test claim.¹⁷⁰

Northern California Water Association Position

In late comments on the draft proposed decision, NCWA seeks to “highlight and emphasize how onerous and expensive these new state mandates are in the Sacramento Valley.”¹⁷¹ NCWA argues that “[t]hese statewide benefits, achieved through implementation of incredibly expensive mandates, ought to be funded by the state and not borne exclusively by the impacted local agencies’ landowners.”¹⁷² NCWA continues: “The draft proposed decision, in an effort to circumvent the clear requirements to reimburse for these types of state mandates, has attempted to avoid reimbursement by exerting exclusions that are not appropriate for the facts before the Commission.”¹⁷³ NCWA denies that any “exemptions” apply to the test claim statutes, and “urge[s] the Commission to modify the draft proposed decision to reimburse these and other similarly affected water suppliers.”¹⁷⁴

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

¹⁶⁵ Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

¹⁶⁶ (2007) 150 Cal.App.4th 1364.

¹⁶⁷ Exhibit T, ELF Comments on Draft Proposed Decision, pages 4-5.

¹⁶⁸ Exhibit T, ELF Comments on Draft Proposed Decision, page 5 [citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427; *Bighorn Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205].

¹⁶⁹ Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

¹⁷⁰ Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

¹⁷¹ Exhibit V, NCWA Comments on Draft Proposed Decision, page 1.

¹⁷² Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

¹⁷³ Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

¹⁷⁴ Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:

- (1) Legislative mandates requested by the local agency affected.
- (2) Legislation defining a new crime or changing an existing definition of a crime.
- (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”¹⁷⁵ Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”¹⁷⁶

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.¹⁷⁷
2. The mandated activity either:
 - a. Carries out the governmental function of providing a service to the public; or
 - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.¹⁷⁸
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.¹⁷⁹
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not

¹⁷⁵ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

¹⁷⁶ *County of Los Angeles v. State of California (County of Los Angeles I)* (1987) 43 Cal.3d 46, 56.

¹⁷⁷ *San Diego Unified School Dist. v. Commission on State Mandates (San Diego Unified School Dist.)* (2004) 33 Cal.4th 859, 874.

¹⁷⁸ *Id.* at 874-875 (reaffirming the test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56).

¹⁷⁹ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

reimbursable if an exception identified in Government Code section 17556 applies to the activity.¹⁸⁰

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.¹⁸¹ The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.¹⁸² In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹⁸³

The parties raise the following issues in their comments:

- The test claim statute and executive order do not impose a new program or higher level of service that is subject to article XIII B, section 6 because the Water Conservation Law and implementing regulations apply to both public and private water suppliers alike, and do not impose requirements uniquely upon local government.
- The test claim statute and executive order do not impose a new program or higher level of service because the provision of water and other utilities is an activity that could be, and often is, undertaken by private enterprise, and is therefore not a quintessentially governmental service in the manner that police and fire protection are generally accepted to be.
- The test claim does not result in costs mandated by the state for agricultural water suppliers because fees or charges for the provision of irrigation water are not “property-related” fees or charges subject to the limitations of articles XIII C and XIII D.

As described below, the Commission denies this claim on the grounds that most of the code sections and regulations pled do not impose new mandated activities, and all affected claimants have sufficient fee authority as a matter of law to cover the costs of any new requirements. Therefore, this decision does not make findings on the additional potential grounds for denial raised in comments on the draft proposed decision summarized above.

A. South Feather Water and Power Agency, Paradise Irrigation District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District are Subject to the Revenue Limitations of Article XIII B, and are Therefore Eligible for Reimbursement Pursuant to Article XIII B, Section 6.

1. To be eligible for reimbursement, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B.

¹⁸⁰ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

¹⁸¹ *County of San Diego, supra*, 15 Cal.4th 68, 109.

¹⁸² *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.

¹⁸³ *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. “Articles XIII A and XIII B work in tandem, together restricting California governments’ power both to levy and to spend taxes for public purposes.”¹⁸⁴

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that “the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property,” and that the one percent (1%) tax was to be collected by counties and “apportioned according to law to the districts within the counties...”¹⁸⁵ In addition to limiting the property tax, section 4 also restricts a local government’s ability to impose special taxes by requiring a two-thirds approval by voters.¹⁸⁶

Article XIII B was adopted by the voters as Proposition 4 less than 18 months after the addition of article XIII A to the state Constitution, and was billed as “the next logical step to Proposition 13.”¹⁸⁷ While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, “the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the ‘proceeds of taxes.’”¹⁸⁸

Article XIII B established an “appropriations limit,” or spending limit for each “entity of local government” beginning in fiscal year 1980-1981.¹⁸⁹ Specifically, the appropriations limit provides as follows:

The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.¹⁹⁰

No “appropriations subject to limitation” may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.¹⁹¹ Article XIII B does not limit the ability to expend government funds collected from *all sources*; the appropriations limit is based on “appropriations subject to limitation,” which means, pursuant to article XIII B, section 8, “any authorization to

¹⁸⁴ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 (*County of Fresno*).

¹⁸⁵ California Constitution, article XIII A, section 1 (effective June 7, 1978).

¹⁸⁶ California Constitution, article XIII A, section 4 (effective June 7, 1978).

¹⁸⁷ *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 (*County of Placer*).

¹⁸⁸ *Ibid.*

¹⁸⁹ California Constitution, article XIII B, section 8(h) (added, Nov. 7, 1979).

¹⁹⁰ California Constitution, article XIII B, section 1 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

¹⁹¹ California Constitution, article XIII B, section 2 (added, Nov. 7, 1979).

expend during a fiscal year the *proceeds of taxes* levied by or for that entity.”¹⁹² Appropriations subject to limitation do not include “local agency loan funds or indebtedness funds”; “investment (or authorizations to invest) funds...of an entity of local government in accounts at banks...or in liquid securities”;¹⁹³ “[a]ppropriations for debt service”; “[a]ppropriations required to comply with mandates of the courts or the federal government”; and “[a]ppropriations of any special district which existed on January 1, 1978 and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 [and one half] cents per \$100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes.”¹⁹⁴

Proposition 4 also added article XIII B, section 6 to require the state to reimburse local governments for any additional expenditures that might be mandated by the state, and which would rely solely on revenues subject to the appropriations limit. The California Supreme Court, in *County of Fresno v. State of California*,¹⁹⁵ explained:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.¹⁹⁶

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Bell Community Redevelopment Agency v. Woolsey*, the Second District Court of Appeal concluded that a redevelopment agency’s power to issue bonds, and to repay those bonds with its tax increment, was not subject to the spending limit of article XIII B. The court reasoned that to construe tax increment payments as appropriations subject to limitation “would be directly contrary to the mandate of section 7,” which provides that “[n]othing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with

¹⁹² California Constitution, article XIII B, section 8 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990) [emphasis added].

¹⁹³ California Constitution, article XIII B, section 8.

¹⁹⁴ California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

¹⁹⁵ *County of Fresno, supra*, (1991) 53 Cal.3d 482.

¹⁹⁶ *Id.*, at p. 487. Emphasis in original.

respect to existing or future bonded indebtedness.”¹⁹⁷ In addition, the court found that article XVI, section 16, addressing the funding of redevelopment agencies, was inconsistent with the limitations of article XIII B:

Article XVI, section 16, provides that tax increment revenues “may be irrevocably pledged” to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit [*sic*], it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds.¹⁹⁸

The court therefore concluded that redevelopment agencies could not reasonably be subject to article XIII B, and therefore upheld Health and Safety Code section 33678, and ordered that the writ issue to compel Woolsey to publish the notice.

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,¹⁹⁹ the court held that redevelopment agencies were not eligible to claim reimbursement because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B.

Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any “proceeds of taxes.” Nor do they raise, through tax increment financing, “general revenues for the local entity.” The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...

For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6... [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies’ collection of tax revenues.²⁰⁰

¹⁹⁷ (1985) 169 Cal.App.3d 24, at p. 31 [quoting article XIII B, section 7].

¹⁹⁸ *Id.*, at p. 31.

¹⁹⁹ (1997) 55 Cal.App.4th 976.

²⁰⁰ *Redevelopment Agency of San Marcos, supra*, 55 Cal.App.4th at pp. 986-987 [internal citations omitted].

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates*, affirmed the reasoning of the *San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.²⁰¹

Therefore, pursuant to the plain language of article XIII B, section 9 and the decisions in *County of Fresno, supra*, *Redevelopment Agency of San Marcos, supra*, and *City of El Monte, supra*, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

Nevertheless, claimants argue that *County of Fresno* and the redevelopment agency cases do not apply in this case. Specifically, claimants argue that *County of Fresno, supra*, predates Proposition 218, which added articles XIII C and XIII D to the California Constitution, and is factually distinguishable from this test claim because the test claim statute at issue in *County of Fresno* specifically authorized user fees to pay for the mandated activities. With respect to the redevelopment cases (*Bell Community Redevelopment Agency, Redevelopment Agency of San Marcos, and City of El Monte*), the claimants argue that the courts' findings rely on Health and Safety Code section 33678, which specifically excepts the revenues of redevelopment agencies from the scope of revenue-limited appropriations under article XIII B.²⁰² In addition, the claimants argue that the above reasoning "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218..." and "would create a class of local agencies that are per se ineligible for reimbursement under this test claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."²⁰³ In addition, both the claimants and CSDA suggest that the Commission broaden the scope of reimbursement eligibility under article XIII B, section 6, beyond that articulated by the courts, and beyond the plain language of articles XIII A and XIII B.²⁰⁴ The claimants and CSDA urge the Commission to consider the restrictions placed on special districts' authority to impose assessments, fees, or charges by articles XIII C and XIII D to be part of the "increasingly limited revenues sources" that subvention under section 6 was intended to protect. The claimants and CSDA would have the Commission broadly interpret and extend the subvention requirement and treat fee authority subject to proposition 218 as proceeds of taxes, "to advance the goal of 'preclud[ing] the state from shifting financial responsibility for carrying out governmental functions onto local entities that [are] ill equipped to handle the task.'²⁰⁵

²⁰¹ (2000) 83 Cal.App.4th 266, 281-282 (*El Monte*).

²⁰² Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18.

²⁰³ Exhibit R, Claimant Comments on Draft Proposed Decision, pages 14-15.

²⁰⁴ See Exhibit R, Claimant Comments on Draft Proposed Decision, page 21; Exhibit S, CSDA Comments on Draft Proposed Decision, pages 10-12 [Arguing that the restrictions of articles XIII C and XIII D are more onerous than the revenue limits of article XIII B, and the Commission should "recognize these restrictions..." and "Articles XIII A, B, C, and D should be read together and harmonized..."].

²⁰⁵ Exhibit R, Claimant Comments on Draft Proposed Decision, page 21 [quoting *County of Fresno, supra* 53 Cal.3d, at p. 487.].

The claimant's comments do not alter the above analysis. The factual distinction that claimants allege between this test claim and *County of Fresno* is not dispositive.²⁰⁶ Specific fee authority provided by the test claim statute is not necessary: so long as a local government's statutory fee authority can be legally applied to alleged activities mandated by the test claim statute, there are no *costs mandated by the state* within the meaning of Government Code section 17514 and article XIII B, section 6, to the extent of that fee authority.²⁰⁷ If the local entity is not compelled to rely on *appropriations subject to limitation* to comply with the alleged mandate, no reimbursement is required.²⁰⁸

The claimant's comments addressing the redevelopment cases are similarly unpersuasive. Those cases are discussed above not as analogues for the types of special districts represented in this test claim, but only to demonstrate that *not all local government entities* are subject to articles XIII A and XIII B, and that an agency that is not bound by article XIII B cannot assert an entitlement to reimbursement under section 6.²⁰⁹

Moreover, enterprise districts, and indeed any local government entity funded exclusively through user fees, charges, or assessments, *are per se* ineligible for mandate reimbursement. This is so because only a mandate to expend revenues that are subject to the appropriations limit, as defined and expounded upon by the courts,²¹⁰ can entitle a local government entity to mandate reimbursement. In other words, a local agency that is funded solely by user fees or charges, (or tax increment revenues, as discussed above), or appropriations for debt service, or any combination of revenues "other than the proceeds of taxes" is an agency that is not subject to the appropriations limit, and therefore not entitled to subvention.²¹¹

This interpretation is supported by decades of mandates precedent and is consistent with the purpose of article XIII B. As discussed above, "Section 6 was included in article XIII B in recognition that article XIII A...severely restricted the *taxing* powers of local governments."²¹² Article XIII B "was not intended to reach beyond taxation..." and "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue..."²¹³ The issue, then, is

²⁰⁶ Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18. *County of Fresno, supra*, 53 Cal.3d at p. 485.

²⁰⁷ See also, *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 812 ["Claimants can choose not to required these fees, but not at the state's expense."]

²⁰⁸ See *Redevelopment Agency of San Marcos, supra*, 55 Cal.App.4th at p. 987 ["No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes."].

²⁰⁹ *City of El Monte, supra*, (2000) 83 Cal.App.4th 266, 281-282 [citing *Redevelopment Agency of San Marcos, supra*, (1997) 55 Cal.App.4th 976].

²¹⁰ See *Placer v. Corin* (1980) 113 Cal.App.3d 443; *Bell Community Redevelopment Agency, supra* (1985) 169 Cal.App.3d 24; *County of Fresno, supra* (1991) 53 Cal.3d 482; *Redevelopment Agency of San Marcos, supra*, (1997) 55 Cal.App.4th 976.

²¹¹ California Constitution, article XIII B, section 9 (Adopted Nov. 6, 1979; Amended June 5, 1990).

²¹² See *County of Fresno, supra*, 53 Cal.3d at p. 487 [emphasis added].

²¹³ *Ibid.*

not *how many* different sources of revenue a local entity has at its disposal, as suggested by claimants;²¹⁴ it is whether and to what extent those sources of revenue (and the appropriations to be made) are *limited* by articles XIII A and XIII B. Based on the foregoing, nothing in claimants' comments alters the above analysis.

The Commission also disagrees with the interpretation offered by CSDA. CSDA argues in its comments that Proposition 1A, adopted in 2004, made changes to article XIII B, section 6, which must be considered by the Commission, and that the voters' intent and understanding when adopting Proposition 1A should weigh heavily on the Commission's interpretation of the amended text.²¹⁵ However, the amendments made by Proposition 1A require the Legislature to either pay or suspend a mandate for local agencies, and expand the definition of a new program or higher level of service. The plain language of Proposition 1A does not address which entities are eligible to claim reimbursement, and does not require reimbursement for all special districts, including those that do not receive property tax revenue and are not subject to the appropriations limitation of article XIII B.²¹⁶ CSDA's comments do not alter the above analysis.

Based on the foregoing, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

2. Biggs-West Gridley Water District and Richvale Irrigation District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, Oakdale Irrigation District and Glenn-Colusa Irrigation District are subject to the taxing and spending limitations, have been substituted in as claimants for both of the consolidated test claims, and are eligible for reimbursement under article XIII B, section 6 of the California Constitution.

10-TC-12 was originally filed by four co-claimants: South Feather, Paradise, Biggs, and Richvale.²¹⁷ 12-TC-01 was filed by Richvale and Biggs only,²¹⁸ and the two test claims were consolidated for analysis and hearing and renamed *Water Conservation*. Based on the analysis herein, the Commission finds that Richvale and Biggs are ineligible to claim reimbursement under article XIII B, section 6, and test claim 12-TC-01 would have to be dismissed for want of an eligible claimant.²¹⁹ However, Oakdale and Glenn-Colusa have requested to be substituted in on both test claims in the place of the ineligible claimants.²²⁰ The analysis below will therefore address the eligibility of each of the six co-claimants, and will show that South Feather, Paradise,

²¹⁴ Exhibit R, Claimant Comments on Draft Proposed Decision, pages 20-21.

²¹⁵ See, e.g., Exhibit S, CSDA Comments on Draft Proposed Decision, page 7.

²¹⁶ See California Constitution, article XIII B, section 6 (b-c).

²¹⁷ Exhibit A, Test Claim 10-TC-12.

²¹⁸ Exhibit B, Test Claim 12-TC-01.

²¹⁹ See Exhibit K, Notice of Pending Dismissal.

²²⁰ Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

Oakdale, and Glenn-Colusa are all eligible to claim reimbursement under article XIII B, section 6, and therefore the Commission maintains jurisdiction over both of the consolidated test claims.

a. Biggs-West Gridley Water District and Richvale Irrigation District are not eligible to claim reimbursement under article XIII B, section 6.

The Districts have acknowledged that “Richvale and Biggs do not receive property tax revenue.”²²¹ With respect to Richvale, that statement is consistent with the original test claim filing, in which Richvale stated that it “does not receive an annual share of property tax revenue.”²²² However, Biggs had earlier stated in a declaration by Karen Peters, the District’s Executive Administrator, that “Biggs receives an annual share of property tax revenue,” and for “Fiscal Year 2011 the amount of property tax revenue is expected to be approximately \$64,000.”²²³ Biggs has since determined that the Peters declaration was in error, and a more recent declaration from Eugene Massa, the District’s General Manager, states that “[t]hat revenue estimate actually reflects Biggs’ *assessment*, equating to \$2 per acre within Biggs’ boundaries.” Mr. Massa goes on to state that “Biggs does not currently receive any share of ad valorem *property tax* revenue.”^{224,225}

Even though Richvale and Biggs acknowledge that they receive no property tax revenue, they argue that they and “other similarly situated public agencies should not be deemed ineligible for subvention due to a historical quirk that resulted in those agencies not receiving a share of ad valorem property taxes.”²²⁶ The “historical quirk” to which Richvale and Biggs refer, it is assumed, is the fact that Richvale and Biggs either did not exist or did not share in ad valorem property tax revenue as of the 1977-78 fiscal year, which would render at least some portion of

²²¹ Exhibit I, Claimant Response to Request for Additional Information, page 1.

²²² Exhibit A, South Feather Water and Power Test Claim, page 22.

²²³ Exhibit A, 10-TC-12, page 30.

²²⁴ Exhibit I, Claimant Response to Request for Additional Information, page 393 [emphasis added].

²²⁵ See also Exhibit X, Special Districts Annual Report 2010-2011, pages 184; 389; 1051 [The Special Districts Annual Report for 2010-2011 is consistent with Richvale’s statement that it does not receive property tax revenue. Table 8 indicates no property tax receipts, and Table 1 does not indicate an appropriations limit. Biggs did not submit the necessary information to the SCO, and therefore does not appear in Tables 1 or 8 of the 2010-2011 Special Districts Annual Report. Based on that report, and the admissions of the Districts, a notice of dismissal was issued on November 12, 2013 for test claim 12-TC-01, for which Richvale and Biggs were the only named claimants. In response to the Notice of Pending Dismissal, the Districts submitted an Appeal of Dismissal, in which they argue that Proposition 218 undermines a local agency’s fee authority, and that the Districts are eligible for reimbursement “for the reasons already explained in the Districts’ ‘Claimants’ Response to Request for Additional Information 10-TC-12 and 12-TC-01.’” (Exhibit K, Notice of Pending Dismissal; Exhibit L, Appeal of Executive Director’s Decision)].

²²⁶ Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

their revenues subject to the appropriations limit, in accordance with article XIII B, section 9.²²⁷ They argue that all public agencies are ill-equipped to cover the costs of new mandates, whether they are subject to the tax and spend limits of articles XIII A and XIII B, or the fee and assessment restrictions of articles XIII C and XIII D.²²⁸ In addition, Richvale and Biggs assert that to the extent they do have authority to raise revenues other than taxes, any increased fees or assessments necessary to cover the costs of the required activities would, by definition, be classified as proceeds of taxes under article XIII B, section 8.²²⁹

The Districts' reasoning is both circular and fundamentally unsound. Article XIII B, section 8 provides that "proceeds of taxes" includes "all tax revenues and the proceeds to an entity of government from (1) regulatory licenses, user charges, and user fees *to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service*, and (2) the investment of tax revenues."²³⁰ The districts argue, therefore, that "proceeds of taxes" includes not only revenues directly derived from taxes, "but also revenues exceeding the costs to fund the services provided by the agency." The Districts argue that Richvale and Biggs are unable, under Proposition 218, to impose new fees as a matter of law, and must reallocate existing fees, which constitute "proceeds of taxes" under article XIII B, section 8. But Proposition 218 added article XIII D to expressly provide that fees or charges "*shall not be extended, imposed, or increased*" if revenues derived from the fee or charge exceed the funds needed to provide the property-related service; and "shall not be used for any purpose other than that for which the fee or charge was imposed."²³¹ Therefore, Proposition 218 imposes an absolute bar to raising fees beyond those necessary to provide the property-related service, or "reallocating" fees for a purpose other than that for which the fee or charge was imposed.

Moreover, Richvale and Biggs' reasoning that such fees *would automatically and by definition* constitute proceeds of taxes under article XIII B, section 8, rests on the initial presumption that such fees or charges would "exceed" those necessary to provide the service. In other words, the Districts presume that the costs of the mandate are unrelated to, or exceed, the costs of providing water service to the districts' users.²³² On the contrary, any fees or charges, whether *new or existing*, imposed by Richvale and Biggs are imposed for the purpose of providing irrigation water. The alleged mandated activities imposed upon irrigation districts by the test claim statute and regulations are required for those districts to *continue* providing irrigation water. Therefore, utilizing revenues from fees or charges to comply with the alleged new requirements is not

²²⁷ Section 9 states that appropriations subject to limitation do not include: "Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 1/2 cents per \$100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."

²²⁸ Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

²²⁹ Exhibit I, Claimant Response to Request for Additional Information, page 3.

²³⁰ Exhibit I, Claimant Response to Request for Additional Information, page 3 [citing California Constitution, article XIII B, section 8 (emphasis added)].

²³¹ Article XIII D, section 6(b) (added November 5, 1996, by Proposition 218).

²³² Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

“divert[ing] existing revenues from their authorized purposes...”²³³ Rather, the increased or reallocated fees are merely being used to ensure that claimants can continue to provide water service consistently with all applicable legal requirements. Claimants’ assertion that an increase or reallocation of fees alters the legal significance of such fees pursuant to article XIII B, section 8 is not supported by the law or the record.

Simply put, Richvale and Biggs do not impose or collect taxes²³⁴ and the Commission cannot say, as a matter of law, that fees increased or imposed to comply with the alleged mandate would constitute proceeds of taxes, within the meaning of article XIII B, section 8. Unless or until a court determines that article XIII B, section 8 can be applied in this manner, the Commission must presume that only those local government entities that collect and expend proceeds of taxes, within the meaning of article XIII A, are subject to the spending limits of article XIII B, including section 6.

Based on the foregoing, the Commission finds that Richvale Irrigation District and Biggs-West Gridley Water District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible to claim reimbursement under article XIII B, section 6.

b. South Feather Water and Power Agency and Paradise Irrigation District are eligible to claim reimbursement under article XIII B, section 6.

Claimants state that “South Feather and Paradise receive property tax revenue,” and “are in the process of establishing their appropriations limits for their current fiscal years.”²³⁵

Declarations attached to claimants’ response state that both South Feather and Paradise are in the process of determining and adopting an appropriations limit. Kevin Phillips, Finance Manager of Paradise, stated that during his tenure, “I have not calculated or otherwise established Paradise’s appropriation limit as set forth in Proposition 4.” Mr. Phillips further states that “[a]t the request of Paradise’s legal counsel, I have begun working to establish Paradise’s appropriation limit and intend...to ask Paradise’s Board of Directors to adopt a resolution...for its current fiscal year.”²³⁶ Similarly, Steve Wong, Finance Division Manager of South Feather, states that he has not “calculated or otherwise established South Feather’s appropriation limit” during his employment with South Feather. Mr. Wong further states that “[a]t the request of South Feather’s legal counsel, I have begun working to establish South Feather’s appropriation limit and intend, after the requisite public review period, to ask South Feather’s Board of Directors to adopt a resolution establishing South Feather’s appropriation limit for its current fiscal year.”²³⁷

²³³ See Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

²³⁴ Note that special districts generally have statutory authorization to impose special taxes, but only with two-thirds voter approval (See article XIII A, section 4). However, there is no evidence in the record indicating that Richvale or Biggs currently collects or expends special taxes.

²³⁵ Exhibit I, Claimant Response to Request for Additional Information, pages 1-2.

²³⁶ See Exhibit I, Claimant Response to Request for Additional Information, page 394.

²³⁷ See Exhibit I, Claimant Response to Request for Additional Information, page 427.

Based on the foregoing, the Commission finds that both South Feather and Paradise are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

3. Oakdale Irrigation District and Glenn-Colusa Irrigation District are eligible to claim reimbursement under article XIII B, section 6 and are thus substituted in as claimants in the consolidated test claims in place of Biggs-West Gridley Water District and Richvale Irrigation District.

Pursuant to the Notice of Pending Dismissal, Oakdale submitted a request to be substituted in as a party on 10-TC-12 and 12-TC-01 on January 13, 2014. Oakdale states that it is subject to the tax and spend limitations of articles XIII A and XIII B, and that it is an agricultural water supplier “subject to the mandates imposed by the Agricultural Water Measurement Regulations...and the Water Conservation Act of 2009.”²³⁸ The declaration of Steve Knell, Oakdale’s General Manager, attached to the Request for Substitution, states that Oakdale “receives an annual share of ad valorem property tax revenue from Stanislaus and San Joaquin counties.” The declaration further states that the District “received \$5,701,730 in property taxes for 2011-2013 and expects to receive approximately \$1.9 million in 2014.”

The Special Districts Annual Reports for 2010-2011 and 2011-2012 do not indicate an appropriations limit for Oakdale in Table 1,²³⁹ but they do indicate that Oakdale received property tax revenue in Table 8 for 2010-2011 and 2011-2012.²⁴⁰

Similarly, Glenn-Colusa submitted a request to be substituted in as a party on both test claims. Glenn-Colusa asserted in its request that it “is subject to the tax and spend limitations of Articles XIII A and XIII B of the California Constitution,” and is an agricultural water supplier, subject to “the mandates imposed by the Water Conservation Act of 2009...and the Agricultural Water Measurement Regulations.”²⁴¹ In declarations attached to the Request for Substitution, Thaddeus Bettner, General Manager of Glenn-Colusa, asserts that the District “received \$520,420 in property taxes in 2013 and expects to receive \$528,300 in 2014.”²⁴²

Table 8 of the Special Districts Annual Report indicates that Glenn-Colusa collected property taxes in 2010-2011 and 2011-2012,²⁴³ but Table 1 does not indicate an appropriations limit for the district.²⁴⁴

²³⁸ Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District, page 2.

²³⁹ Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 159 and 157, respectively.

²⁴⁰ Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 381 and 379, respectively.

²⁴¹ Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, pages 1-2.

²⁴² Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, page 7.

²⁴³ Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 357 and 355, respectively.

²⁴⁴ Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 104 and 101, respectively.

Based on the evidence in the record, including the declarations of the General Managers of Oakdale and Glenn-Colusa, as well as the information reported to the SCO in the Special Districts Annual Reports for fiscal years 2010-2011 and 2011-2012, both the substitute claimants collect some amount of property tax revenue. In turn, because property tax revenue is subject to the appropriations limit, both claimants also expend revenues subject to the appropriations limit, in accordance with article XIII B. A local government entity that is subject to both articles XIII A and XIII B is eligible for subvention under article XIII B, section 6, and is an eligible claimant before the Commission.

The Commission concludes that both Oakdale and Glenn-Colusa are subject to article XIII B as a matter of law, because they have authority to collect and expend property tax revenue.

Based on the foregoing, the Commission finds that Oakdale and Glenn-Colusa are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

B. Some of the Test Claim Statutes and Regulations Impose New Requirements on Urban Retail Water Suppliers.

Test claim 10-TC-12 alleged all of Part 2.55 of Division 6 of the Water Code, which consists of sections 10608 through 10608.64. The following analysis addresses only those sections of Part 2.55 containing mandatory language, and those sections specifically alleged in the test claim narrative. Sections 10608.22, 10608.28, 10608.36, 10608.43, 10608.44, 10608.50, 10608.56, 10608.60, and 10608.64 are not analyzed below, because those sections were not specifically alleged to impose increased costs mandated by the state, and because they do not impose new requirements on local government.

1. Water Code sections 10608, 10608.4(d), 10608.12(a; p), and 10608.16(a), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Water Code section 10608 states the Legislature's findings and declarations, including: "Water is a public resource that the California Constitution protects against waste and unreasonable use..." and "Reduced water use through conservation provides significant energy and environmental benefits, and can help protect water quality, improve streamflows, and reduce greenhouse gas emissions." Subdivision (g), specifically invoked by the claimants,²⁴⁵ states that "[t]he Governor has called for a 20 percent per capita reduction in urban water use statewide by 2020."²⁴⁶ The plain language of this section establishes a goal, but does not, itself, impose any new requirements on local government.

Water Code section 10608.4 as added, states the "intent of the legislature," including, as highlighted by the claimants,²⁴⁷ to "[e]stablish a method or methods for urban retail water suppliers to determine targets for achieving increased water use efficiency by the year 2020, in

²⁴⁵ Exhibit A, Test Claim 10-TC-12, page 3.

²⁴⁶ Water Code section 10608(a; d; g) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁴⁷ Exhibit A, Test Claim 10-TC-12, page 3.

accordance with the Governor’s goal of a 20 percent reduction.”²⁴⁸ The plain language of this section expresses legislative intent, and does not impose any new activities on local government

Water Code section 10608.16(a), as added, states that “[t]he state shall achieve a 20 percent reduction in urban per capita water use in California on or before December 31, 2020.” In addition, section 10608.16(b) provides that the state “shall make incremental progress towards the state target specified in subdivision (a) by reducing urban per capita water use by at least 10 percent on or before December 31, 2015.”²⁴⁹ The plain language of this section is directed to the State generally, and does not impose any new mandated activities on local government.

Water Code section 10608.12 provides that “the following definitions govern the construction of this part:” An “urban retail water supplier “ is defined as “a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes.”²⁵⁰ The claimants allege that the Water Conservation Act imposes unfunded state mandates on urban retail water suppliers, and that South Feather and Paradise “are ‘urban retail water suppliers,’ as defined.”²⁵¹ Likewise, under section 10608.12, an “agricultural water supplier” is defined as “a water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water.”²⁵² The claimants allege that this definition “expanded the definition of what constitutes an agricultural water supplier,” and thus required a greater number of entities to adopt AWMPs and perform other activities under the Water Code.²⁵³ However, whatever new activities may be required by the test claim statutes, the plain language of amended section 10608.12 does not impose any new requirements on urban retail water suppliers or agricultural water suppliers; section 10608.12 merely prescribes the applicability and scope of the other requirements of the test claim statutes.

Based on the foregoing, the Commission finds that sections 10608, 10608.4 10608.12, and 10608.16, pled as added, do not impose any new requirements on local government, and are therefore denied.

2. Water Code sections 10608.20(a; b; e; and j), 10608.24, and 10608.40, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) impose new required activities on urban water suppliers.

Prior law required the preparation of an urban water management plan, and required urban water suppliers to update the plan every five years. The test claim statutes add additional information related to conservation goals to that required to be included in a supplier’s UWMP, and authorize an extension of time from December 31, 2010 to July 1, 2011 for the adoption of the next UWMP. As added by the test claim statute, section 10608.20 provides, in pertinent part:

²⁴⁸ Water Code section 10608.4 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁴⁹ Water Code section 10608.16(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁰ Water Code section 10608.12(p) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵¹ Exhibit A, 10-TC-12, page 2.

²⁵² Water Code section 10608.12(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵³ Exhibit A, 10-TC-12, page 8.

(a)(1) Each urban retail water supplier shall develop urban water use targets and an interim urban water use target by July 1, 2011. Urban retail water suppliers may elect to determine and report progress toward achieving these targets on an individual or regional basis, as provided in subdivision (a) of Section 10608.28, and may determine the targets on a fiscal year or calendar year basis.

(2) It is the intent of the Legislature that the urban water use targets described in subdivision (a) cumulatively result in a 20-percent reduction from the baseline daily per capita water use by December 31, 2020.

(b) An urban retail water supplier shall adopt one of the following methods for determining its urban water use target pursuant to subdivision (a):

(1) Eighty percent of the urban retail water supplier's baseline per capita daily water use.

(2) The per capita daily water use that is estimated using the sum of the following performance standards:

(A) For indoor residential water use, 55 gallons per capita daily water use as a provisional standard. Upon completion of the department's 2016 report to the Legislature pursuant to Section 10608.42, this standard may be adjusted by the Legislature by statute.

(B) For landscape irrigated through dedicated or residential meters or connections, water efficiency equivalent to the standards of the Model Water Efficient Landscape Ordinance set forth in Chapter 2.7 (commencing with Section 490) of Division 2 of Title 23 of the California Code of Regulations, as in effect the later of the year of the landscape's installation or 1992. An urban retail water supplier using the approach specified in this subparagraph shall use satellite imagery, site visits, or other best available technology to develop an accurate estimate of landscaped areas.

(C) For commercial, industrial, and institutional uses, a 10-percent reduction in water use from the baseline commercial, industrial, and institutional water use by 2020.

(3) Ninety-five percent of the applicable state hydrologic region target, as set forth in the state's draft 20x2020 Water Conservation Plan (dated April 30, 2009). If the service area of an urban water supplier includes more than one hydrologic region, the supplier shall apportion its service area to each region based on population or area.

(4) A method that shall be identified and developed by the department, through a public process, and reported to the Legislature no later than December 31, 2010...²⁵⁴

In addition, section 10608.20(e) provides that an urban retail water supplier "shall include in its urban water management plan due in 2010...the baseline daily per capita water use, urban water

²⁵⁴ Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining estimates, including references to supporting data.”²⁵⁵

And, section 10608.20(j) provides that an urban retail water supplier “shall be granted an extension to July 1, 2011...” to adopt a complying water management plan, and that an urban retail water supplier that adopts an urban water management plan due in 2010 “that does not use the methodologies developed by the department pursuant to subdivision (h) shall amend the plan by July 1, 2011 to comply with this part.”²⁵⁶

Section 10608.40 provides that an urban retail water supplier shall also “report to [DWR] on their progress in meeting their urban water use targets as part of their [UWMPs] submitted pursuant to Section 10631.”²⁵⁷

Section 10608.24 provides that each urban retail water supplier “shall meet its interim urban water use target by December 31, 2015,” and “shall meet its [final] urban water use target by December 31, 2020.”²⁵⁸

As discussed above, prior law required the adoption of an UWMP, which, pursuant to section 10631, included a detailed description and analysis of water supplies within the service area, including reliability of supply in normal, dry, and multiple dry years, and a description and evaluation of water demand management measures currently being implemented and scheduled for implementation.²⁵⁹ Pursuant to existing section 10621, that plan was required to be updated “once every five years...in years ending in five and zero.”²⁶⁰ And, existing section 10631(e) also required identification and quantification of past, current and projected water use over a five-year period including, but not necessarily limited to, all of the following uses:

- (A) Single-family residential.
- (B) Multifamily.
- (C) Commercial.
- (D) Industrial.
- (E) Institutional and governmental.
- (F) Landscape.
- (G) Sales to other agencies.
- (H) Saline water intrusion barriers, groundwater recharge, or conjunctive use, or any combination thereof.

²⁵⁵ Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁶ Water Code section 10608.20(j) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁷ Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁸ Water Code section 10608.24(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁹ Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

²⁶⁰ Water Code section 10621 (Stats. 2007, ch. 64 (AB 1376)).

(I) Agricultural.²⁶¹

However, nothing in prior law required the adoption of urban water use targets, baseline information on a per capita basis (as opposed to on a type of use basis), interim and final water use targets, assessment of present and proposed measures to achieve the targeted reductions, or a report on the supplier's progress toward meeting the reductions.

Based on the foregoing, the Commission finds that Water Code sections 10608.20, 10608.24, and 10608.40, as added by the test claim statute, impose new requirements on urban retail water suppliers, as follows:

- Develop urban water use targets and an interim urban water use targets by July 1, 2011.²⁶²
- Adopt one of the methods specified in section 10608.20(b) for determining an urban water use target.²⁶³
- Include in its urban water management plan due in 2010 the baseline daily per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining those estimates, including references to supporting data.²⁶⁴
- Report to DWR on their progress in meeting urban water use targets as part of their UWMPs.²⁶⁵
- Amend its urban water management plan, by July 1, 2011, to allow use of technical methodologies developed by the department pursuant to subdivisions (b) and (h) of section 10608.20.²⁶⁶
- Meet interim urban water use target by December 31, 2015.²⁶⁷
- Meet final urban water use target by December 31, 2020.²⁶⁸

The activities required to meet the interim and final urban water use targets are intended to vary significantly among local governments based upon differences in climate, population density, levels of per capita water use according to plant water needs, levels of commercial, industrial, and institutional water use, and the amount of hardening that has occurred as a result of prior conservation measures implemented in different regions

²⁶¹ Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

²⁶² Water Code section 10608.20(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶³ Water Code section 10608.20(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁴ Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁵ Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁶ Water Code section 10608.20(i) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁷ Water Code section 10608.24(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁸ Water Code section 10608.24(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

throughout the state. Local variations, therefore, are not expressly stated in the test claim statutes.

3. Water Code section 10608.26, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), requires urban water suppliers to conduct at least one public hearing to allow community input regarding an urban retail water supplier's implementation plan.

Section 10608.26 provides that “[i]n complying with this part,” an urban retail water supplier shall conduct at least one public hearing “to accomplish all of the following:” (1) allow community input regarding the urban retail water supplier’s implementation plan; (2) consider the economic impacts of the urban retail water supplier’s implementation plan; and (3) adopt one of the four methods provided in section 10608.20(b) for determining its urban water use target.²⁶⁹

The claimants assert that “prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts of the implementing the 20% reduction [*sic*], or to adopt a method for determining an urban water use target.”²⁷⁰

Section 10642, added by Statutes 1983, chapter 1009, required a public hearing prior to *adopting an UWMP*, as follows:

Prior to adopting a plan, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to Section 6066 of the Government Code...²⁷¹

However, section 10608.26 requires a public hearing for purposes of allowing public input regarding an implementation plan, considering the economic impacts of an implementation plan, or adopting a method for determining the urban water supplier’s water use targets, as required by section 10608.20(b). DWR, the agency with responsibility for implementing the Water Conservation Act, has interpreted these two requirements as only requiring one hearing.²⁷² As the implementing agency, DWR’s interpretation of the Act is entitled to great weight.²⁷³

Based on the foregoing, the Commission finds that section 10608.26 imposes a new and additional requirement on urban retail water suppliers, as follows:

²⁶⁹ Water Code section 10608.26(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁷⁰ Exhibit A, 10-TC-12, page 8 [citing Water Code section 10608.26(a)(1-3)].

²⁷¹ Water Code section 10642 (Stats. 1983, ch. 1009) [citing Government Code section 6066 (Stats. 1959, ch. 954), which provides for publication once per week for two successive weeks in a newspaper of general circulation].

²⁷² Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

²⁷³ *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11.

Include in the public hearing on the adoption of the UWMP an opportunity for community input regarding the urban retail water supplier's implementation plan; consideration of the economic impacts of the implementation plan; and the adoption of a method, pursuant to section 10608.20(b), for determining urban water use targets.²⁷⁴

4. Water Code section 10608.42, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new requirements on local government.

Section 10608.42 provides:

The department shall review the 2015 urban water management plans and report to the Legislature by December 31, 2016, on progress towards achieving a 20-percent reduction in urban water use by December 31, 2020. The report shall include recommendations on changes to water efficiency standards or urban water use targets in order to achieve the 20-percent reduction and to reflect updated efficiency information and technology changes.²⁷⁵

The claimants allege that section 10608.42 requires an UWMP, adopted by an urban retail water supplier, to "describe the urban retail water supplier's progress toward achieving the 20% reduction by 2020."²⁷⁶ However, the plain language of this section is directed to DWR, and does not, itself, impose any new activities or requirements on local government.

Based on the foregoing, the Commission finds that section 10608.42 does not impose any new requirements on local government, and is therefore denied.

5. Water Code sections 10608.56 and 10608.8, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Section 10806.56 provides that "[o]n and after July 1, 2016, an urban retail water supplier is not eligible for a water grant or loan awarded or administered by the state unless the supplier complies with this part."²⁷⁷ The plain language of this section does not impose any new requirements on local government; the section only states the consequence of failing to comply with all other requirements of the Act.

Section 10608.8 provides that "[b]ecause an urban agency is not required to meet its urban water use target until 2020 pursuant to subdivision (b) of Section 10608.24, an urban retail water supplier's failure to meet those targets shall not establish a violation of law for purposes of any state administrative or judicial proceeding prior to January 1, 2021."²⁷⁸ The plain language of

²⁷⁴ Water Code section 10608.26 ((Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)). See also Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

²⁷⁵ Water Code section 10608.42 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁷⁶ Exhibit A, 10-TC-12, page 3.

²⁷⁷ Water Code section 10608.56 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁷⁸ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

this section does not impose any new requirements on local government; rather, the section states that no violation of law shall occur until after the date that urban water use targets are supposed to be met.

The claimants allege that Water Code section 10608.56 imposes reimbursable state-mandated costs, alleging that “[f]ailure to comply with the aforementioned mandates by South Feather and Paradise will result, on and after July 1, 2016, in ineligibility for water grants or loans awarded or administered by the State of California.” In addition, the claimants allege that “a failure to meet the 20% target shall be a violation of law on and after January 1, 2021,” citing Water Code section 10608.8.²⁷⁹ The plain language of sections 10608.8 and 10608.56, as described above, do not impose any new activities or tasks on local government; the provisions that the claimants allege only state the consequences of failing to comply with all other requirements of the Act.

Based on the foregoing, the Commission finds that sections 10806.56 and 10806.8 do not impose any new requirements on local government, and are therefore denied.

C. Some of the Test Claim Statutes and Regulations Impose New Requirements on Non-exempt Agricultural Water Suppliers.

Chapter 4 of Part 2.55 of Division 6 of the Water Code consists of a single code section that addresses water conservation requirements for agricultural water suppliers: section 10608.48. The remaining provisions of the test claim statute addressing agricultural water suppliers were added in Part 2.8 of Division 6 of the Water Code, consisting of sections 10800-10853, and address agricultural water management planning requirements. Sections 10608.8 and 10828 provide for exemptions from the requirements of Part 2.55 and Part 2.8, respectively, under certain circumstances, which are addressed where relevant below.

1. Water Code section 10608.48(a-c), as amended by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), imposes new requirements on some agricultural water suppliers to implement efficient water management practices, including measurement and a pricing structure based in part on quantity of water delivered; and to implement up to fourteen other efficient water management practices, if locally cost effective and technically feasible.

Section 10608.48 provides for the implementation by agricultural water suppliers of specified critical efficient water management practices, including measurement and volume-based pricing; and *additional* efficient water management practices, where locally cost effective and technically feasible, as follows:

- (a) On or before July 31, 2012, an agricultural water supplier shall implement efficient water management practices pursuant to subdivisions (b) and (c).
- (b) Agricultural water suppliers shall implement *all of the following critical efficient management practices*:
 - (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).

²⁷⁹ Exhibit A, 10-TC-12, page 4.

(2) Adopt a pricing structure for water customers based at least in part on quantity delivered.

(c) Agricultural water suppliers shall implement *additional efficient management practices*, including, but not limited to, practices to accomplish all of the following, *if the measures are locally cost effective and technically feasible*:

- (1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.
- (2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.
- (3) Facilitate the financing of capital improvements for on-farm irrigation systems.
- (4) Implement an incentive pricing structure that promotes one or more of the following goals:
 - (A) More efficient water use at the farm level.
 - (B) Conjunctive use of groundwater.
 - (C) Appropriate increase of groundwater recharge.
 - (D) Reduction in problem drainage.
 - (E) Improved management of environmental resources.
 - (F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.
- (5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.
- (6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.
- (7) Construct and operate supplier spill and tailwater recovery systems.
- (8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.
- (9) Automate canal control structures.
- (10) Facilitate or promote customer pump testing and evaluation.
- (11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.
- (12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:
 - (A) On-farm irrigation and drainage system evaluations.

- (B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.
 - (C) Surface water, groundwater, and drainage water quantity and quality data.
 - (D) Agricultural water management educational programs and materials for farmers, staff, and the public.
- (13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.
- (14) Evaluate and improve the efficiencies of the supplier's pumps.²⁸⁰

The claimants allege that section 10608.48 requires agricultural water suppliers (Oakdale and Glenn-Colusa) to “measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate.” In addition, they allege, agricultural water suppliers are required to “adopt a pricing structure for water customers based on the quantity of water delivered.” The claimants further allege that “[i]f ‘locally cost effective’ and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices” specified in section 10608.48(c).²⁸¹

The claimants argue that prior to the test claim statute, agricultural water suppliers “were not required to have a pricing structure based, at least in part, on the quantity of water delivered,” and were not required to measure the volume of water delivered if it was not locally cost effective to do so. The claimants assert that “[w]hile subdivision (a) of Water Code section 531.10 was a preexisting obligation, subdivision (b) of that same section gave an exception to the farm-gate measurement requirement if the measurement devices were not locally cost effective.” The claimants conclude that now “[t]he Act requires compliance with subdivision (a) regardless of whether it is locally cost effective.”²⁸² In addition, the claimants assert that prior to the Act, “there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible.”²⁸³

Section 531.10 of the Water Measurement Law, as added by Statutes 2007, chapter 675 provides, in its entirety:

- (a) An agricultural water supplier shall submit an annual report to the department that summarizes aggregated farm-gate delivery data, on a monthly or bimonthly basis, using best professional practices.
- (b) Nothing in this article shall be construed to require the implementation of water measurement programs or practices that are not locally cost effective.

²⁸⁰ Water Code section 10608.48(a-c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)) [emphasis added].

²⁸¹ Exhibit A, Test Claim 10-TC-12, page 4.

²⁸² Exhibit A, 10-TC-12, page 8.

²⁸³ Exhibit A, 10-TC-12, page 8.

(c) It is the intent of the Legislature that the requirements of this section shall complement and not affect the scope of authority granted to the department or the board by provisions of law other than this article.

The plain language of section 531.10 required agricultural water suppliers to submit an annual report to DWR summarizing aggregated data on water delivered to individual agricultural customers using best professional practices, but only if water measurement programs or practices were locally cost effective.²⁸⁴ Therefore, to the extent that water measurement programs or practices *were* locally cost effective, such activities were required to comply with prior law. Section 10608.48(b), in turn, does not impose a *new* requirement to “[m]easure the volume of water delivered to customers with sufficient accuracy to comply with [section 531.10(a),]” if such water measurement activities were already performed. However, section 10608.48(b) also requires an agricultural water supplier, *regardless of local cost-effectiveness*, to “[m]easure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 *and to implement paragraph (2),*” which requires suppliers to implement a pricing structure based at least in part on volume of water delivered. Therefore, section 10608.48(b) imposes a new requirement to the extent that prior law activities were not sufficient to also implement a pricing structure based at least in part on quantity of water delivered.

Moreover, Water Code section 10608.8 provides that “[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement” (QSA), as defined in Statutes 2002, chapter 617, section 1, for as long as the QSA remains in effect.²⁸⁵ The local agency parties to the QSA include the San Diego County Water Authority, Coachella Valley Water District, Imperial Irrigation District, and Metropolitan Water District of Southern California.²⁸⁶ As a result, by the plain language of Water Code section 10608.8 those entities are exempt and are not mandated by the state to comply with the requirements of Part 2.55 of Division 6 of the Water Code, including section 10608.48.

Based on the foregoing, the Commission finds that section 10608.48 imposes new requirements on agricultural water suppliers, except those that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617, section 1, for as long as QSA remains in effect, as follows:

- Measure the volume of water delivered to customers with sufficient accuracy to (1) comply with subdivision (a) of Water Code section 531.10, which previously imposed the requirement, with specified exceptions, for agricultural water suppliers to submit an annual report summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis, using best professional practices; and (2) implement a pricing structure for water customers based at least in part on quantity of water delivered.²⁸⁷

²⁸⁴ Water Code section 531.10 (Stats. 2007, Ch. 675 (AB 1404)).

²⁸⁵ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

²⁸⁶ Exhibit X, Quantification Settlement Agreement, dated October 10, 2003.

²⁸⁷ Water Code section 10608.48(b)(1) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

*This activity is only newly required if measurement of farm-gate delivery data was not previously performed by the agricultural water supplier pursuant to a determination under section 531.10(b) that such measurement programs or practices were not locally cost effective, or if measurement data was not sufficient to implement a pricing structure based at least in part on quantity of water delivered.*²⁸⁸

- Implement a pricing structure for water customers based at least in part on quantity of water delivered.²⁸⁹
- *If the measures are locally cost effective and technically feasible, implement additional efficient management practices, including, but not limited to, practices to accomplish all of the following:*
 - (1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.
 - (2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.
 - (3) Facilitate the financing of capital improvements for on-farm irrigation systems.
 - (4) Implement an incentive pricing structure that promotes one or more of the following goals:
 - (A) More efficient water use at the farm level.
 - (B) Conjunctive use of groundwater.
 - (C) Appropriate increase of groundwater recharge.
 - (D) Reduction in problem drainage.
 - (E) Improved management of environmental resources.
 - (F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.
 - (5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.
 - (6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

²⁸⁸ Water Code section 531.10(a-b) previously required reporting annually to the Department of Water Resources aggregated farm-gate delivery data, summarized on a monthly or bi-monthly basis, unless such measurement programs or practices were not locally cost effective. If an agricultural water supplier had not determined that such practices were not locally cost effective, then the prior law, Section 531.10(a) would have required measurement, and the activity is not therefore new.

²⁸⁹ Water Code section 10608.48(b)(2) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- (7) Construct and operate supplier spill and tailwater recovery systems.
 - (8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.
 - (9) Automate canal control structures.
 - (10) Facilitate or promote customer pump testing and evaluation.
 - (11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.
 - (12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:
 - (A) On-farm irrigation and drainage system evaluations.
 - (B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.
 - (C) Surface water, groundwater, and drainage water quantity and quality data.
 - (D) Agricultural water management educational programs and materials for farmers, staff, and the public.
 - (13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.
 - (14) Evaluate and improve the efficiencies of the supplier's pumps.²⁹⁰
2. Water Code sections 10608.48(d-f) and 10820-10829, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers, as defined pursuant to section 10608.12, to prepare and adopt on or before December 31, 2012, and to update on or before December 31, 2015, and every five years thereafter, an agricultural water management plan, as specified. However, many agricultural water suppliers, including all participants in the Central Valley Project and United States Bureau of Reclamation water contracts, are exempt from the requirement to *prepare and adopt an agricultural water management plan pursuant to 10826*, because they were already required by existing federal law to prepare a water conservation plan, which they may submit to satisfy this requirement.

As noted above, the test claim statute repealed and added Part 2.8 of Division 6 of the Water Code, commencing with section 10800. While a number of the activities alleged in these consolidated test claims were required by the prior provisions of the Water Code that were repealed and replaced by the test claim statute, those provisions were by their own terms no longer operative immediately prior to the effective date of the test claim statute. Former Water Code section 10855, as added by Statutes 1986, chapter 954, provided that “[t]his part shall

²⁹⁰ Water Code section 10608.48(c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

remain operative only until January 1, 1993...” Therefore, the provisions added by the test claim statute, which became effective on February 3, 2010, impose new requirements or activities.²⁹¹

Section 10820, as added, provides that all agricultural water suppliers *shall prepare and adopt* an AWMP on or before December 31, 2012, and shall update that plan on December 31, 2015, and on or before December 31 every five years thereafter.²⁹²

Section 10826, as added, provides that the plan “shall do all of the following:”

(a) Describe the agricultural water supplier and the service area, including all of the following:

- (1) Size of the service area.
- (2) Location of the service area and its water management facilities.
- (3) Terrain and soils.
- (4) Climate.
- (5) Operating rules and regulations.
- (6) Water delivery measurements or calculations.
- (7) Water rate schedules and billing.
- (8) Water shortage allocation policies.

(b) Describe the quantity and quality of water resources of the agricultural water supplier, including all of the following:

- (1) Surface water supply.
- (2) Groundwater supply.
- (3) Other water supplies.
- (4) Source water quality monitoring practices.
- (5) Water uses within the agricultural water supplier’s service area, including all of the following:
 - (A) Agricultural.
 - (B) Environmental.
 - (C) Recreational.
 - (D) Municipal and industrial.
 - (E) Groundwater recharge.
 - (F) Transfers and exchanges.

²⁹¹ Bills introduced in an extraordinary session take effect 91 days after the final adjournment of that extraordinary session. (Cal. Const. Art. IV, Sec. 8(c)(1).) The 7th Extraordinary Session concluded on November 4, 2009. Thus, the effective date of SB X7 7 is February 3, 2010.

²⁹² Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- (G) Other water uses.
- (6) Drainage from the water supplier's service area.
- (7) Water accounting, including all of the following:
 - (A) Quantifying the water supplier's water supplies.
 - (B) Tabulating water uses.
 - (C) Overall water budget.
- (8) Water supply reliability.
- (c) Include an analysis, based on available information, of the effect of climate change on future water supplies.
- (d) Describe previous water management activities.
- (e) Include in the plan the water use efficiency information required pursuant to Section 10608.48.²⁹³

Meanwhile, section 10608.48(d) provides that agricultural water suppliers "shall include in the agricultural water management plans required pursuant to [section 10820] a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report, and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future."²⁹⁴

Furthermore, section 10608.48 provides that if a supplier "determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination."²⁹⁵ And, the section further provides that "[t]he data shall be reported using a standardized form developed pursuant to Section 10608.52."²⁹⁶

In addition, section 10828 provides that:

(a) Agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, *may submit those water conservation plans to satisfy the requirements of Section 10826, if both of the following apply:*

- (1) The agricultural water supplier has adopted and submitted the water conservation plan to the United States Bureau of Reclamation within the previous four years.
- (2) The United States Bureau of Reclamation has accepted the water conservation plan as adequate.

²⁹³ Water Code section 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁴ Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁵ Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁶ *Ibid.*

(b) This part does not require agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, to prepare and adopt water conservation plans according to a schedule that is different from that required by the United States Bureau of Reclamation.²⁹⁷

And, section 10829 provides that an agricultural water supplier may satisfy the requirements “of this part” by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.²⁹⁸

Based on the plain language of section 10828, those local agencies who are CVP or USBR contractors may submit a copy of their water conservation plan already submitted to USBR in satisfaction of the requirements of section 10826 (which provides for the contents of an AWMP). In addition, section 10828(b) provides that CVP or USBR contractors are not required to adhere to the “schedule” for preparing and adopting AWMPs, as provided in section 10820, above. Therefore, the requirements of section 10820, to prepare and adopt an AWMP on or before December 31, 2012, and to update the AWMP on or before December 31, 2015 and every five years thereafter, do not apply to CVP or USBR contractors, who may instead rely on the schedule for updating and readopting their water conservation plans.

Both Glenn-Colusa and Oakdale are contractors with the United States Bureau of Reclamation (USBR) and as a result are required by federal law to prepare water conservation plans. Glenn-Colusa and Oakdale are also CVP contractors, as are dozens of other local agencies.²⁹⁹

As noted above, Water Code section 10608.8 provides that “[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement” (QSA), as defined in Statutes 2002, chapter 617, section 1 for as long as QSA remains in effect.³⁰⁰ Therefore, a supplier that is a party to the QSA is not mandated by the state to include the water use efficiency reporting requirements in the plan pursuant to section 10680.48.

Additionally, section 10608.48(f) provides that an agricultural water supplier “may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to the United States Bureau of Reclamation that meets the requirements described in Section 10828.”³⁰¹ Therefore, the requirements to include in a supplier’s AWMP a report on efficient water management practices and documentation on those practices determined not to be cost effective or technically feasible, pursuant to section 10608.48(d-e), do not apply to CVP or

²⁹⁷ Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁸ Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁹ Exhibit X, Bureau of Reclamation, Mid-Pacific Region, Central Valley Project (CVP) Water Contractors, dated March 4, 2014.

³⁰⁰ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁰¹ Water Code section 10608.48(e; f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

USBR contractors that prepare and submit water conservation plans to USBR.³⁰² The *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, issued by DWR, “encourages” suppliers to file certain “documentation as an attachment with the USBR-accepted water management/conservation plan.”³⁰³ However, the plain language of section 10608.48(f) states that a supplier may satisfy the requirements of section 10608.48(d) and (e) by submitting to DWR its water conservation plan prepared for USBR. And, section 10828, as shown above, exempts CVP and USBR contractors from the requirement to prepare an AWMP in the first instance. Finally, pursuant to section 10829, the requirement to adopt an AWMP in the first instance does not apply if the supplier adopts a UWMP, or participates in regional water management planning.

Based on the foregoing, the Commission finds that newly added sections 10820 and 10826, and 10608.48(d-f), impose the following new requirements on agricultural water suppliers, except for suppliers that adopt a UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and CVP and USBR contractors:

- On or before December 31, 2012, prepare and adopt an agricultural water management plan in accordance with section 10826.³⁰⁴
- On or before December 31, 2015, and every five years thereafter, update the agricultural water management plan, in accordance with section 10820 et seq.³⁰⁵
- If a supplier becomes an agricultural water supplier, as defined, after December 31, 2012, that agricultural water supplier shall prepare and adopt an agricultural water management plan within one year after the date that it has become an agricultural water supplier.³⁰⁶
- Include in the agricultural water management plans required pursuant to Water Code section 10800 et seq. a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report,

³⁰² Water Code section 10608.48(f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁰³ Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 11, “The agricultural water suppliers that submit a plan to USBR may meet the requirements of section 10608.48 (d) and (e) [report of EWMPs implemented, planned for implementation, and estimate of efficiency improvements, as well as documentation for not locally cost effective EWMPs] by submitting the USBR-accepted plan to DWR. “DWR encourages CVPIA/RRA water suppliers to also provide a report on water use efficiency information (required by section 10608.48(d);see Section 3.7 of this Guidebook).” Emphasis added.

³⁰⁴ Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁰⁵ Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁰⁶ Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future.³⁰⁷

*In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.*³⁰⁸

- If an agricultural water supplier determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination.³⁰⁹

*In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.*³¹⁰

- Report the data using a standardized form developed pursuant to Water Code section 10608.52.³¹¹

*An agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.*³¹²

3. Section 10608.48(g-i), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new activities on local government.

Section 10608.48(g) provides that on or before December 31, 2013, DWR shall submit to the Legislature a report on agricultural efficient water management practices that have been implemented or are planned to be implemented, and an assessment of those practices and their effects on agricultural operations. Section 10608.48(h) states that DWR “may update the efficient water management practices required pursuant to [section 10608.48(c)],” but only after conducting public hearings. Section 10608.48(i) provides that DWR “shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement” of section 10608.48(b).

The plain language of these sections section 10608.48(g-i) is directed to DWR, and does not impose any activities or requirements on local government.

4. Sections 10821, 10841, 10842, 10843, and 10844, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers.

³⁰⁷ Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁰⁸ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁰⁹ Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁰ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³¹¹ Water Code section 10608.48(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹² Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

Water Code section 10821, as added, provides that an agricultural water supplier required to prepare an AWMP pursuant to this part, “shall notify each city or county within which the supplier provides water supplies that the agricultural water supplier will be preparing the plan or reviewing the plan and considering amendments or changes to the plan.”³¹³

In addition, newly added section 10841 requires that the plan be made available for public inspection and that a public hearing shall be held as follows:

Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned agricultural water supplier pursuant to Section 6066 of the Government Code. A privately owned agricultural water supplier shall provide an equivalent notice within its service area and shall provide a reasonably equivalent opportunity that would otherwise be afforded through a public hearing process for interested parties to provide input on the plan...³¹⁴

Section 10842 provides that an agricultural water supplier shall implement its AWMP “in accordance with the schedule set forth in its plan.”³¹⁵

Following adoption of an AWMP, section 10843 requires an agricultural water supplier to submit a copy of its AWMP, no later than 30 days after adoption, to DWR and to the following affected or interested entities:

- (2) Any city, county, or city and county within which the agricultural water supplier provides water supplies.
- (3) Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.
- (4) Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
- (5) Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
- (6) The California State Library.
- (7) Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.³¹⁶

Finally, newly added section 10844 requires an agricultural water supplier to make its water management plan available for public review via the internet, as follows:

³¹³ Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁴ Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁵ Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁶ Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- (a) Not later than 30 days after the date of adopting its plan, the agricultural water supplier shall make the plan available for public review on the agricultural water supplier's Internet Web site.
- (b) An agricultural water supplier that does not have an Internet Web site shall submit to [DWR], not later than 30 days after the date of adopting its plan, a copy of the adopted plan in an electronic format. [DWR] shall make the plan available for public review on [its] Internet Web site.³¹⁷

The prior provisions of the Water Code pertaining to the adoption and implementation of AWMPs, as explained above, were inoperative by their own terms as of January 1, 1993.³¹⁸ Therefore, the requirements to hold a public hearing, to implement the plan in accordance with the schedule, to submit copies to DWR and other specified local entities, and to make the plan available by either posting the plan on the supplier's web site, or by sending an electronic copy to DWR for posting on its web site, are new activities with respect to prior law.

However, section 10828, as discussed above, provides that USBR or CVP contractors may satisfy the requirements of section 10826 by submitting their water conservation plans adopted within the previous four years pursuant to the Central Valley Improvement Act or the Reclamation Reform Act of 1982.³¹⁹ This section does not expressly exempt CVP or USBR contractors from all requirements of Part 2.8, but only from the content requirements of the plan itself, and the requirement to adopt according to the "schedule" set forth in section 10820, as discussed above. Accordingly, DWR's *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 [AWMP]* provides:

All agricultural water suppliers required to prepare new agricultural water management/conservation plans must prepare and complete their plan in accordance with Water Code Part 2.8, Article 1 and Article 3 requirements for notification, public participation, adoption, and submittal (refer to Section 3.1 for details). *The federal review process may incorporate many requirements specified in Part 2.8, Articles 1 and 3; as such the federal process may meet the requirements of Part 2.8, otherwise, the agricultural water supplier would have to complete those requirements in Part 2.8, Articles 1 and 3 that are not already a part of the federal review process.*³²⁰

Article 1 of Part 2.8 includes section 10821, which requires an agricultural water supplier to notify the city or county that it will be preparing an AWMP. Therefore, to the extent that the "federal process" of adopting a water conservation plan for USBR or CVP also requires notice to the city or county, this activity is not newly required. Article 3 of Part 2.8 includes sections 10840-10845, pertaining to the adoption and implementation of AWMPs. Those requirements include, as discussed above, noticing and holding a public hearing; implementing the plan in

³¹⁷ Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁸ See former Water Code sections 10840-10845; 10855 (Stats. 1986, ch. 954).

³¹⁹ Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁰ Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 94 [emphasis added].

accordance with the schedule set forth in the plan; submitting a copy of the AWMP to specified state and local entities within 30 days after adoption; and making the AWMP available on the supplier's website, or submitting the AWMP for posting on DWR's website. To the extent that the "federal process" satisfies those requirements, they are not newly required by the test claim statutes.

In addition, as noted above, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.³²¹ That exception would include all of the notice and hearing requirements identified below.

Based on the foregoing, the Commission finds that Water Code sections 10821, 10841, 10842, 10843, and 10844 impose new requirements on agricultural water suppliers, except those that adopt an UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and except to the extent that suppliers that are USBR or CVP contractors have water conservation plans that satisfy the AWMP adoption requirements, as follows:

- Notify the city or county within which the agricultural supplier provides water supplies that it will be preparing the AWMP or reviewing the AWMP and considering amendments or changes.³²²
- Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan.³²³
- Prior to the hearing, notice of the time and place of hearing shall be published in a newspaper within the jurisdiction of the publicly owned agricultural water supplier once a week for two successive weeks, as specified in Government Code 6066.³²⁴
- Implement the AWMP in accordance with the schedule set forth in the AWMP.³²⁵
- An agricultural water supplier shall submit to the following entities a copy of its plan no later than 30 days after the adoption of the plan. Copies of amendments or changes to the plans shall be submitted to the entities identified within 30 days after the adoption of the amendments or changes.
 - DWR.
 - Any city, county, or city and county within which the agricultural water supplier provides water supplies.
 - Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.

³²¹ Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²² Water Code section 10821(Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²³ Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁴ Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁵ Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
- Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
- The California State Library.
- Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.³²⁶
- An agricultural water supplier shall make its agricultural water management plan available for public review on its web site not later than 30 days after adopting the plan, or for an agricultural water supplier that does not have a web site, submit an electronic copy to the Department of Water Resources not later than 30 days after adoption, and the Department shall make the plan available for public review on its web site.³²⁷

5. Agricultural Water Measurement Regulations, California Code of Regulations, Title 23, Division 6, sections 597 through 597.4, Register 2012, Number 28.

California Code of Regulations, title 23, section 597 provides that under authority included in Water Code section 10608.48(i), DWR is required to adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirements of section 10609.48(b).³²⁸ The plain language of this section does not impose any new activities or requirements on local government.

Section 597.1 provides that an agricultural water supplier providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article, and a supplier providing water to 10,000 or more irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article unless sufficient funding is provided pursuant to Water Code section 10853. A supplier providing water to 25,000 irrigated acres or more, excluding acres that receive only recycled water, is subject to this article. A supplier providing water to wildlife refuges or habitat lands, as specified, is subject to this article. A *wholesale* agricultural water supplier is subject to this article at the location at which control of the water is transferred to the receiving water supplier, but the wholesale supplier is not required to measure the ultimate deliveries to customers. A canal authority or other entity that conveys water through facilities owned by a federal agency is not subject to this article. An agricultural water supplier that is a party to the QSA, as defined in Statutes 2002, chapter 617, section 1, is not subject to this article. And finally, DWR is not subject to this article.³²⁹ None of the above-described provisions of section 597.1 impose any new requirements or activities on local government.

³²⁶ Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁷ Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁸ Code of Regulations, title 23, section 597 (Register 2012, No. 28).

³²⁹ Code of Regulations, title 23, section 597.1 (Register 2012, No. 28).

Section 597.2 provides definitions of “accuracy,” “agricultural water supplier,” “approved by an engineer,” “best professional practices,” “customer,” “delivery point,” “existing measurement device,” “farm-gate,” “irrigated acres,” “manufactured device,” “measurement device,” “new or replacement measurement device,” “recycled water,” and “type of device.”³³⁰ Based on the plain language of 597.2, the definitions provided in section 597.2 do not impose any new requirements or activities on local government.

Section 597.3 requires an agricultural water supplier to measure surface water and groundwater that it delivers to its customers and provides a range of options to comply with section 10608.48(i), as follows:

An agricultural water supplier subject to this article shall measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards in this section. The supplier may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section. Measurement device accuracy and operation shall be certified, tested, inspected and/or analyzed as described in §597.4 of this article.

(a) Measurement Options at the Delivery Point or Farm-gate of a Single Customer

An agricultural water supplier shall measure water delivered at the delivery point or farm-gate of a single customer using one of the following measurement options. The stated numerical accuracy for each measurement option is for the volume delivered. If a device measures a value other than volume, for example, flow rate, velocity or water elevation, the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume as described in §597.4(e).

- (1) An existing measurement device shall be certified to be accurate to within +12% by volume,
and,
- (2) A new or replacement measurement device shall be certified to be accurate to within:
 - (A) ±5% by volume in the laboratory if using a laboratory certification;
 - (B) ±10% by volume in the field if using a non-laboratory certification.

(b) Measurement Options at a Location Upstream of the Delivery Points or Farm-gates of Multiple Customers

- (1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer's delivery points meet either of the following conditions:

³³⁰ Code of Regulations, title 23, section 597.2 (Register 2012, No. 28).

- (A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device.
 - (B) An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at a single farm-gate, accuracy standards of measurement options in §597.3(a) cannot be met by installing a measurement device or devices (manufactured or on-site built or in-house built devices with or without additional components such as gauging rod, water level control structure at the farm-gate, etc.). If conditions change such that the accuracy standards of measurement options in §597.3(a) at the farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, a schedule, budget and finance plan to demonstrate progress to measure water at the farm-gate in compliance with §597.3(a) of this article.
- (2) An agricultural water supplier choosing an option under paragraph (b)(1) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:
- (A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those points.
 - (B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the water level or flow conditions described in §597.3(b)(1)(B) exist at individual customer's delivery points downstream of the point of measurement as approved by an engineer.
 - (C) The agricultural water supplier shall document all of the following criteria about the methodology it uses to apportion the volume of water delivered to the individual downstream customers:
 - (i) How it accounts for differences in water use among the individual customers based on but not limited to the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system, and;
 - (ii) That it is sufficient for establishing a pricing structure based at least in part on the volume delivered, and;

- (iii) That it was approved by the agricultural water supplier's governing board or body.³³¹

Thus, one option under these regulations, in order to measure the volume of water delivered, as required by section 10608.48, is measurement “at the delivery point or farm-gate of a single customer” using an existing measurement device certified to be accurate to within 12 percent by volume, or a new measurement device certified to be accurate within 5 percent if certified in a laboratory or within 10 percent if certified in the field. Another option is to measure upstream of a delivery point or farm gate if the supplier does not have legal access to the delivery point for an individual customer, or if the standards of measurement cannot be met due to large fluctuations in flow rate or velocity during the delivery season. If this option is chosen, appropriate documentation explaining the option must be provided, as described above.

The claimants allege that section 597.3 requires agricultural water suppliers to measure at a delivery point or farm gate “by either (1) using an existing measurement device, certified to be accurate within $\pm 12\%$ by volume or (2) a new or replacement measurement device, certified to be accurate within $\pm 5\%$ by volume in the laboratory if using a laboratory certification or $\pm 10\%$ by volume in the field if using a non-laboratory certification.” In addition, the claimants allege that the regulations provide for “limited exceptions” if the supplier is unable to measure at the farm-gate, which allow, in certain circumstances, for upstream measurement.³³² The claimants assert that prior to these regulations, “there was no requirement to measure water delivered to the farm-gate of *each* single customer, with limited exception.”³³³

DWR argues that these regulations merely provide options, and are not therefore a mandate. Specifically, DWR asserts that “[n]o local government is required to comply with those regulations.” DWR asserts that “the regulations exist as a resource for agricultural water suppliers who wish to comply with certain requirements...described in the 2009 Water Law.” DWR concludes that “[the regulations] are optional, and the suppliers are free to comply with the law in other ways.”³³⁴

Section 10608.48(i) provides that DWR “shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement” to comply with the measurement requirements of subdivision (b).³³⁵ The phrase “may use or implement” suggests that the regulations provide a choice for agricultural water suppliers, rather than a mandate.

However, Section 10608.48(b) states that agricultural water suppliers “shall implement all of the following critical efficient management practices...(1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to [adopt a pricing structure based in part on quantity of water delivered].”³³⁶ Moreover, the plain language of section 597.3 of the regulations, as cited above, states that an agricultural water

³³¹ Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

³³² Exhibit B, 12-TC-01, page 4.

³³³ Exhibit B, 12-TC-01, page 6.

³³⁴ Exhibit D, DWR Comments, page 11.

³³⁵ Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³³⁶ *Ibid.*

supplier “shall measure surface water and groundwater that it delivers to customers pursuant to the accuracy standards in this section.” The language states that the supplier “may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section.”³³⁷ There is no express provision for choosing a measurement option or combination of options not listed in section 597.3. Although an agricultural water supplier may pick which one of the regulatory options to comply with, it “shall” pick one of them based on the plain language of section 597.3. As a result, most agricultural water suppliers are required to implement one of the measurement options provided by 597.3. As discussed above though, there are several water suppliers exempt from this requirement, including parties to the QSA, suppliers providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, and suppliers providing water to more than 10,000 irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, unless sufficient funding is provided pursuant to Water Code section 10853. Thus, section 597.3 requires the following for those agencies which are not exempt:

- Measure water delivered at the delivery point or farm-gate of a single customer using one of the following options.
 - An existing measurement device certified to be accurate to within $\pm 12\%$ by volume.
 - A new or replacement measurement device certified to be accurate to within:
 - $\pm 5\%$ by volume in the laboratory if using a laboratory certification;
 - $\pm 10\%$ by volume in the field if using a non-laboratory certification.

If a device measures a value other than volume (e.g., flow rate, velocity or water elevation) the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume.³³⁸

- Measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers if:
 - The supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device; or
 - An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season, accuracy standards of measurement cannot be met by installing a measurement device or devices.³³⁹
- And, when a supplier chooses to measure water delivered at an upstream location:

³³⁷ Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

³³⁸ Code of Regulations, title 23, section 597.3(a) (Register 2012, No. 28).

³³⁹ Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

- Provide, where applicable, documentation to demonstrate the lack of legal access at delivery points of individual or groups of customers downstream of the point of measurement; or documentation of the water measurement device unavailability and that water level or flow conditions exist that prohibit meeting accuracy standards, as approved by an engineer.
- Document the following about its apportionment of water delivered to individual customers:
 - How the supplier accounts for differences in water use among individual customers based on the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system;
 - That it is sufficient for establishing a pricing structure based at least in part on the volume of water delivered; and
 - That it was approved by the agricultural water supplier's governing board or body.³⁴⁰

Section 597.4, also alleged in this consolidated test claim, requires that measurement devices be certified and documented as follows:

(a) Initial Certification of Device Accuracy

The accuracy of an existing, new or replacement measurement device or type of device, as required in §597.3, shall be initially certified and documented as follows:

- (1) For existing measurement devices, the device accuracy required in section 597.3(a) shall be initially certified and documented by either:
 - (A) Field-testing that is completed on a random and statistically representative sample of the existing measurement devices as described in §597.4(b)(1) and §597.4(b)(2). Field-testing shall be performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer.

Or,

 - (B) Field-inspections and analysis completed for every existing measurement device as described in §597.4(b)(3). Field-inspections and analysis shall be performed by trained individuals in the use of field inspection and analysis, and documented in a report approved by an engineer.
- (2) For new or replacement measurement devices, the device accuracy required in sections 597.3 (a)(2) shall be initially certified and documented by either:

³⁴⁰ Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

- (A) Laboratory Certification prior to installation of a measurement device as documented by the manufacturer or an entity, institution or individual that tested the device following industry-established protocols such as the National Institute for Standards and Testing (NIST) traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device.

Or,

- (B) Non-Laboratory Certification after the installation of a measurement device in the field, as documented by either:
 - (i) An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devices for each type of device installed at specified locations.

Or,

- (ii) A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.

(b) Protocols for Field-Testing and Field-Inspection and Analysis of Existing Devices

- (1) Field-testing shall be performed for a sample of existing measurement devices according to manufacturer's recommendations or design specifications and following best professional practices. It is recommended that the sample size be no less than 10% of existing devices, with a minimum of 5, and not to exceed 100 individual devices for any particular device type. Alternatively, the supplier may develop its own sampling plan using an accepted statistical methodology.
- (2) If during the field-testing of existing measurement devices, more than one quarter of the samples for any particular device type do not meet the criteria pursuant to §597.3(a), the agricultural water supplier shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed an additional 100 individual devices for the particular device type. This second round of field-testing and corrective actions shall be completed within three years of the initial field-testing.
- (3) Field-inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards

of §597.3(a) and operation and maintenance protocols meet best professional practices.

(c) Records Retention

Records documenting compliance with the requirements in §597.3 and §597.4 shall be maintained by the agricultural water supplier for ten years or two Agricultural Water Management Plan cycles.

(d) Performance Requirements

- (1) All measurement devices shall be correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.
- (2) If an installed measurement device no longer meets the accuracy requirements of §597.3(a) based on either field-testing or field-inspections and analysis as defined in sections 597.4 (a) and (b) for either the initial accuracy certification or during operations and maintenance, then the agricultural water supplier shall take appropriate corrective action, including but not limited to, repair or replacement to achieve the requirements of this article.

(e) Reporting in Agricultural Water Management Plans

Agricultural water suppliers shall report the following information in their Agricultural Water Management Plan(s):

- (1) Documentation as required to demonstrate compliance with §597.3 (b), as outlined in section §597.3(b)(2), and §597.4(b)(2).
- (2) A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.
- (3) If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:
 - (A) For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: $\text{Volume} = \text{flow rate} \times \text{duration of delivery}$.
 - (B) For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is

derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.

- (C) For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).
- (4) If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.

Thus, the plain language of section 597.4 requires agricultural water suppliers to certify and document the initial accuracy of “existing, new or replacement measurement device[s],” as specified.³⁴¹ In addition, section 597.4 provides that field-testing “shall be performed” following “best professional practices,” and either sampling “no less than 10% of existing devices,” as recommended by the department, or developing a “sampling plan using an accepted statistical methodology.” Then, if field testing results in more than a quarter of any particular devices failing the accuracy criteria described in section 597.3(a), above, the supplier “shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices...”³⁴² In addition, section 597.4 provides that records documenting compliance “shall be maintained...for ten years or two Agricultural Water Management Plan cycles.”³⁴³ Section 597.4 further provides that “all measurement devices shall be correctly installed, maintained, operated, inspected, and monitored,” and if a device no longer meets the accuracy requirements of section 597.3, the supplier “shall take appropriate corrective action,” including repair or replacement, if necessary.³⁴⁴ And finally, section 597.4 requires agricultural water suppliers to report additional information regarding their compliance and “best professional practices” for water measurement in their agricultural water measurement plan.³⁴⁵

As noted above, some agricultural water suppliers may have been required pursuant to section 531.10 to measure farm-gate water deliveries.³⁴⁶ To the extent that those measurement programs or practices satisfy the requirements of these regulations, the regulations do not impose new activities.³⁴⁷ In addition, for any agricultural water supplier that is also an urban water supplier,

³⁴¹ Code of Regulations, title 23, section 597.4(a) (Register 2012, No. 28).

³⁴² Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

³⁴³ Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

³⁴⁴ Code of Regulations, title 23, section 597.4(d) (Register 2012, No. 28).

³⁴⁵ Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

³⁴⁶ Water Code section 531.10 (Stats. 2007, ch. 675 (AB 1404)).

³⁴⁷ See discussion above addressing section 10608.48(a-c).

existing sections 525 through 527 required those entities to install water meters on new and existing service connections, as specified.³⁴⁸ To the extent that any such water meter on an agricultural service connection satisfies the measurement requirements of these regulations, the regulations do not impose any new activities or requirements.

Based on the foregoing, the Commission finds that section 597.4 imposes new requirements on agricultural water suppliers not exempt from the water measurement requirements, and not already required by existing law to take part in the programs or practices of water measurement, discussed above, that would satisfy the accuracy standards of these regulations, as follows:

- Certify the initial accuracy of existing measurement devices by either:
 - Field-testing that is completed on a random and statistically representative sample of the existing measurement devices, performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer; or
 - Field inspections and analysis for every existing measurement device, performed by individuals trained in the use of field inspection and analysis, and documented in a report approved by an engineer.³⁴⁹
- Certify the initial accuracy of new or replacement measurement devices by either:
 - Laboratory certification prior to installation of the device as documented by the manufacturer or an entity, institution, or individual that tested the device following industry-established protocols such as the National Institute of Standards and Testing traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device; or
 - Non-laboratory certification after installation of a measurement device in the field, documented by either:
 - An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devices for each type of device installed at specified locations; or
 - A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.³⁵⁰
- Ensure that field-testing is performed as follows:

³⁴⁸ Section 525 as amended by statutes 2005, chapter 22; Section 527 as amended by statutes 2005, chapter 22; Section 526 as amended by Statutes 2004, chapter 884.

³⁴⁹ Code of Regulations, title 23, section 597.4(a)(1) (Register 2012, No. 28).

³⁵⁰ Code of Regulations, title 23, section 597.4(a)(2) (Register 2012, No. 28).

- Field-testing shall be performed for a sample of existing measurement devices according to the manufacturer’s recommendations or design specifications and following best professional practices.
- If more than one quarter of the samples for any particular device type do not meet the accuracy criteria specified in section 597.3(a), the supplier shall provide in its Agricultural Water Management Plan a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed 100 additional devices for the particular device type, and shall complete the second round of field-testing and corrective actions within three years of the initial field-testing.
- Field inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards specified in section 597.3(a) and that operation and maintenance protocols meet best professional practices.³⁵¹
- Maintain records documenting compliance with the requirements of sections 597.3 and 597.4 for ten years or two Agricultural Water Management Plan cycles.³⁵²
- Ensure that all measurement devices are correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.³⁵³
- If an installed measurement device no longer meets the accuracy requirements of section 597.3(a) based on either field-testing or field-inspections and analysis for either the initial accuracy certification or during operations and maintenance, take appropriate corrective action, including but not limited to, repair or replacement of the device.³⁵⁴
- Report the information listed below in its Agricultural Water Management Plan(s) :
 - Documentation, as required, to demonstrate that an agricultural water supplier that chooses to measure upstream of a delivery point or farm-gate for a customer or group of customers has complied justified the reason to do so, and has taken appropriate steps to ensure that measurements can be allocated to the customer or group of customers sufficiently to support a pricing structure based at least in part on quantity of water delivered.

³⁵¹ Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

³⁵² Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

³⁵³ Code of Regulations, title 23, section 597.4(d)(1) (Register 2012, No. 28).

³⁵⁴ Code of Regulations, title 23, section 597.4(d)(2) (Register 2012, No. 28).

- A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.
- If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:
 - For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: $\text{Volume} = \text{flow rate} \times \text{duration of delivery}$.
 - For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is derived by the following formula: $\text{Volume} = \text{velocity} \times \text{cross-section flow area} \times \text{duration of delivery}$.
 - For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).
- If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.³⁵⁵

D. The Test Claim Statutes and Regulations do not Result in Increased Costs Mandated by the State, Because the Claimants Possess Fee Authority Sufficient as a Matter of Law to Cover the Costs of any New Mandated Activities.

As the preceding analysis indicates, many of the requirements of the test claim statutes are not new, at least with respect to *some* urban or agricultural water suppliers, because suppliers were previously required to perform substantially the same activities under prior law. Additionally, many of the alleged test claim statutes do not impose any requirements at all, based on the plain language. However, even if the new requirements identified above could be argued to mandate a new program or higher level of service, the Commission finds that the costs incurred to comply

³⁵⁵ Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

with those requirements are not costs mandated by the state, within the meaning of article XIII B, section 6 and Government Code section 17514, because all affected entities have fee authority, sufficient as a matter of law to cover the costs of any mandated activities.

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state, as defined in section 17514, if the local government claimant “has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California*.³⁵⁶ The Court, in holding that the term “costs” in article XIII B, section 6 excludes expenses recoverable from sources other than taxes, stated:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.³⁵⁷

Accordingly, in *Connell v. Superior Court of Sacramento County*,³⁵⁸ the Santa Margarita Water District, among others, was denied reimbursement based on its authority to impose fees on water users. The water districts submitted evidence that funding the mandated costs with fees was not practical: “rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water.”³⁵⁹ The court concluded that “[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs.” Water Code section 35470 authorized the levy of fees to “correspond to the cost and value of the service,” and “to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose.”³⁶⁰ The court held that the Districts had not demonstrated “that anything in Water Code section 35470 limits the authority of the Districts to levy fees ‘sufficient’ to cover their costs,”

³⁵⁶ *County of Fresno v. State of California, supra*, 53 Cal.3d 482.

³⁵⁷ *Id.*, at p. 487 [emphasis added].

³⁵⁸ (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382.

³⁵⁹ *Id.*, at p. 399.

³⁶⁰ *Ibid.*

and that therefore “the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry.”³⁶¹

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the SCO was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts’ authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court noted that the concept underlying Government Code sections 17514 and 17556(d) is that “[t]o the extent a local agency or school district ‘has the authority’ to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.”³⁶² The court further noted that, “this basic principle flows from common sense as well.” The court reasoned: “As the Controller succinctly puts it, ‘Claimants can choose not to require these fees, but not at the state’s expense.’”³⁶³

1. The claimants have statutory authority to levy fees or charges for the provision of water.

Both Finance and DWR asserted, in comments on the test claim, that the test claim statutes are not reimbursable pursuant to section 17556(d). Finance argued that the claimants are “statutorily authorized to charge a fee for the delivery of water,” and thus “each of these water agencies has the ability to cover any potential initial and ongoing costs related to the Act and Regulations with fee revenue.”³⁶⁴ DWR asserted that “Senate Bill 1017, which amended the [Urban Water Management Act] in 1994,” provides authority for an urban water supplier “to recover the costs of preparing its [urban water management plan] and implementing the reasonable water conservation measures included in the plan in its water rates.”³⁶⁵

For the following reasons, the Commission finds that the claimants have statutory authority to establish and increase fees or assessments for the provision of water services.

Water Code section 35470 provides generally that “[a]ny [water] district formed on or after July 30, 1917, may, in lieu in whole or in part of raising money for district purposes by assessment, make water available to the holders of title to land or the occupants thereon, and may fix and collect charges therefor.” Section 35470 further provides that “[t]he charges may vary in different months and in different localities of the district to correspond to the cost and value of the service, and the district *may use so much of the proceeds of the charges as may be necessary to defray the ordinary operation or maintenance expenses of the district and for any other lawful purpose.*”³⁶⁶ In addition, section 50911 provides that an irrigation district may “[a]dopt a schedule of rates to be charged by the district for furnishing water for the irrigation of district lands.”³⁶⁷

³⁶¹ *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

³⁶² *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

³⁶³ *Ibid.*

³⁶⁴ Exhibit C, Finance Comments on Test Claim, page 1.

³⁶⁵ Exhibit D, DWR Comments on Test Claim, pages 8-9 [citing Water Code section 10654].

³⁶⁶ Water Code section 35470 (Stats. 2007, ch. 27 (SB 444)) [emphasis added].

³⁶⁷ Water Code section 50911 (Stats. 2007, ch. 27 (SB 444)).

More specifically, and pertaining to the requirements of the test claim statutes, Water Code section 10654 permits an urban water supplier to “recover in its rates” for the costs incurred in preparing and implementing water conservation measures.³⁶⁸ And, section 10608.48 expressly requires agricultural water suppliers to “[a]dopt a pricing structure for water customers based at least in part on quantity delivered.”³⁶⁹ This provision indicates that the Legislature intended user fees to be an essential component of the water conservation practices called for by the Act. And finally, Water Code section 10608.32, as added *within the test claim statute*, provides that all costs incurred pursuant to this part may be recoverable in rates subject to review and approval by the Public Utilities Commission.³⁷⁰

Based on the foregoing, the Commission finds that both agricultural and urban water suppliers have statutory authority to impose or increase fees to cover the costs of new state-mandated activities.

2. Nothing in Proposition 218, case law, or any prior Commission Decision, alters the analysis of the claimants’ statutory fee authority.

The claimants argue that both Finance and DWR cite *Connell v. Superior Court* and “ignore the most recent rulings on the subject of Proposition 218 where their exact arguments were considered and overruled by the Commission in *Discharge of Stormwater Runoff*, 07-TC-09.” The claimants argue that “under Proposition 218, Claimants’ customers could reject the Board’s action to establish or increase fees or assessments, yet Claimants would still be obligated to implement the mandates.”³⁷¹ In comments on the draft proposed decision, the claimants reiterate, more urgently:

The Commission should not accept its staff’s invitation to ignore a prior Commission decision that is directly on point, and which was based on a plain reading of the California Constitution, all in order to reject the test claim here. To do so would undermine the Commission’s credibility, eviscerate the Commission’s Constitutional duty to reimburse agencies for new state mandates, and have far-reaching negative effects.³⁷²

For the following reasons, the claimant’s argument is unsound. In *Connell v. Superior Court*, *supra* the court held that “[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs,” and that the economic viability of the necessary rate increases “was irrelevant and injected improper factual questions into the inquiry.”³⁷³ *Connell* did not address the possible impact of Proposition 218 on the districts’ fee authority, because the districts did not “contend that the services at issue...are among the ‘many services’

³⁶⁸ Water Code section 10654 (Stats. 1994, ch. 609 (SB 1017)).

³⁶⁹ Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁷⁰ Water Code section 10608.32 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁷¹ Exhibit E, Claimant Rebuttal Comments, pages 11-12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

³⁷² Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

³⁷³ *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

impacted by Proposition 218.”³⁷⁴ The claimants here argue that *Connell* is no longer good authority, because Proposition 218 has changed the landscape of special districts’ legal authority to impose fees or charges.

Proposition 218, adopted by the voters in 1996, also known as the “Right to Vote on Taxes Act,” declared its purpose to protect taxpayers “by limiting the methods by which local governments exact revenue from taxpayers without their consent.” Proposition 218 added articles XIII C and XIII D to the Constitution;³⁷⁵ article XIII C addresses assessments, while article XIII D addresses user fees and charges. The claimants allege that article XIII D, section 6, specifically, imposes a legal or constitutional hurdle to imposing or increasing fees, which undermines any analysis of statutory fee authority under Government Code section 17556(d).

The requirements of article XIII D, section 6 to which claimants refer provide as follows:

Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. *If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*

[¶...¶]

(c) Voter Approval for New or Increased Fees and Charges. *Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures*

³⁷⁴ 59 Cal.App.4th at p. 403.

³⁷⁵ Exhibit X, Text of Proposition 218.

similar to those for increases in assessments in the conduct of elections under this subdivision.³⁷⁶

The claimants have acknowledged that they have fee authority, absent the restrictions of articles XIII C and XIII D: “Claimants do not deny that, before the passage Proposition 218, the Water Code would have provided Claimants sufficient authority, pursuant to their governing bodies’ discretion, to unilaterally establish or increase fees or charges for the provision of water services.”³⁷⁷ After Proposition 218, the claimants argue they are now “authorized to do no more than *propose* a fee increase that can be rejected” by majority protest.³⁷⁸ Furthermore, the claimants maintain that the Commission’s decision in *Discharge of Stormwater Runoff* recognized the limitations imposed by article XIII D, section 6, and the effect on local governments’ fee authority: “[f]inding *Connell* inapposite, the Commission observed that ‘The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one.’”³⁷⁹

However, claimants’ reliance on the Commission’s prior action is misplaced, and claimants’ assertions about the effect of Proposition 218 on the law of *Connell* are overstated. Commission decisions are not precedential, and in any event the current test claim is distinguishable from the analysis in *Discharge of Stormwater Runoff*. The Commission, in *Discharge of Stormwater Runoff*, deviated from the rule of *Connell*, and found that Proposition 218, as *applied to the claimants and the mandated activities in that test claim*, constituted a legal and constitutional barrier to increasing fees. The test claim was brought by the County of San Diego and a number of cities, and alleged various mandated activities and costs related to reducing stormwater pollution.³⁸⁰ The Commission found that although the County and the Cities had a generalized fee authority based on regulatory and police powers,³⁸¹ “[w]ith some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996.”³⁸² The Commission reasoned that “it is possible that the local agency’s voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate,”³⁸³ and that “[a]bsent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d).”³⁸⁴ Thus, the

³⁷⁶ California Constitution, article XIII D, section 6 (added, November 5, 1996, by Proposition 218) [emphasis added].

³⁷⁷ Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

³⁷⁸ Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

³⁷⁹ Exhibit E, Claimant Rebuttal Comments, page 12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

³⁸⁰ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 1.

³⁸¹ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 103.

³⁸² Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 105.

³⁸³ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 106.

³⁸⁴ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107.

Commission concluded that “[t]he voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one.”³⁸⁵

Here, Proposition 218 does not impose a legal and constitutional hurdle, because fees for the provision of water services are expressly exempt from the voter approval requirements of Proposition 218.³⁸⁶ The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines “water” as “any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water.”³⁸⁷ Thus, an urban or agricultural water supplier that undertakes measures to ensure the conservation of water, to produce more water, and enhance the quality and reliability of its supply, is providing water service, within the meaning of the Omnibus Act. The statutory and regulatory metering and other conservation practices required of the claimants therefore describe “water service.” Unlike the test claimants in *Discharge of Stormwater Runoff* (cities and counties), the services for which fees or charges would be increased are expressly exempt from the voter approval requirements in article XIII D, section 6(c), and the decision and reasoning of the Commission in *Discharge of Stormwater Runoff* is not relevant. Therefore, the Commission’s earlier decision is distinguishable on the very same ground that renders *Connell* significantly poignant. The claimants cannot rely on the unwillingness of voters to raise fees, because the fees in question fall, based on the plain language of the Constitution, outside voter-approval requirement of article XIII D, section 6(c).

Claimants acknowledge that fees for water service “are excused from the formal election requirement under article XIII D section 6(c), [but] the majority protest provision in subdivision (a)(2) still applies and constitutes a legal barrier to Claimants’ fee authority.”³⁸⁸ Claimants therefore argue that they “find themselves required to implement and pay for the newly mandated activities, yet are authorized to do no more than *propose* a fee increase that can be rejected by a simple majority of affected customers.”³⁸⁹

However, the so-called “majority protest provision,” which claimants allege constitutes a legal barrier to claimants’ fee authority, presents either a mixed question of fact and law, which has not been demonstrated based on the evidence in the record, or a legal issue that is incumbent on the courts first to resolve. In order for the Commission to make findings that the claimants’ fee authority has been diminished, or negated, pursuant to article XIII D, section 6(a), the claimants would have to provide evidence that they tried and failed to impose or increase the necessary fees,³⁹⁰ or provide evidence that a court determined that Proposition 218 represents a

³⁸⁵ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107 [citing *Connell v. Superior Court*, *supra*, 59 Cal.App.4th 382, at p. 401].

³⁸⁶ See California Constitution, article XIII D, section 6(c).

³⁸⁷ Government Code section 53750(m) (Stats. 2002, ch. 395).

³⁸⁸ Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

³⁸⁹ Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

³⁹⁰ If a claimant were to provide evidence that it had tried and failed to impose or increase fees, that evidence could constitute costs “first incurred,” within the meaning of Government Code section 17551, and a claimant otherwise barred from reimbursement under section 17556(d) could thus potentially demonstrate that it had incurred costs mandated by the state, as defined in

constitutional hurdle to fee authority as a matter of law. The Commission cannot now say, as a matter of law, that the claimants' fee authority is insufficient based on the speculative and uncertain threat of a "written protests against the proposed fee or charge [being] presented by a majority of owners of the identified parcels..."³⁹¹

Based on the foregoing analysis, the Commission cannot find costs mandated by the state, within the meaning of Government Code section 17514, because the claimants have sufficient fee authority, as a matter of law, to establish or increase fees or charges to cover the costs of any new required activities.

V. Conclusion

Based on the foregoing analysis, the Commission finds that the Water Conservation Act of 2009, enacted as Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), and the Agricultural Water Measurement Regulations issued by the Department of Water Resources, found at Code of Regulations, title 23, section 597 et seq., do not impose a reimbursable state-mandated program on urban retail water suppliers or agricultural water suppliers within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission therefore denies this test claim.

section 17514. The Commission does not make findings on this issue, but merely observes the potentiality.

³⁹¹ See article XIII D, section 6(a)(2).

COMMISSION ON STATE MANDATES

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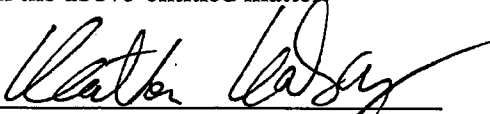
RE: Decision

Water Conservation, 10-TC-12 and 12-TC-01.

Water Conservation Act of 2009 et al.

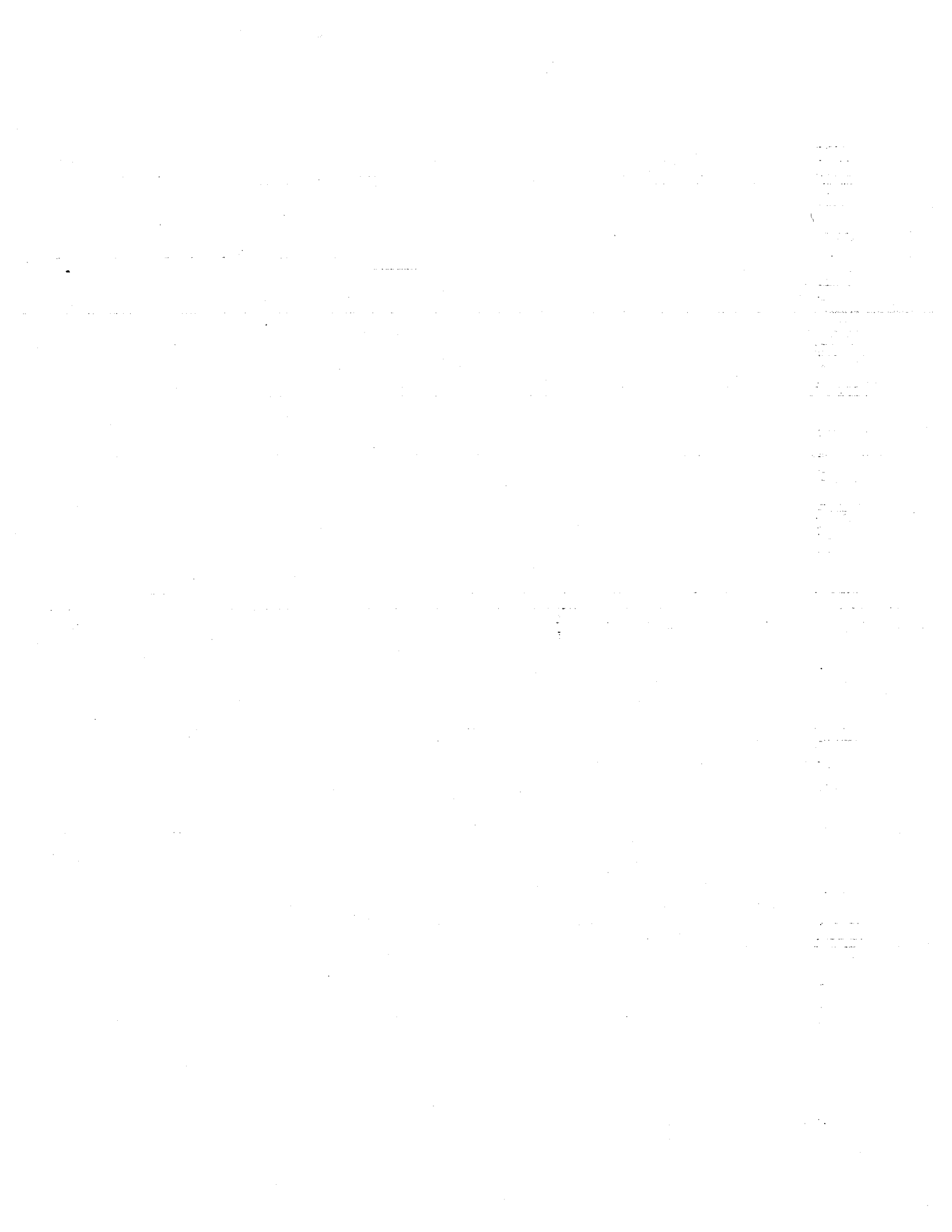
South Feather Water and Power Agency, Paradise Irrigation District,
Oakdale Irrigation District, and Glenn-Colusa Irrigation District, Claimants

On December 5, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.



Heather Halsey, Executive Director

Dated: December 12, 2014



BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758 Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L.

Filed June 20, 2008, by the County of San Diego, Cities of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, San Diego, and Vista, Claimants.

Case No.: 07-TC-09

Discharge of Stormwater Runoff - Order No. R9-2007-0001

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

(Adopted on March 26, 2010)

STATEMENT OF DECISION

The Commission on State Mandates (“Commission”) heard and decided this test claim during a regularly scheduled hearing on March 26, 2010. Tim Barry, John VanRhyn, Helen Peak, Shawn Hagerty and James Lough appeared on behalf of the claimants. Elizabeth Jennings appeared on behalf of the State Water Resources Control Board. Carla Shelton and Susan Geanacou appeared on behalf of the Department of Finance.

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 6-1.

Summary of Findings

The test claim, filed by the County of San Diego and several cities, alleges various activities related to reducing stormwater pollution in compliance with a permit issued by the San Diego Regional Water Quality Control Board, a state agency.

The Commission finds that the following activities in the permit (as further specified on pp. 122-132 below) are a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

- street sweeping (permit part D.3.a(5));
- street sweeping reporting (part J.3.a.(3)(c) x-xv);
- conveyance system cleaning (part D.3.a.(3));
- conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii));
- educational component (part D.5.a.(1)-(2) & D.5.b.(1)(c)-(d) & D.5.(b)(3));
- watershed activities and collaboration in the Watershed Urban Runoff Management Program (part E.2.f & E.2.g);
- Regional Urban Runoff Management Program (parts F.1., F.2. & F.3);
- program effectiveness assessment (parts I.1 & I.2);
- long-term effectiveness assessment (part I.5) and
- all permittee collaboration (part L.1.a.(3)-(6)).

The Commission also finds that the following test claim activities are not reimbursable because the claimants¹ 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 copermittees² 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.”

Stormwater⁴ runoff flowing untreated from urban streets directly into creeks, streams, rivers, lakes and the ocean, creates pollution, as the Ninth Circuit Court of Appeal has stated:

Storm water runoff is one of the most significant sources of water pollution in the nation, at times “comparable to, if not greater than, contamination from industrial and sewage sources.” [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.⁵

Because of these stormwater pollution problems described by the Ninth Circuit, both California and the federal government regulate stormwater runoff.

California Law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

² “Copermittees” are entities responsible for National Pollutant Discharge Elimination System (NPDES) permit conditions pertaining to their own discharges. (40 C.F.R. § 122.26 (b)(1).)

³ Municipal separate storm sewer system means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

⁴ Storm water means “storm water runoff, snow melt runoff, and surface runoff and drainage.” (40 C.F.R. § 122.26 (b)(13).)

⁵ *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

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 pollutants⁸ from point sources⁹ to waters of the United States, since

⁶ *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

⁷ *Id.* at page 621. State and regional board permits allowing discharges into state waters are called “waste discharge requirements.” (Wat. Code, § 13263).

⁸ According to the federal regulations, “Discharge of a pollutant” means: (a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other

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 limitations¹¹ are not “less stringent” than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), “[t]he primary means” for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)¹²

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California’s permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a Regional Board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority

conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.” (40 C.F.R. § 122.2.)

⁹ A point source is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

¹⁰ 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

¹¹ *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of “pollutants” which are “discharged” from “point sources” into “waters of the United States,” the waters of the “contiguous zone,” or the ocean. (40 C.F.R. § 122.2.)

¹² *City of Burbank v. State Water Resources Control Bd., supra*, 35 Cal.4th 613, 621. State and regional board permits allowing discharges into state waters are called “waste discharge requirements” (Wat. Code, § 13263).

to “enforce any effluent limitation” that is not “*less stringent*” than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent* than required by federal law-from taking into account the economic effects of doing so.¹³

Actions that dischargers must implement as prescribed in permits are commonly called “best management practices” or BMPs.¹⁴

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), “Municipal and Industrial Stormwater Discharges.” Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges “associated with industrial activity,” discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.¹⁵

NPDES permits are required for “A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.”¹⁶ The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.¹⁷

¹³ *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th 613, 627-628.

¹⁴ Best management practices are “schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of “waters of the United States.” BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” (40 CFR § 122.2.)

¹⁵ *Environmental Defense Center, Inc. v. U.S. E.P.A.*, *supra*, 344 F.3d 832, 841-842.

¹⁶ 33 USCA section 1342 (p)(2)(C).

¹⁷ 33 USCA section 1342 (p)(3)(B).

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 copermitees 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 copermitees 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 copermitees. 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 pollutants²⁴ from the MS4 to the MEP, and prevent urban runoff²⁵ 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 Permittee²⁹ 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. Hydromodification³¹

Part D.1.g. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, g. Hydromodification – Limits on Increases of Runoff Discharge Rates and Durations) states:

g. HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS

Each Copermittee shall collaborate with the other Copermittees to develop and implement a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects,³²

³¹ Hydromodification is defined in Attachment C of the permit as “The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes.”

Hydromodification is also defined as changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat.” *Draft Hydromodification Management Plan for San Diego County*, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009 .

³² According to the permit, “Priority Development Projects” are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

[¶]...[¶] [Part D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This

where such increased rates and durations are likely to cause increased erosion³³ of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses³⁴ and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan]³⁵ and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for

category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

³³ Erosion is defined in Attachment C of the permit as "When land is diminished or worn away due to wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building and timber harvesting."

³⁴ Beneficial Uses is defined in Attachment C of the permit as "the uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. ... "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

³⁵ The Standard Urban Storm Water Mitigation Plan is defined in Attachment C of the permit as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

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 durations³⁶ 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 flow³⁸ that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

³⁶ Flow duration is defined in Attachment C of the permit as "The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). ... Flow duration within the range of geomorphologically significant flows is important for managing erosion.

³⁷ Attachment C of the permit defines "Pre-project or pre-development runoff conditions (discharge rates, durations, etc.) as "Runoff conditions that exist onsite immediately before the planned development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development."

³⁸ Critical channel flow, according to Attachment C of the permit, is "the channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Q_c [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 Copermitees 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 Projects³⁹ 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, sackrete, 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 Development⁴¹ (“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 BMP⁴² 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 as pervious concrete, porous asphalt, unit pavers, and granular materials.
- vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either

(1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

filtration, biological uptake, media absorption or any other physical, biological, or chemical process.”

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermitttee 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 Copermitttee'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 Copermitttee shall collaborate with the other Copermitttees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermitttees' 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 Copermitttees' 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 year⁴⁷ 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 litter⁴⁸ 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 Copermitttee 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 Discharge⁴⁹ 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 1-6⁵⁰ 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

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
<ul style="list-style-type: none"> • 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) 	<ul style="list-style-type: none"> • Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	Other Topics
<ul style="list-style-type: none"> • Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections 	<ul style="list-style-type: none"> • Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation • Alternative materials and designs to maintain peak runoff values • Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

- i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
- ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
- iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
- iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

- [1] Storm water management plan development and review;
- [2] Methods to control downstream erosion impacts;
- [3] Identification of pollutants of concern;
- [4] LID BMP techniques;
- [5] Source control BMPs; and
- [6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

- i. Federal, state, and local water quality laws and regulations applicable to construction and grading⁵⁶ 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 Activities⁵⁷

(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 Constitution⁵⁹ 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

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,

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 person⁷⁴ who discharges or proposes to discharge pollutants ... and who does not have an effective permit ... must submit a complete application to the Director in accordance with this section and part 124 of this chapter.⁷⁵

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: “Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state ... shall file a report of the discharge in compliance with the procedures set forth in Section 13260 ...”⁷⁶ Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

⁷² *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

⁷³ The Report of Waste Discharge is attachment 36 of the State Water Resources Control Board comments submitted October 2008.

⁷⁴ *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

⁷⁵ 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

⁷⁶ Water Code section 13376.

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., copermittée collaboration, parts F.2., F.3 & L, Regional Residential Education Program Development, part F.1., Low Impact Development, part D.1.d(7)-(8), long-term effectiveness assessment, part I.5, program effectiveness assessment, parts I.1 & I.2, educational surveys and tests, part D.5, and the Watershed Urban Runoff Management Program, parts E.2.f & E.2.g). Other permit activities were not proposed in the ROWD (e.g., hydromodification, part D.1.g., street sweeping, parts D.2.a(5) & J.3.a(3)(c)x-xv, conveyance system cleaning, part D.3.a(3) & J.3.a(3)(c)iv-viii).

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which are not the result of the claimants’ discretion.

C. Does the permit constitute a program within the meaning of article XIII B, section 6 of the California Constitution?

As to whether the permit provisions in the test claim constitute a “program,” courts have defined a “program” for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.⁷⁸

The State Board, in its October 2008 comments, argues that the NPDES program is not a program because the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government in that industrial and construction facilities must also obtain NPDES stormwater permits.

The State Board reiterates this argument in its January 2010 comments, asserting that the draft analysis “fails to consider that private entities, as well as certain state ... and ... federal agencies also receive NPDES permits for storm water discharges.” The State Board and Finance also cite *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, for the proposition that “where municipalities have separate but not more stringent requirements than private entities, there is no program subject to reimbursement.” Finance, in its February 2010 comments, asserts that “the requirements within the test claim permit apply generally to state and private dischargers.”

⁷⁷ The 2001 Permit is attached to the State Water Resources Control Board, comments submitted October 2008, Attachment 25.

⁷⁸ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d 46, 56; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.)

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 permit⁸⁰ 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 Copermitees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable.”

⁷⁹ 33 U.S.C. § 1342(p)(3).

⁸⁰ Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001. The Commission issued a decision on parts 4C2a, 4C2b, 4E and 4Fc3 of this permit (test claims 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21) at its July 31, 2009 hearing.

⁸¹ *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

⁸² The cities are Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

Thus, the permit carries out the governmental function of providing public services, and also imposes unique requirements on local agencies in San Diego County to implement a state policy that does not apply generally to all residents and entities in the state. Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

D. Are the permit provisions in the test claim a federal mandate or a state-mandated new program or higher level of service?

The next issue is whether the parts of the permit alleged in the test claim are a state mandate, or federally mandated, as asserted by the State Board and the Department of Finance. If so, the permit would not constitute a state mandate. The California Supreme Court has stated that “article XIII B, section 6, and the implementing statutes ... by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs.”⁸³

Also discussed is whether the permit is a new program or higher level of service. To determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption, in this case, the 2001 permit.⁸⁴

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that “[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies’ taxing and spending limitations” under article XIII B.⁸⁵ When federal law imposes a mandate on the state, however, and the state “freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.”⁸⁶

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find “costs mandated by the state” if “[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.”

In *Long Beach Unified School Dist. v. State of California*,⁸⁷ the court considered whether a state executive order involving school desegregation constituted a state mandate. The regulations required, for example, conducting mandatory biennial racial and ethnic surveys, developing a reasonably feasible plan every four years to alleviate and prevent segregation to include specifics

⁸³ *San Diego Unified School Dist. v. Commission on State Mandates*, *supra*, 33 Cal.4th 859, 879-880, emphasis in original.

⁸⁴ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

⁸⁵ *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

⁸⁶ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1594.

⁸⁷ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

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

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 program⁹² 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 chosen⁹³ to effect the stormwater permit program. Further discussion in this analysis of federal “requirements” should be construed in the context of California’s choice to participate in the federal regulatory NPDES program.

Finance, in its February 2010 comments on the draft staff analysis, states:

The state’s role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. ...[N]o state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.

Similarly, the State Board’s January 2010 comments argue that the *Hayes* case is distinguishable from this test claim because NPDES permits do not impose a federal mandate on the state. Rather, federal law requires municipalities to comply with the permit. The State Board also states:

⁹² Water Code section 13374 states: “The term ‘waste discharge requirements’ as referred to in this division is the equivalent of the term ‘permits’ as used in the Federal water Pollution Control Act, as amended.”

⁹³ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

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 Act⁹⁵ 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 addition to federally required measures.⁹⁶ Those state measures that may constitute a state mandate if they "exceed the mandate in ... federal law."⁹⁷ Thus, although California opted into the NPDES program, further analysis is needed to determine whether the state requirements exceed the federal requirements imposed on local agencies.

The permit provisions are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402 (p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26. The federal stormwater statute states:

Permits for discharges from municipal storm sewers--

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator⁹⁸ or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)).

The issues are whether the parts of the permit in the test claim are federal mandates or state mandates, and whether they are a new program or higher level of service.

⁹⁴ State Board comments submitted January 2010.

⁹⁵ 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

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

⁹⁷ Government Code section 17556, subdivision (b). *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155, 173.

⁹⁸ Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

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 copermitttee “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 copermitttees, a hydromodification management plan (HMP) “to manage increases in runoff discharge rates and durations from all Priority Development Projects.”⁹⁹ Priority development projects can include both private projects, and municipal (city or county) projects. The purpose of the HMP is:

⁹⁹ According to the permit, Priority Development Projects are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)..

[¶]...[¶] [Section D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment

[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 copermitees will incorporate the HMP requirements into their local approval processes.” Also required is collaborative reporting on the HMP and implementation 180 days after the HMP is approved by the Regional Water Board, with earlier implementation encouraged.

According to the State Board’s comments submitted in October 2008 the requirement to develop and implement a HMP is necessary to meet the minimum federal MEP standard. The Board states that “broad federal legal authority is contained in CWA sections 402(p)(3)(B)(ii)-(iii), CWA section 402(a), and in 40 C.F.R. sections 122.26 (d)(2)(i)(B)-(C), (E), and (F), 131.12, and 122.26(d)(2)(iv)(A)(2), which states:

will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. “Directly adjacent” means situated within 200 feet of the ESA. “Discharging directly to” means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

¹⁰⁰ It is also defined as “changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat.” Draft Hydromodification Management Plan for San Diego County, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009.

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator¹⁰¹ of a discharge¹⁰² from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

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

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

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

¹⁰¹ “*Owner or operator* means the owner or operator of any “facility or activity” subject to regulation under the NPDES program.” (40 CFR § 122.2)

¹⁰² “*Discharge* when used without qualification means the “discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.” (40 CFR § 122.2.)

(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 chosen¹⁰⁵ to

¹⁰³ Government Code section 17556, subdivision (c).

¹⁰⁴ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁰⁵ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

impose these requirements. Thus, the Commission finds that part D.1.g. of the permit is not a federal mandate.

All of part D.1.g. of the permit requires the HMP to have specified contents except part D.1.g.(2), which states that the HMP “*may* include implementation of planning measures ...” as specified. As the plain language of this part does not require the implementation of planning measures, the Commission finds that part D.1.g.(2) of the permit is not a state mandate.

The Commission also finds that HMP is not a state mandate for municipal (city or county) projects that are priority development projects, such as a hospital, laboratory or other medical facility, recreational facility, airfield, parking lot, street, road, highway, and freeway, a project over an acre, and a project located in an environmentally sensitive area.¹⁰⁶ Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.¹⁰⁷ Thus, municipal projects are built by cities or counties voluntarily, and their decision triggers the requirements to comply with the HMP. In *Kern High School Dist.*,¹⁰⁸ the California Supreme Court decided whether the state must reimburse the costs of school site councils and advisory committees complying with the Brown (Open Meetings) Act for schools who participate in various school-related education programs. The court determined that participation in the underlying school site council program was not legally compelled and so mandate reimbursement was not required for the downstream compliance with the Brown Act. The court said:

Activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.¹⁰⁹

As with the voluntary programs in *Kern*, there is no requirement for municipalities to undertake any of the priority development projects described in the permit. Thus, the Commission finds that the costs of complying with the HMP in part D.1.g., is not a state mandate for priority development projects undertaken by a city or county.

Based on the mandatory language of the remainder of part D.1.g. of the permit (except part D.1.g.(2) and except for municipal projects), the Commission finds that it is a state mandate on the claimants to do the following:

¹⁰⁶ The County of San Diego, in its January 2010 comments on the draft staff analysis, raises the issue of its fee authority for municipal projects. The League of California Cities, in its January 2010 comments on the draft staff analysis, also discusses municipal projects, citing examples “where a city or county constructs a Priority Development Project for which no third party is available to assess a fee against.”

¹⁰⁷ California Constitution, article XI, section 7. “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”

¹⁰⁸ *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

¹⁰⁹ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

- (e) Include a review of pertinent literature.
- (f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.
- (g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.
- (h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.
- (i) Include technical information supporting any standards and criteria proposed.
- (j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.
- (k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.
- (l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.
- (m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

[¶]...[¶]

(3) Section D.1.g.(1)(c) does not apply to Development Projects where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.¹¹⁰

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 Report¹¹² 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 SUSMP¹¹³ [adopted in 2002] developed by the Copermittees requires project proponents to control hydromodification, it provides no standard or performance criteria for how this is to be achieved.

The Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) with respect to private priority development projects is a new program or higher level of service. The Fact Sheet/Technical Report describes the section as an "expansion" of hydromodification control requirements. The 2001 permit (in part F.1.b.(2)(j)) included only the following on hydromodification:

Downstream Erosion – As part of the model SUSMP [Standard Urban Storm Water Mitigation Plan] and the local SUSMPs, the Copermittees shall develop criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, criteria shall be developed to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Storm water discharge volumes and durations should also be considered.

The requirements in the 2007 permit, however, are much more expansive and detailed, requiring development and implementation of a hydromodification management plan (HMP) to be approved by the Regional Board. And while the 2001 permit contained a broad description of

¹¹¹ *Building Industry Assoc. of San Diego County v. State Water Resources Control Board*, *supra*, 124 Cal.App.4th 866, 870.

¹¹² The Fact Sheet/Technical Report was attached to the test claim.

¹¹³ According to the Fact Sheet/Technical Report, the Model SUSMP was completed and adopted in 2002.

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 copermitees 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 chosen¹¹⁷ to impose these requirements. Thus, the Commission finds that part D.1.d. of the permit is not a federal mandate.

The Commission further finds that the LID requirements are not a state-mandated program for municipal projects for the same reason as discussed in the HMP discussion above: there is no requirement for cities or counties to build priority development projects, which would trigger the downstream requirement to comply with parts D.1.d.(7) and D.1.d.(8) of the permit, the LID portions of the permit.

As to non-municipal projects, however, because of the mandatory language on the face of the permit, the Commission finds that part D.1.d. of the permit is a state mandate for the claimants to do all of the following:

(7) Update of SUSMP BMP Requirements

The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP requirements that meet or exceed the requirements of sections D.1.d.(4) and D.1.d.(5), and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update shall include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

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 as pervious concrete, porous asphalt, unit pavers, and granular materials.
- vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

¹¹⁸ Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

¹¹⁹ Part D.1.d.(5) of the permit lists source control BMP requirements.

¹²⁰ Part D.1.d.(6) of the permit lists treatment control BMP requirements.

(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 chosen¹²⁶ 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 Copermitttee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:

(a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.

(b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.

(c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

¹²¹ *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564.

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

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

¹²⁴ Government Code section 17556, subdivision (c).

¹²⁵ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

¹²⁶ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1593-1594.

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 that many Copermittees meet or exceed the mandatory requirements on a voluntary basis. To the extent the frequencies are already being met and the Permit imposes the same MEP standard as its predecessor ... the 2007 Permit does not impose a higher level of service.

In their February 2009 rebuttal comments, the claimants cite Government Code section 17565 to argue that whether or not they were sweeping streets at frequencies equal or more than the permit requires is not relevant. Government Code section 17565 states: "If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate." The claimants also state that the 2001 permit did not in fact require street sweeping, "[a]t best it only included general statements regarding the need to control pollutants in streets and other impervious areas and, in any event, minimum frequencies were not required."

The Regional Board's Fact Sheet/Technical Report on part D.3.a.(5) of the 2007 permit states that street sweeping "has been added to ensure that the Copermittees are implementing this effective BMP at all appropriate areas."

The Commission finds that the street sweeping provision (part D.3.a.(5)) in the permit is a new program or higher level of service. The Commission agrees that Government Code section 17565 makes it irrelevant (for purposes of mandate reimbursement) whether or not claimants

were performing the activity prior to the permit, since voluntary activities do not affect reimbursement of an activity that is subsequently mandated by the state.

The 2001 permit, in part F.3.a.(3) and (4) stated:

(a) To establish priorities for oversight of municipal areas and activities required under this Order, each Copermittee shall prioritize each watershed inventory in F.3.a.2. above by threat to water quality and update annually. Each municipal area and activity shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality, each Copermittee shall consider (1) type of municipal area or activity; (2) materials used (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility or area; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; and (9) any other relevant factors.

(b) At a minimum, the high priority municipal areas and activities shall include the following:

(i) Roads, Streets, Highways, and Parking Facilities. [¶]...[¶]

F.3.a.(4) BMP Implementation (Municipal)

(a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality municipal areas and activities (as determined under section F.3.a.(3)). The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific as appropriate.

Street sweeping is not expressly required in this 2001 permit provision, nor does it specify any frequencies or required reporting. Thus, the Commission finds that part D.3.a.(5) of the 2007 permit that requires street sweeping, as specified, is a new program or higher level of service, as well as part J.3.a(3)x-xv that requires reporting on street-sweeping activities.

D. Conveyance system cleaning and reporting (parts D.3.a.(3) & J.3.a.(3)(c)(iv)-(viii)): Also under part D.3 “Existing Development,” part D.3.a.(3) requires conveyance system cleaning, including the following:

- Verifying proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from the MS4s and related drainage structures.
- Cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Cleaning open channels of observed anthropogenic litter in a timely manner.

In J.3.a.(3)(c)(iv)-(viii), as part of the annual reporting requirements, copermittees shall provide a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned. In addition, copermittees must report by category tons of waste and litter removed from the facilities.

The State Board, in its comments submitted in October 2008, disagrees that the requirements exceed federal law, saying that “the same broad authorities applicable to the street sweeping requirement also apply to the conveyance system cleaning requirements.” According to the State Board, specificity in inspection and cleaning requirements is consistent with and supported by U.S. EPA guidance. Also, to the extent that permit requirements are more specific than the federal regulations, the State Board asserts that the requirements are an appropriate exercise of the San Diego Water Board’s discretion to define the MEP standard.

The claimants, in their February 2009 comments, state that “the requirements to inspect and perform maintenance to insure compliance with these standards is not limited by the ‘regular schedule of maintenance’ obligation but rather must be done as frequently as is necessary to comply with these specific standards.” Also, claimants note that the content and detail in the reporting is more than required by the 2001 permit. As to the MEP standard required by the federal regulations, claimants assert that the U.S. EPA documents cited by the State Board provide guidance, not mandates, and the permit Fact Sheet does not specifically set forth mandatory annual inspection and maintenance requirements. According to the claimants, the only mandatory requirement is that a maintenance program exist, and that the applicant provide an inspection schedule if maintenance depends on the results of inspections or occurs infrequently. Yet the 2007 permit includes “very specific requirements that go beyond the U.S. EPA guidance and are not included within the federal regulations.” Finally, claimants note that the State Board has acknowledged that the 2007 permit requirements are more specific than federal regulations, and cites the *Long Beach Unified School District* case to conclude that the specificity makes the requirements state mandates.

The Commission agrees with claimants. Like street sweeping, the permit requires conveyance system cleaning activities that fall within the federal regulations to include: “[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers.”¹²⁷ And they also require: “A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems...”¹²⁸

Yet the permit requirements are more specific. Part D.3.a.(3) requires verifying proper operation of all municipal structural treatment controls, cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner, cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately, and cleaning open channels of observed anthropogenic litter in a timely manner. In addition, the reporting in part J requires a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned, and reporting by category tons of waste and litter removed from the facilities. These activities, “exceed[s] the mandate in that federal law or regulation.”¹²⁹ As in *Long Beach*

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 chosen¹³¹ to impose these requirements. Therefore, the Commission finds that parts D.3.a.(3) and J.3.a.(3)(c)iv-viii of the permit are not a federal mandate.

Rather, the Commission finds that part D.3.a.(3) of the 2007 permit is a state mandate on the claimants to do the following:

(a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.

(b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:

i. Inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.

ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.

iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.

iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.

v. Proper disposal of waste removed pursuant to applicable laws.

vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission also finds that part J.3.a.(3)(c) iv-viii is a state mandate to report the following information in the JURMP annual report:

iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

¹³⁰ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹³¹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

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 copermitee to ‘implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges. By contrast, the 2007 permit requires each copermitee 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 copermitees 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 Copermitees 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 Copermitees will be required to inspect all storm drain inlets and catch basins. This change will assist the Copermitees 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 copermitees to perform the activities on pages 25-28 above, which can be summarized as:

- Implement an educational program so that copermitees’ 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 copermitees’ 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 copermitees to implement public education programs. According to the State Board, the regulations apply to copermitees 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 chosen¹³⁴ 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
<ul style="list-style-type: none"> • 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) 	<ul style="list-style-type: none"> • Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	Other Topics
<ul style="list-style-type: none"> • Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections 	<ul style="list-style-type: none"> • Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation • Alternative materials and designs to maintain peak runoff values • Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

- i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
- ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
- iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
- iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
 - [1] Storm water management plan development and review;
 - [2] Methods to control downstream erosion impacts;
 - [3] Identification of pollutants of concern;
 - [4] LID BMP techniques;
 - [5] Source control BMPs; and
 - [6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

- i. Federal, state, and local water quality laws and regulations applicable to construction and grading¹³⁵ 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) Copermitttee 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 F.4.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 copermitttee 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): Copermitttee 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 activities¹³⁶ 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 copermitee is only responsible for their own systems." Claimants quote another federal regulation: "Copermitees 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 copermitees 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 copermitees 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 chosen¹⁴¹ 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 copermitees:

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 Activities¹⁴²

(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

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

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 chosen¹⁵¹ to impose these requirements. Thus, the Commission finds that part F.1. of the permit does not constitute a federal mandate.

Based on the mandatory language on the face of the permit, the Commission finds that the permit constitutes a state mandate on the claimants to do all the following in part F.1 of the permit:

The Regional Urban Runoff Management Program shall, at a minimum:

1. Develop and implement a Regional Residential Education Program. The program shall include:
 - a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
 - b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a (p. 50.)

As to whether this is a new program or higher level of service, the State Board, in its October 2008 comments, states that it is not because the claimants were already implementing a residential education program at a regional level before the permit was adopted.

In claimants’ February 2009 rebuttal comments, they assert that it is irrelevant whether or not the copermittees voluntarily met or exceeded the now mandatory requirements imposed by the 2007 permit because Government Code section 17565 states: “If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate.”

The Commission finds that part F.1 of the permit is a new program or higher level of service. The 2001 permit required an educational component as part of the Jurisdictional Urban Runoff Management Program (part F.4) that contained a residential component, but not a Regional Residential Education Program, so the activities in this program are new. Also, the Commission agrees that whether or not claimants were engaged in an educational program is not relevant due to Government Code section 17565. The Regional Board, in requiring the regional educational program, leaves the local agencies with no choice but to comply.

¹⁴⁹ Government Code section 17556, subdivision (c).

¹⁵⁰ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155, 173.

¹⁵¹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

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 large¹⁵³ or medium¹⁵⁴ municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different

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

¹⁵³ “(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ...” [40 CFR § 122.26 (b)(4).]

¹⁵⁴ “(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ...” [40 CFR § 122.26 (b)(7).]

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 chosen¹⁵⁷ 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 Copermitees 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 copermitees to collaborate to address common issues and promote consistency among JURMPs and WURMPs and to

¹⁵⁵ Government Code section 17556, subdivision (c).

¹⁵⁶ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁵⁷ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

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

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 chosen¹⁶² 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 Discharge¹⁶³ 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 1-6¹⁶⁴ to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,¹⁶⁵ Water Quality Assessment,¹⁶⁶ and Integrated Assessment,¹⁶⁷ where applicable and feasible.

¹⁶⁰ Government Code section 17556, subdivision (c).

¹⁶¹ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁶² *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹⁶³ Illicit discharge, as defined in Attachment C of the permit, is “any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)].”

¹⁶⁴ See footnote 50, page 21.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)¹⁶⁸ shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

- (a) Each Watershed Water Quality Activity implemented;
- (b) Each Watershed Education Activity implemented; and
- (c) Implementation of the Watershed Urban Runoff Management Program as a whole.

¹⁶⁵ Implementation Assessment is defined in Attachment C of the permit as an “Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measurable 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 copermitees 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 copermitees 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 Copermitee 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 Copermitee 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 Copermitee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

The 2007 permit requires more detail in its assessments than the 2001 permit. The 2007 permit requires annual assessments and using outcome levels, among other things, to assess the effectiveness of (a) each significant jurisdictional activity/BMP, (b) implementation of each major component of the JURMP, and (c) implementation of the JURMP as a whole. The 2001 permit did not require assessments at these three levels. And for example, outcome level 4 in the 2007 permit is required for measuring load reductions.¹⁷⁰ This is a higher level of service than “pollutant loading estimations” to be used as an effectiveness strategy in the 2001 permit.¹⁷¹ Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

¹⁷⁰ There are six Effectiveness Assessments incorporated into part I.1.a.(3) of the permit and are defined in Attachment C. One of them is “Effectiveness Assessment Level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed.”

¹⁷¹ See Fact Sheet/Technical Report for Order No. R9-2007-0001.

The assessment provisions of the Watershed Urban Runoff Management Program are in part J.2 of the 2001 permit, which requires each copermitttee 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 copermitees to collaborate to develop a Long Term Effectiveness Assessment (LTEA) that evaluates the copermitee 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 Copermitees’ 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 copermitees, 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 chosen¹⁷⁵ 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 Copermitee shall collaborate with the other Copermitees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermitees’ 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 Copermitees’ Report of Waste Discharge for the next permit cycle.
- c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).
- d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of

¹⁷³ Government Code section 17556, subdivision (c).

¹⁷⁴ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁷⁵ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹⁷⁶ Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall:
(6) Include evaluation of whether the Copermitees’ 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 Copermitee programs. (d) Assessment of progress in implementing Copermitee programs and activities. (e) Assessment of the effectiveness of Copermitee 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 Copermitee 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 chosen¹⁸¹ to impose these requirements. Thus, the Commission finds that part L of the permit does not impose a federal mandate.

Based on the mandatory language in the permit, the Commission finds that part L of the permit is a state mandate on the claimants to do the following:

¹⁷⁷ 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

¹⁷⁸ 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

¹⁷⁹ Government Code section 17556, subdivision (c).

¹⁸⁰ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁸¹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

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 Permittee¹⁸² and Lead Watershed Permittees;¹⁸³
- (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
- (3) Establishes a management structure to promote consistency and develop and implement regional activities;
- (4) Establishes standards for conducting meetings, decisions-making, and cost-sharing;
- (5) Provides guidelines for committee and workgroup structure and responsibilities;
- (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
- (7) Includes any and all other collaborative arrangements for compliance with this order.

The State Board, in its October 2008 comments, asserts that the management structure framework in part L of the 2007 permit is not a new program or higher level of service because:

The 2001 permit required significant collaboration to address common issues and promote consistency across management programs [and] development of a management structure through execution of a formal agreement, meeting minimum specifications. It also required standardized reporting, including fiscal analysis.

The State Board also argues there is “minimal substantive difference” between the 2001 and 2007 permits in their requirements to establish “a formal cooperative arrangement and to implement regional urban runoff management activities. The 2007 Permit merely elaborates on and refines the 2001 requirements.”

In its February 2009 rebuttal comments, the claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

¹⁸² The Principal Permittee is the County of San Diego.

¹⁸³ According to the permit: “Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area].”

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 copermitttee 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 copermitttees 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 Copermitttee’s] construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: the topics in (iii) to (vi), as specified (D.5.b.(1)(b)(iii) & (iv));
 - Municipal Industrial/Commercial Activities (D.5.b.(1)(c));
 - Municipal Other Activities (D.5.b.(1)(d));
 - New Development and Construction Education (D.5.(b)(2));
 - Residential, General Public, and School Children Education (D.5.(b)(3)).

II. Watershed Urban Runoff Management Program (Parts E.2.f & E.2.g.)

- Identify and implement the Watershed activities as specified (E.2.f.).
- Collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings. (E.2.g.)

III. Regional Urban Runoff Management Program (Parts F.1, F.2 & F.3)

- Include developing and implementing a Regional Residential Education Program development and implementation in the RURMP, as specified (F.1.).
- Include developing the standardized fiscal analysis method required in permit part G in the RURMP (F.2.).
- Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs in the RURMP (F.3.).

IV. Program Effectiveness Assessment (Parts I.1, I.2 & I.5)

- Annually assess the effectiveness of each copermittee's JURMP, as specified (I.1.).
- Annually assess the effectiveness of each watershed group's WURMP (I.2.).
- Collaborate with the other copermittees to develop a Long-term Effectiveness Assessment, as specified, and submit it to the Regional Board as specified (I.5.).

V. All Permittee Collaboration (Part L)

- Collaborate with all other copermittees to address common issues, promote consistency among the JURMP and WURMP, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement as specified (L.1.a. (3)-(5)).

Any further reference to the test claim activities is limited to these parts of the permit found to be a new program or higher level of service.

Issue 2: Do the test claim activities impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the permit provisions impose costs mandated by the state,¹⁸⁴ and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "cost mandated by the state" as follows:

[A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

¹⁸⁴ *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

Government Code section 17564 requires reimbursement claims to exceed \$1000 to be eligible for reimbursement. In the test claim, the County of San Diego itemized the costs of complying with the permit conditions as follows:

Activity	Cost FY 2007-08
Regional Urban Runoff Management Program -Copermittee collaboration (F.2, F.3, L)	\$260,031.09
Copermittee collaboration, Regional Residential Education, Program Development and Implementation (F.1)	\$131,250.00
Jurisdictional Urban Runoff Management Program (JURMP) -hydromodification (D.1.g)	\$630,000.00
JURMP Standard Urban Storm Water Mitigation Plans -low impact development (D.1.d)	\$52,200.00
Long Term Effectiveness Assessment (I.5)	\$210,000.00
Street Sweeping (D.3.a.(5) Equipment, Staffing, Contract	\$3,477,190.00
Conveyance System Cleaning (D.3.a.(3)) and Reporting (J.2.a.(3)(c) iv – vii.	\$3,456,087.00
Program Effectiveness Assessment (I.1 & I.2)	\$392,363.00
Educational Surveys and Tests (D.5)	\$62,617.00
Watershed Urban Runoff Management Program -Copermittee collaboration (E.2.f., E.2.g)	\$1,632,893.00
Total	\$10,304,631.09

Claimants submitted documentation in February 2010 that show the 2008-2009 cost for the permit activities is \$18,014,213. These figures, along with those in the test-claim narrative and declarations submitted by the San Diego County and 18 cities,¹⁸⁵ illustrate that the costs to comply with the permit activities exceed \$1,000. The Commission, however, cannot find “costs mandated by the state” within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Claimants did not request the test claim activities within the meaning of Government Code section 17556, subdivision (a).

The first issue is whether the claimants requested or proposed the activities in the permit. The Department of Finance and the State Board both assert that claimants did so in their Report of

¹⁸⁵ The County and city declarations are attached to the test claim.

Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.¹⁸⁶

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

(a) The claim is submitted by a local agency ... that requested legislative authority for that local agency ... to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency ... that requests authorization for that local agency ... to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request “legislative authority” to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Claimants have fee authority under Government Code section 17556, subdivision (d), for the test claim activities that do not require voter approval under Proposition 218

Government Code section 17556, subdivision (d), states:

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ... if, after a hearing, the commission finds any one of the following: [¶]...[¶] (d) The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California*.¹⁸⁷ The court, in holding that the term “costs” in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly

¹⁸⁶ Water Code section 13376; 40 Code of Federal Regulations, section 122.21 (a). The Federal regulation applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state-program provision) by reference. Also see the 2007 permit, page 2, part A.

¹⁸⁷ *County of Fresno v. State of California, supra*, 53 Cal.3d 482.

declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.

In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that “The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that” the local government “has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” Considered within its context, the section effectively construes the term “costs” in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.¹⁸⁸

In another case about subdivision (d) of section 17556, *Connell v. Superior Court*,¹⁸⁹ the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked “sufficient” fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program.” The court rejected the districts’ argument that “authority” as used in the statute should be construed as a “practical ability in light of surrounding economic circumstances” because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the districts to levy fees “sufficient” to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.¹⁹⁰

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

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

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 program²⁰¹ or that distributes the collective cost of a regulation²⁰² 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

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

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

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

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 copermitee to collaborate with other copermitees to develop and implement and report on developing a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, as specified. As discussed above, the HMP is a state-mandated new program or higher level of service for only private priority development projects. The purpose of the HMP is:

[T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

According to the permit, priority development projects are:

- a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

²²² In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, the court held that water service fees were subject to Proposition 218, but that water connection fees were not. In *Apartment Assoc. of Los Angeles County v. City of Los Angeles*, *supra*, 24 Cal.4th 830, 839-840, the court held that apartment inspection fees were not subject to Proposition 218 because they were not imposed on property owners as such, but in their capacity as landlords.

²²³ A recent report by the Office of the Legislative Analyst concurs with this conclusion: "Local governments finance stormwater clean-up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two-thirds of the voters, or a majority of property owners. Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two-thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56. [Emphasis added.] See: <http://www.lao.ca.gov/2008/rsrc/water_primer/water_primer_102208.pdf> as of October 22, 2008.

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 approvals²²⁸ [Emphasis added.]

Public facilities are defined in the Act as "public improvements, public services, and community amenities."²²⁹

When a local agency imposes or increases a fee as a condition of development approval, it must do all of the following: (1) Identify the purpose of the fee; (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and, (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project upon which the fee is imposed. (Gov. Code, § 66001, subd. (a),)

The city or county must also determine whether there is a reasonable relationship between the specific amount of the fee and the costs of building, expanding, or upgrading public facilities. These determinations, known as nexus studies, are in writing and must be updated whenever new fees are imposed or existing fees are increased.²³⁰ A fee imposed "as a condition of approval of

²²⁶ *California Building Industry Assoc. v. Governing Board* (1988) 206 Cal.App.3d 212, 234.

²²⁷ *Sinclair Paint, supra*, 15 Cal.4th at page 875.

²²⁸ Government Code section 66000, subdivision (b).

²²⁹ Government Code section 66000, subdivision (d).

²³⁰ Government Code section 66001, subdivision (b). The Act also requires cities to segregate fee revenues from other municipal funds and to refund them if they are not spent within five years. Any person may request an audit to determine whether any fee or charge levied by the city or county exceeds the amount reasonably necessary to cover the cost of the service provided (Gov. Code, §66006, subd. (d)). Under Government Code section 66014, fees charged for zoning changes, use permits, building permits, and similar processing fees are subject to the same nexus requirements as development fees. Lastly, under California Government Code

a proposed development or development project” is limited to the estimated reasonable cost of providing the service or facility.²³¹ This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.²³²

The Mitigation Fee Act defines a “development project” as “any project undertaken for the purpose of development ... includ[ing] a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate.” (Gov. Code, § 66000, subd. (a).)

A fee does not become a development fee simply because it is made in connection with a development project. Approval of the development must be conditioned on the payment of the fee. The Mitigation Fee Act is limited to situations where the fee or exaction is imposed as a condition of approval of a development project.²³³

Because local agencies may make development of priority development projects conditional on the payment of a fee, the Commission finds that the claimants have fee authority, governed by the Mitigation Fee Act, that is sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the hydromodification management plan and low-impact development activities. As discussed below, HMP and LID are “public facilities,” which the Mitigation Fee Act defines as “public improvements, public services, and community amenities.”²³⁴

The County of San Diego, in its January 2010 comments on the draft staff analysis, disagrees that it can impose a fee for the hydromodification plan (HMP) activities in the permit, stating that development and implementation of the HMP does not constitute a “public facility.”

The Commission disagrees. The purpose of the permit is to prevent or abate pollution in waterways and beaches in San Diego County. More specifically, the purpose of the HMP is:

[T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

All these stated purposes of the HMP provide public services or improvements, or community amenities within the meaning of the Act.²³⁵ Moreover, the California Supreme Court stated that the Act “concerns itself with development fees; that is, fees imposed on development projects in

section 66020, agencies collecting fees must provide project applicants with a statement of the amounts and purposes of all fees at the time of fee imposition or project approval.

²³¹ Government Code section 66005, subdivision (a).

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

²³³ *California Building Industry Ass’n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th, 130, 131.

²³⁴ Government Code section 66000, subdivision (d).

²³⁵ Government Code section 66000, subdivision (d).

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 Fresno²³⁸ and the City of La Quinta,²³⁹ collect an assessment for street sweeping as a street maintenance activity. Both approaches are discussed below in light of the procedural requirements under Proposition 218.

Fees for street sweeping as refuse collection/solid waste handling: Article XI, section 7 of the California Constitution states: "A county or city may make and enforce within its limits all local, police, sanitary or other ordinances and regulations not in conflict with general laws." Local agency fees for refuse collection are authorized by Public Resources Code section 40059, which states:

(a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:

(1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services. [Emphasis added.]

"Solid waste" is defined in Public Resources Code section 40191 as:

[A]ll putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge

²³⁷ City of Pasadena, Agenda Report, Resolution Nos. 8942 and 8943, April 27, 2009, "Public Hearing: Amendment to the General Fee Schedule to Increase the Residential Refuse Collection Fees and Solid Waste Franchise Fees." One of the findings in the resolution is: "Whereas, street sweeping is a refuse collection service involving solely the collection, removal and disposal of solid waste from public rights of way, and is, therefore, properly allocated to the Refuse Fund."

²³⁸ County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

²³⁹ City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

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 refuse²⁴¹ collection is the same as solid waste handling, as the dictionary definition of “refuse” and the statutory definition of “solid waste” both refer to rubbish and trash as synonyms. Refuse is collected via solid waste handling.

To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)). In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property-related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner (article XIII D, § 6, subd. (b)).

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes “costs mandated by the state” if “The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.

Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to “to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”²⁴²

Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.

²⁴⁰ This definition also excludes hazardous waste, radioactive waste and medical waste, as defined.

²⁴¹ “Refuse” is defined as “ Items or material discarded or rejected as useless or worthless; trash or rubbish.” <<http://dictionary.reference.com/browse/refuse>> as of November 23, 2009.

²⁴² *County of San Diego, supra*, 15 Cal.4th 68, 81.

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 Fresno²⁴³ and the City of La Quinta.²⁴⁴ Assessments are defined as “any levy or charge upon real property by an agency for a special benefit conferred upon the real property. ‘Assessment’ includes, but is not limited to, ‘special assessment,’ ‘benefit assessment,’ ‘maintenance assessment’ and ‘special assessment tax.’” (article XIII D, § 2, subd. (b).) The terms “maintenance and operation” of “streets” and “drainage systems,” although used in article XIII D, are not defined in it. The plain meaning of maintenance of streets and drainage systems, however, would include street sweeping because “maintenance” means “the work of keeping something in proper condition; upkeep.”²⁴⁵ Clean streets are used not only for transportation, but for conveying storm water to storm drains.

The Supreme Court defined special assessments as follows:

A special assessment is a “compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein....” [Citation.] [Citation.] In this regard, a special assessment is ‘levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.’ [Citation.] ‘The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.’²⁴⁶

The Supreme Court summarized the constitutional procedures for creating an assessment district.

Under Proposition 218's procedures, local agencies must give the record owners of all assessed parcels written notice of the proposed assessment, a voting ballot, and a statement disclosing that a majority protest will prevent the assessment's

²⁴³ County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

²⁴⁴ City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

²⁴⁵ <<http://dictionary.reference.com/browse/maintenance>> as of December 7, 2009.

²⁴⁶ *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 442.

passage. (Art. XIII D, § 4, subs. (c), (d).) The proposed assessment must be “supported by a detailed engineer’s report.” (Art. XIII D, § 4, subd. (b).) At a noticed public hearing, the agencies must consider all protests, and they “shall not impose an assessment if there is a majority protest.” (Art. XIII D, § 4, subd. (e).) Voting must be weighted “according to the proportional financial obligation of the affected property.” (*Ibid.*)²⁴⁷

Proposition 218 dictated that as of July 1, 1997, existing assessments were to comply with its procedural requirements, but an exception was created for “any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control.” (art. XIII D, § 5, subd. (a), emphasis added.) This means that the procedural requirements of Proposition 218 apply only to increases in assessments for street sweeping that were imposed after Proposition 218 was enacted.²⁴⁸

Absent any evidence in the record that assessments imposed before July 1, 1997 for street sweeping are sufficient to pay for the street sweeping specified in part D.3.a. of the permit, the Commission cannot find that assessments imposed before that date would pay for the costs mandated by the state for street sweeping within the meaning of Government Code section 17556, subdivision (d).

Should a local agency determine that its existing assessments are not sufficient to pay for the mandated street sweeping, it can raise assessments by following the article XIII D (Proposition 218) procedures detailed above. Those procedures, however, include an election and a protest, both of which were found above to extinguish local fee authority sufficient to pay for the mandate and to block the application of Government Code section 17556, subdivision (d).

Thus, to the extent that the claimants impose or increase assessments to pay for the street sweeping, they would be identified as offsetting revenue in the parameters and guidelines.

4. Claimants’ fee or assessment authority under Health and Safety Code section 5471 is not sufficient to pay for conveyance-system cleaning, and Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning

Conveyance-system cleaning for operation and maintenance of the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.) is required in the permit (part D.3.a.(3)). Specifically, claimants are required to clean in a timely manner “Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity.... Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.” Claimants are also required to report on the number of catch basins and inlets inspected and cleaned (J.3.a.(3)(c)iv-viii).

²⁴⁷ *Silicon Valley Taxpayers Ass’n v. Santa Clara Open Space Authority*, *supra*, 44 Cal.4th 431, 438.

²⁴⁸ See also *Howard Jarvis Taxpayers Ass’n v. City of Riverside* (1999) 73 Cal.App.4th, 679, holding that a preexisting streetlighting assessment is ‘exempt under Proposition 218.’

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 entity²⁴⁹ 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 copermitttee 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:

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 Discharge²⁵⁵ 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 1-6²⁵⁶ to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

²⁵⁵ Illicit discharge, as defined in Attachment C of the permit, is “any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)].”

²⁵⁶ Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,²⁵⁷ Water Quality Assessment,²⁵⁸ and Integrated Assessment,²⁵⁹ where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)²⁶⁰ shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

²⁵⁷ Implementation Assessment is defined in Attachment C of the permit as an “Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed.”

²⁵⁸ Water Quality Assessment is defined in Attachment C of the permit as an “Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges.”

²⁵⁹ Integrated Assessment is defined in Attachment C of the permit as an “Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality.”

²⁶⁰ Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

- (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.



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

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 stormwater⁶ on water pollution, the Ninth Circuit Court of Appeal has stated the following:

Storm water runoff is one of the most significant sources of water pollution in the nation, at times “comparable to, if not greater than, contamination from industrial and sewage sources.” [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.⁷

⁴ Government Code section 17557, subdivision (e).

⁵ Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

⁶ Storm water means “storm water runoff, snow melt runoff, and surface runoff and drainage.” (40 C.F.R. § 122.26 (b)(13).)

⁷ *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

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 pollutants⁹ from point sources¹⁰ to waters of the United States, since

⁸ *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

⁹ According to the federal regulations, “Discharge of a pollutant” means: (a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.” (40 C.F.R. § 122.2.)

¹⁰ A point source is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

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 limitations¹² are not “less stringent” than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), “[t]he primary means” for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)¹³

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California’s permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a regional board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to “enforce any effluent limitation” that is not “*less stringent*” than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent*

¹¹ 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

¹² *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of “pollutants” which are “discharged” from “point sources” into “waters of the United States,” the waters of the “contiguous zone,” or the ocean. (40 C.F.R. § 122.2.)

¹³ *City of Burbank v. State Water Resources Control Bd., supra*, 35 Cal.4th 613, 621. Actually, State and regional board permits allowing discharges into state waters are called “waste discharge requirements” (Wat. Code, § 13263).

than required by federal law-from taking into account the economic effects of doing so.¹⁴

Actions that dischargers must implement as prescribed in permits are commonly called “best management practices” or BMPs.¹⁵

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), “Municipal and Industrial Stormwater Discharges.” Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges “associated with industrial activity,” discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.¹⁶

NPDES permits are required for “A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.”¹⁷ The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.¹⁸

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application.

¹⁴ *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th 613, 627-628.

¹⁵ Best management practices, or BMPs, means “schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of “waters of the United States.” BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” (40 CFR § 122.2.)

¹⁶ *Environmental Defense Center, Inc. v. U.S. E.P.A.*, *supra*, 344 F.3d 832, 841-842.

¹⁷ 33 USCA 1342 (p)(2)(C).

¹⁸ 33 USCA 1342 (p)(3)(B).

The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

[A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.¹⁹

General state-wide permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,²⁰ as described in the permit as follows:

To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. ... Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations. (Permit, p. 11.)

The State Board has statutory fee authority to conduct inspections to enforce the general state-wide permits.²¹ The statewide permits are discussed in further detail in the analysis.

The Los Angeles Regional Board permit (Order No. 01-182, Permit CAS004001)

To obtain the permit, the County of Los Angeles, on behalf of all permittees, submitted on January 31, 2001 a Report of Waste Discharge, which constitutes a permit application, and a Stormwater Quality Management Program, which constituted the permittees' proposal for best management practices that would be required in the permit.²²

¹⁹ 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

²⁰ A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

²¹ Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

²² State Water Resources Control Board, comments submitted April 18, 2008, page 8 and attachment 36.

The permit states that its objective is: “to protect the beneficial uses of receiving waters in Los Angeles County.”²³ The permit was upheld by the Second District Court of Appeal in 2006, which described it as follows:

The 72-page permit is divided into 6 parts. There is an overview and findings followed by a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees.²⁴

After finding that “the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from “municipal separate storm sewer systems” (storm drain systems)” and that the discharges were the subject of regional board permits in 1990 and 1996, the regional board found that the storm drain systems in the county discharged a host of specified pollutants into local waters. The permit summed up by stating: “Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region.”²⁵

The permit also specifies prohibited and allowable discharges, receiving water limitations, the implementation of the Storm Water Quality Management Program “requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible.”²⁶ As the court described the permit:

In the prohibited discharges portion of the permit, the county and the cities were required to “effectively prohibit non-stormwater discharges” into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-stormwater emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the

²³ Permit page 13. The permit also says: “This permit is intended to develop, achieve, and implement a timely comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the US subject to the Permittees’ jurisdiction.”

²⁴ *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 990.

²⁵ *County of Los Angeles v. California State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985, 990

²⁶ *County of Los Angeles v. California State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985, 994.

regional board; “uncontaminated ground water infiltrations” ... and waters from emergency fire-fighting flows.²⁷

There is also a list of permissible discharges that are incidental to urban activity, as specified (e.g., landscape irrigation runoff, etc.). In the part on receiving water limitations, the permit prohibits discharges from storm sewer systems that “cause or contribute” to violations of “Water Quality Standards” objectives in receiving waters as specified in state and federal water quality plans. Storm or non-stormwater discharges from storm sewer systems which constitute a nuisance are also prohibited.²⁸

To comply with the receiving water limitations, the permittees must implement control measures in accordance with the permit.²⁹

The permittees are also to implement the Storm Water Quality Management Program (SQMP) that meets the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduces the pollutants in stormwaters to the maximum extent possible with the use of best management practices. And the permittees must revise the SQMP to comply with specified total maximum daily load (TMDL) allocations.³⁰ If a permittee modified the countywide SQMP, it must implement a local management program. Each permittee is required by November 1, 2002, to adopt a stormwater and urban runoff ordinance. By December 2, 2002, each permittee must certify that it had the legal authority to comply with the permit through adoption of ordinances or municipal code modifications.³¹

²⁷ *County of Los Angeles v. California State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985, 991-992.

²⁸ “‘Nuisance’ means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes.” *Id.* at 992.

²⁹ If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee must immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that describes the best management practices currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes these changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board. *Id.* at 993.

³⁰ A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <<http://www.epa.gov/OWOW/tmdl>> as of October 3, 2008.

³¹ *County of Los Angeles v. California State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985.

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 TMDL³² shall: [¶]...[¶]
 - (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Claimant County asserts that this permit condition requires the following:

1. Identifying all transit stops within its jurisdiction except for the Los Angeles River and Ballona Creek Watershed Management areas.
2. Selecting proper trash receptacle design and evaluating proper placement of trash receptacles.
3. Designing receptacle pad improvement, if needed.
4. Constructing and installing trash receptacle units.
5. Collecting trash and maintaining receptacles.

Inspection of Industrial and Commercial Facilities: In claim 03-TC-19, *Inspection of Industrial/Commercial Facilities*, filed by the County, and 03-TC-20, *Waste Discharge Requirements*, filed by the cities, claimants allege the following activities as stated in the permit parts 4C2a and 4C2b (Part 4, Special Provisions, C. Industrial/Commercial Facilities Control Program):

³² A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <<http://www.epa.gov/OWOW/tmdl>> as of October 3, 2008.

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 Facilities³³

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 activity³⁶ to stormwater. For those facilities that do

³³ On page 62 of the permit, U.S. EPA Phase I Facilities are defined as “facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

³⁴ Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): “*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...; Restaurants; Wholesale trade (scrap, auto dismantling) ...; Automotive service facilities; Fabricated metal products ...; Motor freight ...; Chemical/allied products ...; Automotive Dealers/Gas Stations ...; Primary Metals.*”

³⁵ Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): “*Electric/Gas/Sanitary ...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products ...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products ...; Miscellaneous Manufacturing ...; Food and kindred Products ...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...; Laundries ...; Instruments ...; Textile Mills Products ...; Apparel ...*”

³⁶ “Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Inspection of Construction Sites: In claims 03-TC-20 and 03-TC-21, *Waste Discharge Requirements*, the cities allege the activities in permit parts 4C2a, 4C2b, and 4F5c3, as listed in the test claims cited above, in addition to the following activities as stated in part 4E of the permit (Part 4, Special Provisions, E. Development Construction Program):

- For construction sites one acre or greater, each Permittee shall comply with all conditions in section E1 above and shall: ...

(b) Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. The Local SWPPP [Storm Water Pollution Prevention Plan] shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Part 4E3 of the Order provides, in relevant part, as follows:

3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E1 and E2 and shall:

- a) require, prior to issuing a grading permit for all projects requiring coverage under the state general permit,³⁷ proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction

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.

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 Constitution⁴⁰ recognizes the state constitutional restrictions on the powers of local government to tax and spend.⁴¹ “Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”⁴² A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

⁴⁰ Article XIII B, section 6, subdivision (a), provides:

(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

⁴¹ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 735.

⁴² *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

task.⁴³ In addition, the required activity or task must be new, constituting a “new program,” or it must create a “higher level of service” over the previously required level of service.⁴⁴

The courts have defined a “program” subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.⁴⁵ To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.⁴⁶ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”⁴⁷

Finally, the newly required activity or increased level of service must impose costs mandated by the state.⁴⁸

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.⁴⁹ In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”⁵⁰

The permit provisions in the consolidated test claim are discussed separately to determine whether they are reimbursable state-mandates.

⁴³ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

⁴⁴ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

⁴⁵ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.)

⁴⁶ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

⁴⁷ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

⁴⁸ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

⁴⁹ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

⁵⁰ *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue 1: Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, and whether they constitute a federal mandate.

A. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which defines an “executive order” for purposes of state mandates, as “any order, plan, requirement, rule, or regulation issued by any of the following:

- (a) The Governor.
- (b) Any officer or official serving at the pleasure of the Governor.
- (c) Any agency, department, board, or commission of state government.”⁵¹

The LA Regional Water Board is a state agency.⁵² The permit it issued is both a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) the result of claimants’ discretion?

The permit provisions require placing and maintaining trash receptacles at transit stops and inspecting specified facilities and construction sites.

The Department of Finance, in comments submitted March 27, 2008, asserts that the claimants had discretion over what activities and conditions to include in the permit application, so that any resulting costs are downstream of the claimant’s decision to include those provisions in the permit. Thus, Finance argues that the costs are not mandated by the state.

Similarly, the State Board, in its April 18, 2008 comments, cites the Stormwater Quality Management Program (SQMP) submitted by the county that constituted the claimants’ proposal for the BMPs required under the permit. The State Water Board refers to (on p. 28 of the SQMP) the county’s proposal to “collect trash along open channels and encourage voluntary trash collection in natural stream channels.” The State Water Board further states that the SQMP (pp. 22-23) contains the municipalities’ proposal for (1) site visits to industrial and commercial facilities, including automotive service businesses and restaurants to verify evidence of BMP

⁵¹ Section 17516 also states: ““Executive order” does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code.” The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra*, 150 Cal.App.4th 898, 904.

⁵² Water Code section 13200 et seq.

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 person⁵⁵ who discharges or proposes to discharge pollutants ... and who does not have an effective permit ... must submit a

⁵³ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

⁵⁴ State Water Resources Control Board, comments submitted April 18, 2008, page 8 & attachment 36.

⁵⁵ *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

complete application to the Director in accordance with this section and part 124 of this chapter.⁵⁶

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: “Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state ... shall file a report of the discharge in compliance with the procedures set forth in Section 13260 ...”⁵⁷ Thus, submitting the ROWD is not discretionary.

Federal regulations also anticipate the filing of an application for a stormwater permit, which contains the information in the SQMP. The regulation states in part:

(d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application.⁵⁸

According to the permit, section 122.26, subdivision (d), of the federal regulations contains the essential components of the SQMP (p. 32), which is an enforceable element of the permit (p. 45). Section 122.26, subdivision (d)(2)(iv)(C), in the federal regulations is interpreted in the permit to “require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4.” (p. 35.) In short, the claimants were required by law to submit the ROWD and SQMP, with specified contents.

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which were not the result of the claimants’ discretion.

C. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b)?

The next issue is whether the parts of the permit at issue are federally mandated, as asserted by the State Board and the Department of Finance (whose comments are detailed below). If so, the parts of the permit would not constitute a state mandate.

In *County of Los Angeles v. Commission on State Mandates*, the court stated as follows regarding this permit: “We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances.”⁵⁹ But after

⁵⁶ 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

⁵⁷ Water Code section 13376.

⁵⁸ 40 Code of Federal Regulations, section 122.26 (d).

⁵⁹ *County of Los Angeles v. Commission on State Mandates*, *supra*, 150 Cal.App.4th 898, 914.

summarizing the arguments on both sides, the court declined to decide the issue, stating: “Resolution of the federal or state nature of these [permit] obligations therefore is premature and, thus, not properly before this court.”⁶⁰ The court agreed with the Commission (calling it an “inescapable conclusion”) that the federal versus state issues in the test claims must be addressed in the first instance by the Commission.⁶¹

The California Supreme Court has stated that “article XIII B, section 6, and the implementing statutes ... by their terms, provide for reimbursement only of *state-* mandated costs, not *federally* mandated costs.”⁶²

When analyzing federal law in the context of a test claim under article XII B, section 6, the court in *Hayes v. Commission on State Mandates* held that “[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies’ taxing and spending limitations” under article XIII B.⁶³ When federal law imposes a mandate on the state, however, and the state “freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.”⁶⁴

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find “costs mandated by the state” if “[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.”

In *Long Beach Unified School Dist. v. State of California*,⁶⁵ the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.⁶⁶ The *Long Beach* court stated that unlike the federal law at issue, “the executive

⁶⁰ *Id.* at page 918.

⁶¹ *Id.* at page 917. The court cited *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830, 837, in support.

⁶² *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th 859, 879-880, emphasis in original.

⁶³ *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra*, 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

⁶⁴ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1594.

⁶⁵ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

⁶⁶ *Id.* at page 173.

Order and guidelines require specific actions ... [that were] required acts. These requirements constitute a higher level of service.”⁶⁷

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not “less stringent” than those set out in the Clean Water Act.⁶⁸ Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.⁶⁹ The federal Clean Water Act also allows for more stringent measures, as follows:⁷⁰

Permits for discharges from municipal storm sewers [¶]...[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the ... State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

As discussed further below, the Commission finds that the permit activities are not federally mandated because federal law does not require the permittees to install and maintain trash receptacles at transit stops, or require inspections of restaurants, automotive service facilities, retail gasoline outlets or automotive dealerships. As to inspecting phase I facilities or construction sites, the federal regulatory scheme authorizes states to perform the inspections under a general statewide permit, making it possible to avoid imposing a mandate on the local agencies to do so.

In its June 2009 comments on the draft staff analysis, the State Board disagrees that specific mandates in the permit exceed the federal requirements, the State Board argues:

This approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California’s Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California’s Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. ... The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not convert the federal mandate into a state mandate.⁷¹

The Commission disagrees. Based on the *Long Beach Unified School Dist.* case discussed above and applied in the analysis below, the specific requirements in the permit may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act.

⁶⁷ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155, 173.

⁶⁸ 33 U.S.C. § 1370.

⁶⁹ *City of Burbank v. State Water Resources Control Board, supra*, 35 Cal.4th 613, 618, 628.

⁷⁰ 33 USCA section 1370.

⁷¹ State Board comments submitted June 2009, page 6.

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 claim⁷⁵ (Parts 4C2a, 4C2b, 4E, and 4F5c3) except when it said: "we need no [sic] address the parties'

⁷² *County of Los Angeles v. State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985.

⁷³ The court's opinion, including the unpublished parts, are in attachment 26 of the State Board's comments submitted April 18, 2008.

⁷⁴ See page 18 of attachment 26 of the State Board's comments submitted April 18, 2008.

⁷⁵ In *County of Los Angeles*, the plaintiffs also challenged the following parts of the permit: (1) part 2.1 that deals with receiving water restrictions and that prohibits all water discharges that violate water quality standards or objectives regardless of whether the best management practices are reasonable; (2) part 3.C, which requires the permittees to revise their storm water quality management programs in order to implement the total maximum daily loads for impaired water bodies, and (3) parts 3.G and 4., which authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. The court held that these contentions were waived for failure to set forth all the

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 program⁷⁷ to comply with the Federal Water Pollution Control Act of 1972 stated the following findings and declaration in Water Code section 13370:

- (a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants ... to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.
- (b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.
- (c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the

applicable evidence, and that the regional board has authority to impose restrictions beyond the maximum extent feasible.

⁷⁶ See page 22, attachment 26 of the State Board’s comments submitted April 18, 2008.

⁷⁷ Water Code section 13374 states: “The term ‘waste discharge requirements’ as referred to in this division is the equivalent of the term ‘permits’ as used in the Federal water Pollution Control Act, as amended.”

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 chosen⁷⁸ 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 TMDL⁸¹ shall: [¶]...[¶]
(3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

The comments of the State Water Board and U.S. EPA assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations. The U.S.

⁷⁸ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1593-1594.

⁷⁹ State Board comments submitted June 2009, page 4.

⁸⁰ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155, 173. Government Code section 17556, subdivision (b).

⁸¹ A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

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 courts⁸⁴ have determined that the permit provisions constitute the “maximum extent practicable” standard, which is the minimum requirement under federal law.

The Department of Finance also asserts that the permit requirements are a federal mandate.

The County of Los Angeles, in comments filed June 23, 2008, states that “Nothing in the federal Clean Water Act requires the County to install trash receptacles at transit stops. Nothing in the federal regulations or the Clean Water Act itself imposes this obligation.” The county states that the U.S.EPA’s citation to BMPs for stormwater management programs “may be permitted under federal law ... and even encouraged as ‘reasonable expectations.’ But such requirements are not mandated on the County by federal law.” The County admits the existence of “an abundance of federal guidance and encouragement to have the County install and maintain trash receptacles at all public transit stops. But these are merely federal suggestions, not mandates.”

The city claimants, in comments filed June 25, 2008, also argue that the requirement for transit trash receptacles is not a federal mandate, stating that nothing in the Clean Water Act or the federal regulations requires cities to install trash receptacles at transit stops. City claimants also submit a survey of other municipal stormwater permits, finding that none of those issued by U.S. EPA required installation of trash receptacles at transit stops.

⁸² Letter from Alexis Strauss, Director, Water Division, U.S. EPA, to Tam M. Doduc, Chair, and Dorothy Rice, Executive Director, State Water Resources Control Board, April 10, 2008, page 3.

⁸³ *Id.* at page 3.

⁸⁴ The State Water Board cites: *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region* (2006) 135 Cal.App.4th 1377; *County of Los Angeles v. California State Water Resources Control Board* (2006) 148 Cal.App.4th 985.

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 Administrator⁸⁵ 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 operator⁸⁶ of a discharge⁸⁷ from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design

⁸⁵ Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

⁸⁶ “*Owner or operator* means the owner or operator of any “facility or activity” subject to regulation under the NPDES program.” (40 CFR § 122.2.)

⁸⁷ “*Discharge* when used without qualification means the “discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.” (40 CFR § 122.2.)

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 measures⁸⁸ 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 permittees to install and maintain trash receptacles at transit stops.

Specifically, the state freely chose⁸⁹ to impose the transit trash receptacle requirement on the permittees because neither the federal statute nor the regulations require it. Nor do they require the permittees to implement “practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems”⁹⁰ although the regulation requires a description of practices for doing so. Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that “mandate costs that exceed the mandate in the federal law or regulation.”⁹¹

⁸⁸ Minimum control measures are defined in 40 CFR § 122.34 to include: 1) Public education and outreach on storm water impacts; (2) Public involvement/participation; (3) Illicit discharge detection and elimination. (4) Construction site storm water runoff control; (5) Post-construction storm water management in new development and redevelopment.; (6) Pollution prevention/good housekeeping for municipal operations.

⁸⁹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

⁹⁰ 40 CFR § 122.26(d)(2)(iv)(A)(3).

⁹¹ Government Code section 17556, subdivision (c).

In *Long Beach Unified School Dist. v. State of California*,⁹² the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.⁹³ The *Long Beach Unified School District* court stated:

Where courts have suggested that certain steps and approaches may be helpful [in meeting constitutional and case law requirements] the executive Order and guidelines require *specific actions*. ...[T]he point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.⁹⁴ [Emphasis added.]

The reasoning of *Long Beach Unified School Dist.* is applicable to this claim. Although “operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems...”⁹⁵ is a federal requirement on municipalities, the permit requirement to place trash receptacles at all transit stops and maintain them is an activity, like in *Long Beach Unified School Dist.*, that is a *specified action* going beyond federal law.⁹⁶

Neither of the cases cited by the State Water Board demonstrate that placing trash receptacles at transit stops is required by federal law. In *City of Rancho Cucamonga v. Regional Water Quality Control Board – Santa Ana Region*⁹⁷ the court upheld a stormwater permit similar to the one at issue in this claim. The City of Rancho Cucamonga challenged the permit on a variety of grounds, including that it exceeded the federal requirements for stormwater dischargers to “reduce the discharge of pollutants to the maximum extent practicable”⁹⁸ and that it was overly prescriptive. The court concluded that the permit did not exceed the maximum extent practicable standard and upheld the permit in all respects. There is no indication in that case, however, that the permit at issue required trash receptacles at transit stops. Similarly, in a suit regarding the same permit at issue in this case, the *Los Angeles County*⁹⁹ court dismissed various challenges to the permit, but made no mention of the permit’s transit trash receptacle provision.

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

⁹³ *Id.* at page 173.

⁹⁴ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155, 173.

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

⁹⁶ *Ibid.*

⁹⁷ *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region, supra*, 135 Cal.App.4th 1377.

⁹⁸ 33 USCA section 1342 (p)(3)(B)(iii).

⁹⁹ *County of Los Angeles v. California State Water Resources Control Board, supra*, 143 Cal.App.4th 985.

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 State 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:

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 Facilities¹⁰²

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:¹⁰³ Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:¹⁰⁴ Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to stormwater. For those facilities that do have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

¹⁰² On page 62 of the permit, U.S. EPA Phase I Facilities are defined as “facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

¹⁰³ Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): “*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...; Restaurants; Wholesale trade (scrap, auto dismantling) ...; Automotive service facilities; Fabricated metal products ...; Motor freight ...; Chemical/allied products ...; Automotive Dealers/Gas Stations ...; Primary Metals.*”

¹⁰⁴ Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): “*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...; Laundries ...; Instruments...; Textile Mills Products ...; Apparel ...*”

- 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 activity¹⁰⁶ 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

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 chosen¹¹⁰ to impose these activities on the permittees. Therefore, the Commission finds that there is no federal mandate on the claimants to perform inspections of phase I facilities as specified in part 4C2b of the permit.

As to whether the permit is a state mandate, part 4C2b contains the following mandatory language:

¹⁰⁸ Permit, page 11, paragraph 22.

¹⁰⁹ State Water Board comments, submitted April 18, 2008, page 15.

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

b) Phase I Facilities¹¹¹

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 activity¹¹⁴ to stormwater. For those facilities that do

¹¹¹ On page 62 of the permit, U.S. EPA Phase I Facilities are defined as “facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

¹¹² Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): “*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...; Restaurants; Wholesale trade (scrap, auto dismantling) ...; Automotive service facilities; Fabricated metal products ...; Motor freight ...; Chemical/allied products ...; Automotive Dealers/Gas Stations ...; Primary Metals.*”

¹¹³ Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): “*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...; Laundries ...; Instruments...; Textile Mills Products ...; Apparel ...*”

¹¹⁴ “Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Based on this mandatory language to perform the inspections of phase I facilities as specified, the Commission finds that part 4C2b of the permit is a state-mandate.

Inspecting construction sites (part 4E): Part 4E of the permit contains the following requirements:

- Implement a program to control runoff from construction activity at all construction sites within each permittees jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

For construction sites one acre or greater, each permittee shall:

- Require the preparation and submittal of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
 - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).
 - If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
 - If non-compliance continues the Regional Board shall be notified for further joint enforcement actions. (Permit, 4E2b.)

except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.” [40 CFR §122.26 (b)(14), Emphasis added.]

- 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 large¹¹⁵ and medium¹¹⁶ municipal separate storm sewer discharges. The operator¹¹⁷ of a discharge from a large or medium

¹¹⁵ “(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as

municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

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

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in stormwater runoff

determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ...” (40 CFR § 122.26 (b)(4).)

¹¹⁶ “(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ...” (40 CFR § 122.26 (b)(7).)

¹¹⁷ “*Owner or operator* means the owner or operator of any ‘facility or activity’ subject to regulation under the NPDES program.” (40 CFR § 122.2.)

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 activity¹²¹ [construction activity from one to less than five acres]--

¹¹⁸ *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region, supra*, 135 Cal.App.4th 1377, 1390.

¹¹⁹ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

¹²⁰ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹²¹ According to 40 CFR § 122.26, (b)(15): “Storm water discharge associated with small construction activity means the discharge of storm water from: (i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. [Emphasis added.]

The state has issued a statewide general construction permit, as described on page 11 of the permit as quoted above, which is enforced through the regional boards.¹²² In fact, the State Board collects fees for the regional board for performing inspections under the GCASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities (in part 4E of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4E of the permit. Therefore, the Commission finds that the requirement for local-agency permittees to inspect construction sites in section 4E of the permit is not a federal mandate.

The Commission finds that, based on the permit's mandatory language, the following activities in part 4E are state mandates on the permittees within the meaning of article XIII B, section 6:

- Implement a program to control runoff from construction activity at all construction sites within each permittee's jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

For construction sites one acre or greater:

- Require the preparation of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
 - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).

Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where: ...”

¹²² For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: “This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs).”

- If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
- If non-compliance continues, notify the Regional Board for further joint enforcement actions. (Permit, 4E2b.)
- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP. (Permit, 4E2c.)
- For sites five acres and greater:
 - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
 - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
 - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

One of the requirements in part 4E3c of the permit is to: "Use an effective system to track grading permits issued by each permittee. To satisfy this requirement, the use of a database or

GIS system is encouraged, but not required.” The Commission finds that, based on the plain language of this provision, using an effective system to track grading permits is a state mandate, although use of a database or GIS system is not.

Overall, the Commission finds that the permit provisions (parts 4C2a, 4C2b, 4E & 4F5c3) are subject to article XIII B, section 6, of the California Constitution.

Issue 2: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) impose a new program or higher level of service?

The next issue is whether the permit provisions at issue, i.e., found above to be state-mandated, are a program, and whether they are a new program or higher level of service.

First, courts have defined a “program” for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.¹²³

The State Water Board, in its April 2008 comments, argues that the NPDES program is not a program because “the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES stormwater permits.”

In comments submitted June 25, 2008, the cities call the State Board’s argument inapposite, and cite the *Carmel Valley Fire Protection District* case¹²⁴ regarding whether the permit constitutes a “program.” According to claimant, “[t]he test is not whether the general program applies to both governmental and non-governmental entities. The test is whether the specific executive orders at issue apply to both government and non-governmental entities.”

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. The permit activities are limited to local governmental entities. The permit defines the “permittees” as the County of Los Angeles and 84 incorporated cities within the Los Angeles County Flood Control District (Permit, p. 1 & attachment A). The permit lists no private entities as “permittees.” Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County. (Or as stated on page 13 of the permit: “The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County.”) Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

In its comments on the draft staff analysis submitted June 5, 2009, the State Board disagrees with this conclusion because NPDES permits may also apply to private entities.

The State Board made this same argument in *County of Los Angeles v. Commission on State Mandates*, which the court addressed by stating: “[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation

¹²³ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra*, 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.)

¹²⁴ *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6.”¹²⁵

In other words, the issue is not whether NPDES permits generally constitute a “program” within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities (parts 4C2a, 4C2b, 4E & 4F5c3) in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.

The next step to determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption.¹²⁶

The Commission finds that local agencies were not required by state or federal law to place and maintain trash receptacles at transit stops before the permit was adopted. Whether or not most cities or counties do so, as argued by the State Water Board in its April 2008 comments, is not relevant to finding a state-mandated new program or higher level of service because even if they do, Government Code section 17565 states: “If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate.”

Because the transit trash receptacle requirement is newly mandated by the permit, and based on the plain language of part 4F5c3 of the permit, the Commission finds that it is a new program or higher level of service to place trash receptacles at transit stops and maintain them as specified in the permit.

For the same reason, the Commission finds that the inspections and enforcement activities at industrial and commercial facilities, including restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, and phase I facilities (in parts 4C2a & 4C2b of the permit) as well as inspection and enforcement at construction sites (in part 4E of the permit) are a new program or higher level of service. These were not required activities of the permittees prior to the permit’s adoption.

In sum, the Commission finds that all the permit provisions at issue in this test claim impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E & 4F5c3) impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

¹²⁵ *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

¹²⁶ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

The final issue is whether the permit provisions impose costs mandated by the state,¹²⁷ and whether any statutory exceptions listed in Government Code section 17556 apply to the test claims. Government Code section 17514 defines “cost mandated by the state” as follows:

[A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Government Code section 17564 requires reimbursement claims to exceed \$1000 to be eligible for reimbursement.

In test claims 03-TC-20 and 03-TC-21, the cities’ claimant representative declares (p. 24) that the cities will incur costs estimated to exceed \$1000 to implement the permit conditions.

In test claim 03-TC-04, the County of Los Angeles states (p. 18) that the costs in providing the services claimed “far exceed the minimum reimbursement amount of \$1000 per annum.” In the attached declaration for *Transit Trash Receptacles*, the County declares (pp. 22-23) the following itemization of costs from December 13, 2001 to October 31, 2002:

- (1) Identify all transit stops in the jurisdiction: \$19,989.17;
- (2) Select proper trash receptacle design, evaluate proper placement, specification and drawing preparation: \$38,461.87;
- (3) Preliminary engineering works (construction contract preparation, specification reviewing process, bid advertising and awarding): \$19,662.02;
- (4) Construct and install trash receptacle units: \$230,755.58, construction management \$34,628.31;
- (5) Trash collection and receptacle maintenance in FY 2002-03, \$3,513.94, maintenance contractor costs for maintaining and collecting trash in FY 2002-03, \$93,982.50;
- (6) Projected costs for on-going maintenance in FY 2003-04, \$375,570.00.

Similarly, attached to claim 03-TC-19 (pp. 20-21) are declarations that itemize the County of Los Angeles’ costs for *Inspection of Industrial/Commercial Facilities* program, from December 13, 2001 to September 15, 2003, as follows:

- (1) inspect 1744 restaurants: \$234,931.83;
- (2) inspect 1110 automotive service facilities: \$149,526.36;
- (3) inspect 249 retail gasoline outlets and automotive dealerships: \$33,542.45;
- (4) Identify and inspect all Phase I (387 Tier 1 and 543 Tier 2) facilities within the jurisdiction: \$125,155.31;
- (5) Total \$543,155.95.

¹²⁷ *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

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

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.

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

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

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 program¹⁴² 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:

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]ny entity¹⁴⁶ shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. ... Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities

The statute makes no mention of “inspecting” commercial or industrial facilities or construction sites. Rather, the fee revenues are used for “maintenance and operation” of storm drainage facilities. Thus, for the types of businesses regulated by the permit (restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites) the Commission cannot find that pursuant to Health and Safety Code section 5471, the claimants have fee authority “sufficient” to pay for the mandated inspection program within the meaning of Government Code section 17556. The statute’s “operation and maintenance” of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

2. Local fee authority under the police power and the Public Resources Code to place and maintain trash receptacles at transit stops (Permit, 4F5c3)

As discussed above, part 4F5c3 of the permit requires the County and cities to place and maintain trash receptacles at transit stops in their jurisdictions. Public Resources Code section 40059, subdivision (a), suggests that the County and cities have fee authority to perform this activity as follows:

(a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

The statute gives local governments the authority over the “nature, location and extent of providing solid waste handling services” and is broad enough to encompass “placing and maintaining” receptacles at transit stops. The statute also provides local governments with broad authority over the “level of services, charges and fees.”

The draft staff analysis determined that the claimants had fee authority under Public Resources Code section 40059 and the police power (Cal. Const. art. XI, § 7) to install and maintain trash receptacles at transit stops and recommended that the Commission deny the test claim with respect to part 4F5c3 of the permit.

¹⁴⁶ Entity is defined to include “counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems.” Health and Safety Code section 5470, subdivision (e).

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.

¹⁴⁷ Commission on State Mandates, Public Hearing, Reporter’s Transcript of Proceedings, July 31, 2009, pages 52-53.

¹⁴⁸ “The general rule views the sidewalk as part of the street; it ... holds the city liable for pedestrian injuries caused by the dangerous condition of the sidewalk.” *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 832.

¹⁴⁹ *California Assn. of Prof. Scientists v. Dept of Fish and Game, supra*, 79 Cal.App.4th, 935, 945.

3. Local fee authority to inspect industrial or construction sites (parts 4C2a, 4C2b & 4E) performed under the statewide general permits would not be preempted by state fee authority in Water Code section 13260, subdivision (b)(2)(B)

In their comments submitted in June 2008 (p. 14), the city claimants argue that the permittees cannot impose fees for inspections of industrial or commercial or construction sites as follows:

[W]ith respect to facilities that hold state-issued general industrial or general construction stormwater permits, the state had occupied the field. ...[T]he state already imposes an annual fee on general industrial and general construction stormwater permittees. That fee is explicitly designated, in part, to cover inspections of these facilities and regulatory compliance. Water Code § 13260(d)(2)(B).

This state fee thus preempts any fee that the Cities or County could charge for inspection of these facilities.

The cities also assert that in 2001, the regional board initiated negotiation of a contract with the County whereby the regional board would pay the County to perform inspections of facilities that held general industrial stormwater permits (the ‘Phase I facilities’) on the regional board’s behalf. Immediately after the permit was issued, the regional board terminated those negotiations.

In comments submitted in June 2009 on the draft staff analysis, city claimants clarify that their comments “are not directed towards the claimants’ ability to assess fees for inspections of the other commercial establishments, i.e., restaurants and automotive service facilities, retail gasoline outlets and automobile dealerships, or Phase I facilities or construction sites that are not required to hold a state-issued general industrial or general construction stormwater permit.”

According to the city claimants, fees for inspecting the phase I industrial facilities and construction sites under the statewide permits (the GIASP and GCASP) would be preempted by state fee authority in Water Code section 13260, under which the State Board collects fees for inspecting those sites. The city claimants state the fact that the specific destination of the funds from the fees in Water Code section 13260, subdivision (d)(2)(iii) is spelled out is evidence of intent that the Legislature fully occupied the field for inspections of GIASP and GCASP permit holders.

Because the fee authority to inspect commercial facilities (identified in the permit as restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships) is not contested by the city claimants, the discussion below is limited to industrial and construction site inspections performed under the statewide permits concurrently with the permit at issue in this claim.

The California Supreme Court has outlined the following rules as to when a statute preempts a local ordinance by fully occupying the field:

A local ordinance *enters a field fully occupied* by state law in either of two situations-when the Legislature “expressly manifest[s]” its intent to occupy the legal area or when the Legislature “impliedly” occupies the field. (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p.

551[“[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost.”].)

When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when “ ‘(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the’ locality.” (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)¹⁵⁰

The state statute at issue, the stormwater fee statute, in subdivision (d) of section 13260 of the Water Code, reads in pertinent part:

(d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]...[¶]

(2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.

(B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

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, subs. (d)(1) & (d)(2).) [Emphasis added.]

The State Water Board has adopted regulations to implement the stormwater fee that include fee schedules based on the threat to water quality and a complexity rating.¹⁵¹ At the hearing on July 31, 2009, Michael Lauffer of the State Water Board testified that the fee is established annually by the State Board, based on the legislative appropriation for the boards to carry out their responsibilities. Mr. Lauffer testified that the annual fee for industrial facilities under this Water Code statute is \$833, and the fee for construction facilities is variable, starting at \$238, plus \$24 per acre, with a cap of \$2,600.¹⁵²

The issue is whether Water Code section 13260, subdivision (d)(1) and (d)(2), preempts local fee authority. In resolving this, we look for express or implied preemption or intent to occupy the field.¹⁵³

First, there is no express intent on the face of the Water Code statute to preempt any local fee ordinance because the statute is silent on local fees. As to implied intent to occupy the field of law, the Supreme Court has stated that it may be found if:

(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.¹⁵⁴

The city claimants, in their comments on the draft staff analysis submitted in June 2009, argue as follows with regard to Water Code section 13260:

Here, the Legislature adopted a statute that specifically established a mechanism for fees to be assessed on GIASP and GCASP holders, for those funds to be

¹⁵¹ Fees for NPDES permits for municipal separate stormwater sewer systems are in subdivision (b) of section 2200 of title 23 of the California Code of Regulations.

¹⁵² Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, page 111.

¹⁵³ *O'Connell v. City of Stockton*, *supra*, 41 Cal.4th 1061, 1068.

¹⁵⁴ *O'Connell v. City of Stockton*, *supra*, 41 Cal.4th 1061, 1068.

segregated and sent to the regional boards, and for a specified amount of those funds (“not less than 50 percent of the money”) to be used by the regional boards “solely” on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. Water Code section 13260(d)(2)(iii). Such a specific determination as to the destination of the funds for the purposes of inspection and compliance evidences the intent of the Legislature that the issue of funding for GIASP and GCASP inspections be “fully occupied.”

The Commission disagrees. Specific determination of funds is not a factor the courts use to determine whether a state statute fully occupies the field. Applying the Supreme Court’s factors from the *O’Connell v. City of Stockton* case, the subject matter of stormwater fees has not been “so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern.”¹⁵⁵ The Water Code’s single fee statute for state permit holders does not rise to that level. Second, the Commission cannot find that “the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action.”¹⁵⁶ No clear indication of a paramount state concern can be found on the face of the Water Code fee statute. And the third instance does not apply because the subject is not “of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.”

The legislative history of the Water Code provision does not indicate any intent to occupy the field. The legislative history of the amendment to require 50 percent of the fees to be used for stormwater inspection and regulatory compliance issues indicated as follows:

...California's 1994 Water Quality Inventory Report states that storm waters and urban run-off are the leading sources of pollution in California estuaries and ocean waters. Proponents argue that non-compliance is rampant, with approximately 10,000 industries in the Los Angeles area alone who are required but have failed to obtain storm water permits. Further, proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site and question whether adequate revenues are returned to the regional boards for this program.¹⁵⁷

The Legislature acknowledged that the state inspections at the time the statute was enacted were inadequate to prevent the pollution that the statewide permits were intended to prevent.

And the regional board, via the permit, acknowledges the role of both local regulation and state regulation under the general permits. Page 11 of the permit states:

¹⁵⁵ *O’Connell v. City of Stockton*, *supra*, 41 Cal.4th 1061, 1068.

¹⁵⁶ *Ibid.*

¹⁵⁷ Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assem. Bill No. 1186 (1997-1998 Reg. Sess.) as amended August 6, 1997.

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 facilities¹⁵⁸ subject to inspection, the inspections do not occupy the field because the permit specifies that these need not be inspected if the regional board has inspected them within the past 24 months.

According to the State Board’s April 2008 comments, the overlapping fees were envisioned by U.S./EPA.

In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge stormwater “associated with industrial activity.” (fn. CWA § 402(p)(2)(B)). As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits. (fn. CWA § 402(p).) The State Water Board has issued

¹⁵⁸ On page 62 of the permit, U.S. EPA Phase I Facilities are defined as “facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

permits for industrial and construction discharges of stormwater, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review stormwater practices, was specifically envisioned and required by U.S. EPA in adopting its stormwater regulations.

U.S./EPA, in its “MS4 Program Evaluation Guidance” document, acknowledged regulation at both the local and state levels as follows:¹⁵⁹

In addition to regulation of construction site stormwater at the local level, EPA regulations also require construction sites disturbing greater than one acre to obtain an NPDES permit. This permit can be issued by the state permitting authority or EPA, depending on whether the state has been delegated the NPDES authority. This dual regulation of construction sites at both the local and state or federal level can be confusing to permittees and construction operators.¹⁶⁰

In fact, as to inspection duties and costs under two permit systems, one court has stated regarding a permit similar to the one in this claim:

Rancho Cucamonga and the other permittees are responsible for inspection construction and industrial sites and commercial facilities within their jurisdiction for compliance with the enforcement of local municipal ordinance and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.¹⁶¹

The reasoning of the *City of Rancho Cucamonga* case is instructive because a local regulatory fee could be used for local-government inspections, and the state fee is for state or regional inspections under the general statewide permits.

The state permit program and local inspection program under the regional board’s permit can be viewed as two programs with similar, overlapping goals. Viewed in this way, the fees for two sets of inspections for construction sites (or for phase I facilities not inspected by the regional board within the past two years) would not necessarily exceed the costs of both sets of inspections.

In short, a local regulatory fee ordinance that provided for inspections of the industrial facilities and construction sites specified in the permit (parts 4C2a, 4C2b & 4E) would not be preempted

¹⁵⁹ State Water Resources Control Board, comments submitted April 18, 2008, attachment 33.

¹⁶⁰ *Ibid.*

¹⁶¹ *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra*, 135 Cal.App.4th 1377. The test claim record is silent as to the number of facilities within the permit area that are subject to the General Industrial Activity Storm Water Permit, or how many construction sites within the permit area are subject to the General Construction Activity Storm Water Permit.

by the state fee authority in Water Code section 13260 or in title 23 of the California Code of Regulations.

4. Local fee authority to inspect industrial or construction sites covered under the state permits would not be a “special tax” under article XIII A, section 4, of the California Constitution

In their June 2008 rebuttal comments, the city claimants assert that they do not have sufficient fee authority under Government Code section 17556, subdivision (d). They focus on facilities that hold state-issued general industrial or construction stormwater permits and pay the state-imposed fees pursuant to Water Code section 13260, arguing that an additional local fee for inspecting these facilities would be considered a special tax. According to the city claimants:

In order for a fee to be considered a “fee” as opposed to a “special tax,” the fee cannot exceed the reasonable cost of providing the services necessary for which the fee is charged. See *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660. Any fee assessed by the Cities or the County for inspection of these facilities would be a double assessment, and thus run afoul of this rule.

The city claimants, in their June 2009 comments on the draft staff analysis, again assert that forcing claimants to recover their costs for inspecting the state-permitted GIASP and GCASP facilities and sites, the regional board is creating a special tax on holders of those state permits.

Special taxes are governed by article XIII A, section 4, of the California Constitution:

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Government Code section 50076 states that a fee is not a special tax under article XIII A, section 4, if the fees are: (1) “charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged,” and (2) “are not levied for unrelated revenue purposes.” The California Supreme Court has reaffirmed this rule.¹⁶²

The Commission finds that a local regulatory stormwater fee, if appropriately calculated and charged, would not be a special tax within the meaning of article XIII A, section 4. There is no evidence in the record that a local regulatory fee charged for the stormwater inspections would exceed the reasonable cost of providing the inspections and related services or would otherwise violate the criteria in section 50076.

As the court stated in the *Connell v. Superior Court* case discussed above:

¹⁶² *Sinclair Paint v. State Board of Equalization, supra*, 15 Cal.4th at p. 876: “[T]he term “special taxes” in article XIII A, section 4, does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes.”

The [Water] Districts argue any fees levied by the districts “cannot exceed the cost to the local agency to provide such service,” because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.¹⁶³

Similarly, in this claim no one is suggesting that the local agencies levy regulatory fees that exceed their costs. Therefore, the Commission finds that a local regulatory fee for stormwater would not be a “special tax” under article XIII A, section 4, of the California Constitution for the activities at issue in the permit.

5. The local fee to inspect industrial and construction sites would not be subject to voter approval under article XIII D (Proposition 218) of the California Constitution

Some local government fees are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 (1996). Article XIII D defines a property-related fee or charge as any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service. Among other things, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (article XIII D, § 6, subd. (c)). Exempt from voter approval, however, are property-related fees for sewer, water, or refuse collection services (*Ibid*).

In 2002, an appellate court decision in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to impose storm water fees if they are imposed “as an incident of property ownership.”

The Commission finds that local fees for inspections of phase I facilities, restaurants, retail gasoline outlets, automotive dealerships, etc., would not be subject to the vote requirement of Proposition 218. In a case involving inspections of apartments in the City of Los Angeles in which a fee was charged to landlords, the California Supreme Court ruled that the regulatory fee for inspecting apartments was not a “levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service”¹⁶⁴ within the meaning of Proposition 218. The court interpreted the phrase “incident of property ownership” as follows:

The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge

¹⁶³ *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, 402.

¹⁶⁴ That is the definition of “fee” or “charge” in article XIII D, section 2, subdivision (e).

against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.¹⁶⁵

[¶]...[¶] In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners*. The [City of Los Angeles'] ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords.¹⁶⁶

Following the reasoning of the *Apartment Assoc.* case, the inspection fees on restaurants, retail gasoline outlets, automotive dealerships, phase I facilities, etc., like the fee in *Apartment Assoc.*, would not be imposed on landowners as landowners, nor as an incident of property ownership, but by virtue of business ownership. Thus, the inspection fee would fall outside the voter requirement of Proposition 218.

As to the fees for inspecting construction sites, the Commission finds that they too would not be subject to Proposition 218's voter requirement. Article XIII D of the California Constitution states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."¹⁶⁷

Moreover, the California Supreme Court, in determining whether water connection fees are within the purview of Proposition 218, reasoned that "water service" fees were within the meaning of "property-related services" but "water connection" fees were not.

Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.¹⁶⁸

The Supreme Court's reasoning applies to local stormwater fees for inspecting construction sites. That is, the fee would not be an incident of property ownership because it results from the owner's voluntary decision to build on or develop the property. Therefore, the Commission finds that local inspection fees for stormwater compliance at construction sites would not be within the purview of the election requirement of Proposition 218. A recent report by the Office of the Legislative Analyst concurs with this conclusion.¹⁶⁹

¹⁶⁵ *Apartment Assoc. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

¹⁶⁶ *Id.* at 842 [Emphasis in original.]

¹⁶⁷ Article XIII D, section 1, subdivision (b).

¹⁶⁸ *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427.

¹⁶⁹ "Local governments finance stormwater clean-up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two-thirds of the voters, or a majority of property owners.

In its June 2009 comments, the County disagrees that stormwater pollution fees would not be subject to the voter requirement in Proposition 218, or that fee authority exists. In support, the County points to unadopted legislation pending in the current or in past legislative sessions that would provide fee authority or expressly exempt stormwater fees from the Proposition 218 voting requirement. For example SCA 18 (2009) would add “stormwater and urban runoff management” fees to those expressly exempted from the vote requirement in article XIII D, putting them in the same category as trash and sewer fees. SB 2058 (2002) would have required the regional water boards to share their fees with counties and cities. And SB 210 (2009) would provide cities and counties with stormwater regulatory or user-based fee authority.

The Commission finds that the unadopted legislative proposals cited by the County are unconvincing to show a lack of regulatory fee authority for business inspections as discussed above. First, courts have said that “As evidence of legislative intent, unadopted proposals have been held to have little value.”¹⁷⁰ Second, if they were enacted, the legislative proposals would grant broader fee authority than is found in this analysis. For example, SCA 18, by adding a stormwater exception from the vote requirement in Proposition 218, would authorize *user* fees on residential property for stormwater and urban runoff programs, whereas this analysis addresses the much narrower issue of *regulatory* fees on businesses for inspections. Likewise, SB 2058 would have required the State Board’s permit fees to be shared with “counties and cities” for the broad purpose of carrying out stormwater programs rather than for the narrower purpose of inspecting businesses. And SB 210 would likewise provide fee authority that is broader than regulatory fees; as the May 28, 2009 version expressly states in proposed section 16103, subdivision (c), of the Water Code: “The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.” In short, the legislative proposals cited by the County do not indicate that fee authority does not exist. Rather, the proposals would, if enacted, provide broader fee authority than now exists.

In comments received June 3, 2009, the Bay Area Stormwater Management Agencies Association (BASMAA) contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the voting requirements of Proposition 218 or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding “funded vs. unfunded” requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two-thirds of the electorate.” Office of the Legislative Analyst. *California’s Water: An LAO Primer* (October 22, 2008) page 56.

¹⁷⁰ *County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1590.

The Commission disagrees. BASMAA raises issues that are outside the scope of the portions of the Los Angeles stormwater permit (parts 4C2a, 4C2b, 4E & 4Fc3) that were pled by the test claimants. Because the Commission's jurisdiction is limited by those parts of the permit pled in the test claim, it cannot opine on other issues outside the pleadings, even if it would raise issues closely related to other NPDES permits (or even other parts of this NPDES permit).

In sum, the Commission finds that the inspections and related activities at issue in the Los Angeles stormwater permit are not subject to voter approval in article XIII D of the California Constitution (Proposition 218), so a regulatory fee ordinance for stormwater inspections would not be subject to voter approval.

Given the existence of local regulatory fee authority under the police power (Cal. Const, art. XI, § 7), and lacking any evidence or information to the contrary, the Commission finds that the claimants' authority to adopt a regulatory fee is sufficient (pursuant to Gov. Code, § 17556, subd. (d)) to pay for the inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites, and related activities specified in the permit. Therefore, for the inspections and related activities at issue, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

For the reasons discussed above, the Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate within the meaning of Government Code sections 17514 and 17556: For local agencies subject to the permit that are not subject to a trash TMDL¹⁷¹ 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

**STATE WATER RESOURCES CONTROL BOARD (STATE WATER BOARD)
WATER QUALITY ORDER NO. 97-03-DWQ
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
GENERAL PERMIT NO. CAS000001 (GENERAL PERMIT)**

**WASTE DISCHARGE REQUIREMENTS (WDRS)
FOR
DISCHARGES OF STORM WATER ASSOCIATED WITH INDUSTRIAL ACTIVITIES
EXCLUDING CONSTRUCTION ACTIVITIES**

The State Water Board finds that:

1. Federal regulations for storm water discharges were issued by the U.S. Environmental Protection Agency (U.S. EPA) on November 16, 1990 (40 Code of Federal Regulations [CFR] Parts 122, 123, and 124). The regulations require operators of specific categories of facilities where discharges of storm water associated with industrial activity (storm water) occur to obtain an NPDES permit and to implement Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) to reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm discharges.
2. This General Permit shall regulate storm water discharges and authorized non-storm water discharges from specific categories of industrial facilities identified in Attachment 1, storm water discharges and authorized non-storm water discharges from facilities as designated by the Regional Water Quality Control Boards (Regional Water Boards), and storm water discharges and authorized non-storm water discharges from other facilities seeking General Permit coverage. This General Permit may also regulate storm water discharges and authorized non-storm water discharges from facilities as required by U.S. EPA regulations. This General Permit shall regulate storm water discharges and authorized non-storm water discharges previously regulated by San Francisco Bay Regional Water Board Order, No.92-11 (as amended by Order No. 92-116). This General Permit excludes storm water discharges and non-storm water discharges that are regulated by other individual or general NPDES permits, storm water discharges and non-storm water discharges from construction activities, and storm water discharges and non-storm water discharges excluded by the Regional Water Boards for coverage by this General Permit. Attachment 2 contains the addresses and telephone numbers of each Regional Water Board office.
3. To obtain coverage for storm water discharges and authorized non-storm water discharges pursuant to this General Permit, operators of facilities (facility operators) must submit a Notice of Intent (NOI), in accordance with the Attachment 3

10. Facility operators who have filed an NOI, pursuant to State Water Board Order No. 91-013-DWQ (as amended by Order No. 92-12) or San Francisco Bay Regional Water Board Order No. 92-11 (as amended by Order No. 92-116) shall:
 - a. Complete the 1996-97 activities required by those general permits. These include, but are not limited to, conducting any remaining visual observations, sample collection, annual site inspection, annual report submittal, and (for group monitoring leaders) Group Evaluation Reports; and
 - b. Comply with the requirements of this General Permit no later than August 1, 1997.
11. If the Regional Water Board determines that a discharge may be causing or contributing to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Board's Basin Plan, the Regional Water Board may order the facility operator to comply with the requirements described in Receiving Water Limitation C.3. The facility operator shall comply with the requirements within the time schedule established by the Regional Water Board.
12. If the facility operator determines that its storm water discharges or authorized non-storm water discharges are causing or contributing to an exceedance of any applicable water quality standards, the facility operator shall comply with the requirements described in Receiving Water Limitation C.3.
13. State Water Board Order No. 91-013-DWQ (as amended by Order No. 92-12-DWQ) and San Francisco Bay Regional Water Board Order No. 91-011 (as amended by Order No. 92-116) are hereby rescinded.

F. REGIONAL WATER BOARD AUTHORITIES

1. Following adoption of this General Permit, Regional Water Boards shall:
 - a. Implement the provisions of this General Permit, including, but not limited to, reviewing SWPPPs, reviewing annual reports, conducting compliance inspections, and taking enforcement actions.
 - b. Issue other NPDES general permits or individual NPDES storm water permits as they deem appropriate to individual facility operators, facility operators of specific categories of industrial activities, or facility operators in a watershed or geographic area. Upon issuance of such NPDES permits by a Regional Water Board, the affected facility operator shall no longer

be regulated by this General Permit. Any new NPDES permit issued by the Regional Water Board may contain different requirements than the requirements of this General Permit.

2. Regional Water Boards may provide guidance to facility operators on the SWPPP and the Monitoring Program and reporting implementation.
3. Regional Water Boards may require facility operators to conduct additional SWPPP and Monitoring Program and reporting activities necessary to achieve compliance with this General Permit.
4. Regional Water Boards may approve requests from facility operators whose facilities include co-located industrial activities that are not contiguous within the facilities (e.g., some military bases) to comply with this General Permit under a single NOI. Storm water discharges and authorized non-storm water discharges from the co-located industrial activities and from other sources within the facility that may generate significant quantities of pollutants are authorized provided the SWPPP and Monitoring Program addresses each co-located industrial activity and other sources that may generate significant quantities of pollutants.

CERTIFICATION

The undersigned, Administrative Assistant to the State Water Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 17, 1997.

AYE: John P. Caffrey
John W. Brown
James M. Stubchaer
Marc Del Piero
Mary Jane Forster

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché

SECTION B. MONITORING PROGRAM AND REPORTING REQUIREMENTS

1. Implementation Schedule

Each facility operator shall develop a written monitoring program for each facility covered by this General Permit in accordance with the following schedule:

- a. Facility operators beginning industrial activities before October 1, 1992 shall develop and implement a monitoring program no later than October 1, 1992. Facility operators beginning operations after October 1, 1992 shall develop and implement a monitoring program when the industrial activities begin.
- b. Facility operators that submitted a Notice Of Intent (NOI) pursuant to State Water Resources Control Board (State Water Board) Order No. 91-013-DWQ (as amended by Order No. 92-12) or San Francisco Bay Regional Water Quality Control Board (Regional Water Board) Order No. 92-11 (as amended by Order No. 92-116), shall continue to implement their existing monitoring program and implement any necessary revisions to their monitoring program in a timely manner, but in no case later than August 1, 1997. These facility operators may use the monitoring results conducted in accordance with those expired general permits to satisfy the pollutant/parameter reduction requirements in Section B.5.c., Sampling and Analysis Exemptions and Reduction certifications in Section B.12., and Group Monitoring Sampling credits in B.15.k. For facilities beginning industrial activities after the adoption of this General Permit, the monitoring program shall be developed and implemented when the facility begins the industrial activities.

2. Objectives

The objectives of the monitoring program are to:

- a. Ensure that storm water discharges are in compliance with the Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations specified in this General Permit.
- b. Ensure practices at the facility to reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges are evaluated and revised to meet changing conditions.
- c. Aid in the implementation and revision of the SWPPP required by Section A of this General Permit.
- d. Measure the effectiveness of best management practices (BMPs) to prevent or reduce pollutants in storm water

discharges and authorized non-storm water discharges. Much of the information necessary to develop the monitoring program, such as discharge locations, drainage areas, pollutant sources, etc., should be found in the Storm Water Pollution Prevention Plan (SWPPP). The facility's monitoring program shall be a written, site-specific document that shall be revised whenever appropriate and be readily available for review by employees or Regional Water Board inspectors.

3. Non-storm Water Discharge Visual Observations

- a. Facility operators shall visually observe all drainage areas within their facilities for the presence of unauthorized non-storm water discharges;
- b. Facility operators shall visually observe the facility's authorized non-storm water discharges and their sources;
- c. The visual observations required above shall occur quarterly, during daylight hours, on days with no storm water discharges, and during scheduled facility operating hours¹. Quarterly visual observations shall be conducted in each of the following periods: January-March, April-June, July-September, and October-December. Facility operators shall conduct quarterly visual observations within 6-18 weeks of each other.
- d. Visual observations shall document the presence of any discolorations, stains, odors, floating materials, etc., as well as the source of any discharge. Records shall be maintained of the visual observation dates, locations observed, observations, and response taken to eliminate unauthorized non-storm water discharges and to reduce or prevent pollutants from contacting non-storm water discharges. The SWPPP shall be revised, as necessary, and implemented in accordance with Section A of this General Permit.

4. Storm Water Discharge Visual Observations

- a. With the exception of those facilities described in Section B.4.d. below, facility operators shall visually

¹ "Scheduled facility operating hours" are the time periods when the facility is staffed to conduct any function related to industrial activity, but excluding time periods where only routine maintenance, emergency response, security, and/or janitorial services are performed.

observe storm water discharges from one storm event per month during the wet season (October 1-May 30). These visual observations shall occur during the first hour of discharge and at all discharge locations. Visual observations of stored or contained storm water shall occur at the time of release.

- b. Visual observations are only required of storm water discharges that occur during daylight hours that are preceded by at least three (3) working days² without storm water discharges and that occur during scheduled facility operating hours.
- c. Visual observations shall document the presence of any floating and suspended material, oil and grease, discolorations, turbidity, odor, and source of any pollutants. Records shall be maintained of observation dates, locations observed, observations, and response taken to reduce or prevent pollutants in storm water discharges. The SWPPP shall be revised, as necessary, and implemented in accordance with Section A of this General Permit.
- d. Feedlots (subject to Federal effluent limitations guidelines in 40 Code of Federal Regulations [CFR] Part 412) that are in compliance with Sections 2560 to 2565, Article 6, Chapter 15, Title 23, California Code of Regulations, and facility operators with storm water containment facilities shall conduct monthly inspections of their containment areas to detect leaks and ensure maintenance of adequate freeboard. Records shall be maintained of the inspection dates, observations, and any response taken to eliminate leaks and to maintain adequate freeboard.

5. Sampling and Analysis

- a. Facility operators shall collect storm water samples during the first hour of discharge from (1) the first storm event of the wet season, and (2) at least one other storm event in the wet season. All storm water discharge locations shall be sampled. Sampling of stored or contained storm water shall occur at the time the stored or contained storm water is released. Facility operators that do not collect samples from the first storm event of the wet season are still required to collect samples from two other storm events of the wet season and shall explain in the Annual Report why the first storm event was not sampled.

² Three (3) working days may be separated by non-working days such as weekends and holidays provided that no storm water discharges occur during the three (3) working days and the non-working days.

- b. Sample collection is only required of storm water discharges that occur during scheduled facility operating hours and that are preceded by at least (3) three working days without storm water discharge.
- c. The samples shall be analyzed for:
 - i. Total suspended solids (TSS) pH, specific conductance, and total organic carbon (TOC). Oil and grease (O&G) may be substituted for TOC; and
 - ii. Toxic chemicals and other pollutants that are likely to be present in storm water discharges in significant quantities. If these pollutants are not detected in significant quantities after two consecutive sampling events, the facility operator may eliminate the pollutant from future sample analysis until the pollutant is likely to be present again; and
 - iii. Other analytical parameters as listed in Table D (located at the end of this Section). These parameters are dependent on the facility's standard industrial classification (SIC) code. Facility operators are not required to analyze a parameter listed in Table D when the parameter is not already required to be analyzed pursuant to Section B.5.c.i. and ii. or B.6 of this General Permit, and either of the two following conditions are met: (1) the parameter has not been detected in significant quantities from the last two consecutive sampling events, or (2) the parameter is not likely to be present in storm water discharges and authorized non-storm water discharges in significant quantities based upon the facility operator's evaluation of the facilities industrial activities, potential pollutant sources, and SWPPP. Facility operators that do not analyze for the applicable Table D parameters shall certify in the Annual Report that the above conditions have been satisfied.
 - iv. Other parameters as required by the Regional Water Board.

6. Facilities Subject to Federal Storm Water Effluent Limitation Guidelines

Facility operators with facilities subject to Federal storm water effluent limitation guidelines, in addition to the requirements in Section B.5. above, must complete the following:

- a. Collect and analyze two samples for any pollutant specified in the appropriate category of 40 CFR Subchapter N. The sampling and analysis exemptions and reductions described in Section B.12. of this General Permit do not apply to these pollutants.
- b. Estimate or calculate the volume of storm water discharges from each drainage area;
- c. Estimate or calculate the mass of each regulated pollutant as defined in the appropriate category of 40 CFR Subchapter N; and
- d. Identify the individual(s) performing the estimates or calculations in accordance with Subsections b. and c. above.

7. Sample Storm Water Discharge Locations

- a. Facility operators shall visually observe and collect samples of storm water discharges from all drainage areas that represent the quality and quantity of the facility's storm water discharges from the storm event.
- b. If the facility's storm water discharges are commingled with run-on from surrounding areas, the facility operator should identify other visual observation and sample collection locations that have not been commingled by run-on and that represent the quality and quantity of the facility's storm water discharges from the storm event.
- c. If visual observation and sample collection locations are difficult to observe or sample (e.g., sheet flow, submerged outfalls), facility operators shall identify and collect samples from other locations that represent the quality and quantity of the facility's storm water discharges from the storm event.
- d. Facility operators that determine that the industrial activities and BMPs within two or more drainage areas are substantially identical may either (i) collect samples from a reduced number of substantially identical drainage areas, or (ii) collect samples from each substantially identical drainage area and analyze a combined sample from each substantially identical drainage area. Facility operators must document such a determination in the annual report.

8. Visual Observation and Sample Collection Exceptions

Facility operators are required to be prepared to collect samples and conduct visual observations at the beginning of the wet season (October 1) and throughout the wet season

until the minimum requirements of Sections B.4. and B.5. are completed with the following exceptions:

- a. A facility operator is not required to collect a sample and conduct visual observations in accordance with Section B.4 and Section B.5 due to dangerous weather conditions, such as flooding, electrical storm, etc., when storm water discharges begin after scheduled facility operating hours or when storm water discharges are not preceded by three working days without discharge. Visual observations are only required during daylight hours. Facility operators that do not collect the required samples or visual observations during a wet season due to these exceptions shall include an explanation in the Annual Report why the sampling or visual observations could not be conducted.
- b. A facility operator may conduct visual observations and sample collection more than one hour after discharge begins if the facility operator determines that the objectives of this Section will be better satisfied. The facility operator shall include an explanation in the Annual Report why the visual observations and sample collection should be conducted after the first hour of discharge.

9. Alternative Monitoring Procedures

Facility operators may propose an alternative monitoring program that meets Section B.2 monitoring program objectives for approval by the Regional Water Board. Facility operators shall continue to comply with the monitoring requirements of this Section and may not implement an alternative monitoring plan until the alternative monitoring plan is approved by the Regional Water Board. Alternative monitoring plans are subject to modification by the Regional Water Boards.

10. Monitoring Methods

- a. Facility operators shall explain how the facility's monitoring program will satisfy the monitoring program objectives of Section B.2. This shall include:
 - i. Rationale and description of the visual observation methods, location, and frequency.
 - ii. Rationale and description of the sampling methods, location, and frequency; and

- iii. Identification of the analytical methods and corresponding method detection limits used to detect pollutants in storm water discharges. This shall include justification that the method detection limits are adequate to satisfy the objectives of the monitoring program.

- b. All sampling and sample preservation shall be in accordance with the current edition of "Standard Methods for the Examination of Water and Wastewater" (American Public Health Association). All monitoring instruments and equipment (including a facility operator's own field instruments for measuring pH and Electro Conductivity) shall be calibrated and maintained in accordance with manufacturers' specifications to ensure accurate measurements. All laboratory analyses must be conducted according to test procedures under 40 CFR Part 136, unless other test procedures have been specified in this General Permit or by the Regional Water Board. All metals shall be reported as total metals. With the exception of analysis conducted by facility operators, all laboratory analyses shall be conducted at a laboratory certified for such analyses by the State Department of Health Services. Facility operators may conduct their own sample analyses if the facility operator has sufficient capability (qualified employees, laboratory equipment, etc.) to adequately perform the test procedures.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On December 15, 2017, I served the:

- **Claimants' Rebuttal Comments filed December 14, 2017**

*California Regional Water Quality Control Board, San Diego Region,
Order No. R9-2010-0016, 11-TC-03*

County of Riverside, Riverside County Flood Control and Water Conservation District,
Cities of Murrieta, Temecula, and Wildomar, 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 December 15, 2017 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 11/30/17

Claim Number: 11-TC-03

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016

Claimants: City of Murrieta
City of Temecula
City of Wildomar
County of Riverside
Riverside County Flood Control and Water Conservation 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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